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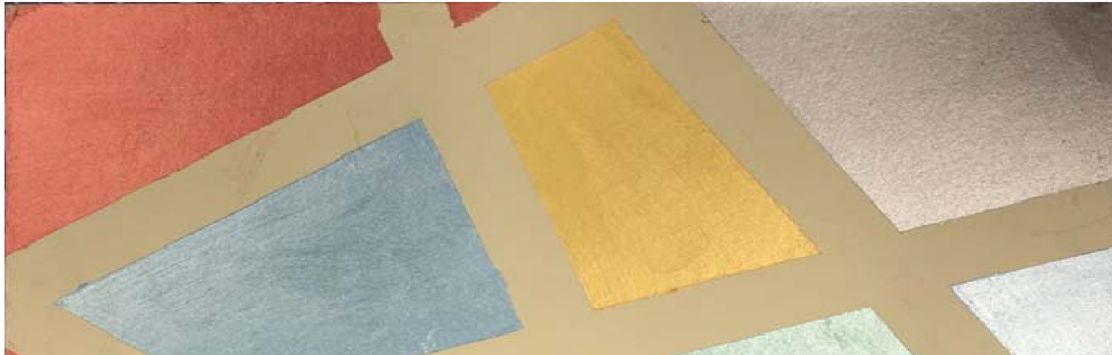

Welcome to the March 2018 Mental Capacity Report. A combination of the January report coming out late in the month, the shortness of February, and the diversion of most of the editors to the Supreme Court in the *Y* case, means that we have had no February report, but are now firmly back on track. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, constructing a best interests decision in practice and the JCHR inquiry into DOLS reform;

(2) In the Property and Affairs Report: *Banks v Goodfellow* resurgens, trust corporations and appointees under the microscope;

(2) In the Practice and Procedure Report: Baker J on Charles J and Sir James Munby, children, confinement and judicial authorisation and the problems of litigants in persons;

(3) In the Wider Context Report: the MCA Action day, immigration detention and access to court for those with impaired capacity and international developments of relevance to capacity law reform;

(4) In the Scotland Report: the Scottish Government consultation on the Adults with Incapacity Act, and a round-up of recent relevant case-law;

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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The past and future of the Court of Protection

[*Editorial Note: By way of (belated) tribute to Charles J, who retired in February, and (anticipatory) tribute to Sir James Munby P, who retires in the summer, we reproduce, in lightly edited form, and with grateful thanks to LexisNexis for permission, the introduction to the Court of Protection Practice 2018 written by its new general editor, Baker J*]

The Judicial College now offers training courses for judges who sit in the Court of Protection, and all judges authorised to sit in the Court are expected to attend such a course. When I started sitting in the Court of Protection following my appointment to the Bench in 2009, no such training was available. Somewhat anxious about my ignorance of the law and practice in this area, I sought advice from a senior member of the judiciary who blithely told me "don't worry, you'll pick it up as you go along." Thus it was that I found myself in the splendid Manchester Civil Justice Centre a few weeks later conducting a preliminary hearing in the litigation which became known as *G v E*, in which I was confronted with a submission from counsel that the court was in contumelious breach of Article 5 of ECHR because of its failure to comply with its statutory obligations. At that point, I was only dimly aware of the Mental Capacity Act 2005 and the forbidding Deprivation of Liberty Safeguards. A furtive glance under the judicial desk at Schedule AI and Schedule 1A to the Act confirmed that there was no chance that I would be able to "pick it up as I went along".

Fortunately, help was at hand in the form of the Court of Protection Practice, with its comprehensive coverage of the statutes, rules, and codes of practice, and at the front a clear and succinct textual summary of the whole field, starting with a fascinating historical section explaining how we have arrived at where we are now. That evening spent reading the text in the judges lodgings in Manchester was amongst the most useful few hours of my judicial career. By the following morning I was able to look counsel in the eye and demonstrate sufficient understanding of the *Winterwerp* criteria to fend off her attack.

Ever since, I have always had a copy of this book by my side and on many occasions I have been grateful for the breadth of its erudition and the clarity of its exposition. And it is therefore an

enormous privilege to be asked to succeed Gordon Ashton as general editor. In taking on this responsibility, I am again aware that, notwithstanding over eight years' experience of sitting in the court and delivering a number of judgments on the interpretation of the statute and rules, my knowledge of this area of the law will never approach the depth of understanding which Gordon acquired through a lifetime's work specialising in this field. I am pleased that, despite the change of general editor, this remains very much Gordon's book. All of those who have contributed to it – and, I am sure, all those who read or refer to it – will wish to join me in thanking him for his outstanding work and his profoundly important contribution to the law relating to mental capacity in this country.

This introduction affords me the opportunity to salute two other individuals whose contribution have been of immense importance, each of whom will retire from the Bench in the next few months. By the time this book is published, Mr Justice Charles will have stepped down as Vice-President of the Court. In that role he has performed invaluable service in reforming the practices and procedures of the court, addressing the many deficiencies in its structure and administration, and helping to steady the ship and steer it through the storm raised by the *Cheshire West* decision. It is thanks to Bill Charles that the Court is now organised in a way which better equips it to serve the community and in particular those vulnerable members of the community for whom it exists.

The summer of 2018 will also see the retirement of the President of the Family Division and the Court of Protection. Over the past thirty years, stretching back to his appearance as counsel in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, no one has had a greater influence on the law relating to mental capacity than Sir James Munby. Under his leadership, the work of the family courts and the Court of Protection has achieved greater recognition and respect across the justice system and, thanks to his unswerving commitment to transparency, in the wider community. His legendary erudition is on a scale which will never be matched, but in addition he has a degree of wisdom and humanity rarely encountered even in this jurisdiction where those qualities are particularly prized. Anyone seeking inspiration to face the challenges of working in this field need look no further than paragraph 120 of his judgment in *Re MM* [2007] EWHC 2003 (Fam). That passage cites an observation of Mr Justice Oliver Wendall Holmes from a judgment in 1919. I venture to suggest that, a hundred years from now, lawyers and judges will still be citing decisions and dicta of Sir James Munby.

I have remarked elsewhere (*Kent CC v A Mother and others* [2011] EWHC (Fam) 402, para 132) that

> [The] *last thirty years have seen a radical reappraisal of the way in which people with a learning disability are treated in society. It is now recognised that they need to be supported and enabled to lead their lives as full members of the community, free from discrimination and prejudice. This policy is right, not only for the individual, since it gives due respect to his or her personal autonomy and human rights, but also for society at large, since it is to the benefit of the whole community that all people are included and respected as equal members of society.*

The modern Court of Protection has a crucial role to play in implementing this policy. I have some sympathy with those who regret that, when passing the 2005 Act which did so much to reform the law relating to incapacitated adults, Parliament decided that the name of the old court should be retained. As I have observed in a number of cases, those who work in this field, including judges, have to be on their guard against the "protection imperative" - the tendency to be drawn towards an outcome that is more protective of the adult, both in the assessment of capacity and in making decisions about best interests. The focus of our work ought to be as much, if not more, on empowering those with a disability as on their protection. One of the challenges facing the new Court as it enters its second decade is to do more to enable those adults who are subject to its jurisdiction to participate in proceedings. The recently introduced rules and procedures governing representation - formerly in rule 3A, now in rule 1.2 of the new 2017 Rules - are an important step in addressing this challenge, but will be of limited use unless funds are found to resource the various options. Similarly, the programme of regionalisation - brought about largely through the determination of the President and Mr. Justice Charles - will greatly improve access to the Court for the benefit of those who are the subject of proceedings and those who care for them. But the benefits of regionalisation will not be realised unless sufficient resources are made available to ensure that there are judges and court staff in the places where they are needed. It seems scarcely credible that it was thought appropriate to set up the new Court largely centred on London when its work plainly affected people throughout the country. Now that this error has been corrected, we are seeing a substantial increase in the volume of welfare cases across England and Wales. In the South-West, for example - where, until recently, I was Family Division Liaison Judge for the Western Circuit and thus involved in decisions about the deployment of judges - the number of cases in the Court has increased by 50% in the second year of regionalisation, without any increase in the judicial or administrative workforce. The pressures caused by the dramatic increase in workload in the Court of Protection are being felt across the justice system, particularly in family and civil justice. The system of regional hubs, under regional lead judges, supported by a team of district judges responsible for allocation, is proving very successful but the judges and administrative staff are unquestionably feeling the strain. Perhaps for this reason, the planned devolution of responsibility for issuing welfare applications to the regions has been postponed, although apparently only for a few months.

It is important to note that the regionalisation programme does not extend to property and affairs applications which numerically form by far the greater proportion of cases and which will continue to remain under the umbrella of the specialist team of judges and administrative staff at First Avenue House under the leadership of the Senior Judge, Carolyn Hilder. Amongst her many tasks is coordinating the recruitment of new judges for the Court across the country. There is an ongoing and urgent need for judges and plans to draw them from a wider cross-section of the existing judiciary, including tribunal judges, are in hand. I hope that in the near future suitably qualified deputy district judges will start sitting in the Court. There can surely be no reason for this not to happen. Part-time fee-paid judges hear about 20% of cases in

other jurisdictions - family and civil. In the past year, selected deputy district judges have been authorised to sit in public law children's cases. The issues in such cases are no less important and difficult than those coming before the Court of Protection. Over the past year, I have sought to encourage lawyers specialising in the field of mental capacity law to consider applying for part-time judicial office, and I take this opportunity to do so again. There are comparatively few lawyers in that category currently on the Bench in any capacity, and their knowledge and experience would be an important addition to the expertise of the judiciary as a whole.

The past year has been notable for the consolidation of the changes introduced by the various "pilot" schemes covering case management, the use of s. 49 reports, and transparency. Of these, it was the last that caused the greatest controversy when it was first proposed, the change being significantly more radical than the incremental approach adopted towards transparency in the family courts. Although there is by no means unanimity on the merits of this reform, the consensus is that the changes have been successful. There remain practical difficulties - the requirement to sign in when attending court is cumbersome, and the listing arrangements have not always worked as smoothly as hoped. The media complain that there is no national list of COP cases so that those members of the specialist press are unable to find out about cases of public interest taking place outside London. It is clear, however, that the culture has changed dramatically so that it is generally accepted that sitting in open court does not lead to any discernible diminution in the quality of justice.

Another notable development during the past year was the recasting of the rules and practice directions. For the most part, with one notable exception, this consisted of a consolidation and tidying up exercise, rather than radical reform. The exception was the complete abolition of Practice Direction 9E dealing with serious medical treatment. Henceforth, such cases fall under the same case management rules as other welfare applications. At a stroke, the special rules for serious medical cases were swept away. It remains to be seen how this change will work out in practice. It is anticipated that applications for orders concerning serious medical treatment of incapacitated adults will continue to be allocated to Tier 3 (i.e in effect High Court) judges, although there is now no express requirement to that effect in the allocation rules. But the extent to which that jurisdiction will be engaged in future is open to question. In *NHS Trust v Y and another* [2017] EWHC 2866 QB, O'Farrell J, sitting in the Queen's Bench Division, following dicta of Peter Jackson J (as he then was) in *Re M (Withdrawl of Treatment: Need for Proceedings)* [2017] EWCOP 19, made a declaration that that it is not mandatory to bring before the court the withdrawal of clinically assisted nutrition and hydration from someone with a prolonged disorder of consciousness in circumstances where the clinical team and the family are agreed that it is not in his best interests that he continues to receive that treatment. At the time of writing, it is understood that this decision will proceed to an appeal in the Supreme Court. At this point, however, it seems that the determined campaign for reform in this area, led by Celia and Jenny Kitzinger, has achieved a remarkable success.

Other notable decisions in the past year include *N v ACCG and others* [2017] UKSC 22, in which the Supreme Court confirmed (albeit on a different basis than that adopted in the lower courts) that a decision as to what is in a person's best interests is a choice between available options. Of equal practical importance is the decision in *Director of Legal Aid Casework and others v Briggs* [2017] EWCA Civ 1169 in which the Court of Appeal overturned the decision of the judge at first instance that he could, within the scope of proceedings under s.21A (which were supported by non-means-tested public funding) consider whether life-sustaining treatment should be given to a man in a minimally conscious state who was being deprived of his liberty, on the grounds that challenging detention under s.21A relates to decisions about the deprivation of liberty and not the circumstances leading up to it.

Taken together, the developments described in the last two paragraphs will lead to a reduction in the number of cases coming before the Court. But the complexities of the law, and the ingenuity of the lawyers, will always result in new seams of work being discovered. It is always unwise to make predictions as to future legal developments, particularly in an area where case law often evolves at a rapid pace so that the predictions may be out of date before they are published. It is fair to say, however, that all practitioners await with interest the government's response to the Law Commission Report on Mental Capacity and Deprivation of Liberty (Law Com no 372) and in particular to the Commission's proposals for a new scheme to replace the Deprivation of Liberty Safeguards (provisionally called the Liberty Protection Safeguards). The case for some reform of the DOLS is overwhelming, and the Law Commission's final model seems eminently workable. Whether Parliamentary time can be found to accommodate amending legislation, given the focus on Brexit, remains to be seen.

Mr Justice Jonathan Baker

Confinement, consent and judicial authorisation for children

Re A-F (Children) [2018] EWHC 138 (Fam) (Family Division (Sir James Munby P))

Article 5 - deprivation of liberty

Summary

Sir James Munby P has pronounced upon two key issues in relation to deprivation of liberty and children:

1. When is a child to be considered to be confined (i.e. for the purpose of the first of the three limbs required to establish a deprivation of liberty, the other two being a lack of valid consent and imputability to the state)?

2. If a child is confined, and no person with true parental responsibility can give consent on their behalf (including where the child is subject to a care order or is in foster care), what process should be followed to obtain the necessary authorisation?

In a wide-ranging judgment, Sir James Munby P reached the following conclusions which are, in general terms, directed to all those under 18, but will (in reality) be particularly relevant to those aged under 16 as they are predominantly directed to applications to be made in

conjunction with care proceedings. For those aged 16/17, the more likely route will be the Re X process, especially where there is any prospect that the individual's circumstances are such that they are likely to continue to be deprived of their liberty post 18 in circumstances not covered by DOLS and/or otherwise to continue to be subject to the jurisdiction of the Court of Protection.

Confinement

Although it is necessary to have regard to the actual circumstances of the child and comparing them with the notional circumstances of the typical child of (to use Lord Kerr's phraseology from *Cheshire West)* the same "age", "station", "familial background" and "relative maturity" who is "free from disability," (but not a 'typical child' subject to a care order), a "rule of thumb" is that:

1. A child aged 10, even if under pretty constant supervision, is unlikely to be "confined";
2. A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion;
3. Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

Process

Sir James Munby P outlined when and what steps are required to obtain judicial authorisation for the deprivation of a child as the counterpart of the *Re X* process for those aged 16+, summarised below.

Need to apply to the court: An application to the High Court for the exercise of its inherent jurisdiction should be made where the circumstances in which the child is, or will be, living constitute, at least ***arguably*** (taking a realistic rather than a fanciful view), a deprivation of liberty.

What has to be approved There is no need for the court to make an order specifically authorising each element of the circumstances constituting the "confinement". It is sufficient if the order (i) authorises the child's deprivation of liberty at placement X, as described (generally) in some document to which the order is cross-referenced, and if appropriate (ii) authorises (without the need to be more specific) medication and the use of restraint.

Process The key elements of an Article 5 compliant process can be summarised as follows:

1. If a substantive order (interim or final) is to be made authorising a deprivation of liberty, there must be an oral hearing in the Family Division (though this can be before a section 9 judge). A substantive order must not be made on paper, but directions can, in an appropriate case, be given on paper without an oral hearing.
2. The child must be a party to the proceedings and have a guardian (if at all possible the children's guardian who is acting or who acted for the child in the care proceedings) who will no doubt wish to see the child in placement unless there is a very good child welfare reason to the contrary or that has

already taken place. The child, if of an age to express wishes and feelings, should be permitted to do so to the judge ***in person*** if that is what the child wants.

3. A 'bulk application' (see the ***Re X cases***) is not lawful, though in appropriate circumstances where there is significant evidential overlap there is no reason why a number of separate cases should not be heard together or in sequence on the same day before one judge.

Evidence The evidence in support of the substantive application (interim or final) should address the following matters and include:

1. The nature of the regime in which it is proposed to place the child, identifying and describing, in particular, those features which it is said do or may involve "confinement". Identification of the salient features will suffice; minute detail is not required.

2. The child's circumstances, identifying and describing, in particular, those aspects of the child's situation which it is said require that the child be placed as proposed and be subjected to the proposed regime and, where possible, the future prognosis.

3. Why it is said that the proposed placement and regime are necessary and proportionate in meeting the child's welfare needs and that no less restrictive regime will do.

4. The views of the child, the child's parents and the Independent Reviewing Officer, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health (typically the most recent documents will suffice).

Interface with care proceedings

5. If, when care proceedings are issued, there is a real likelihood that authorisation for a deprivation of liberty may be required, the proceedings should be issued in the usual way in the Family Court (***not*** the High Court) but be allocated, if at all possible, to a Circuit Judge who is also a section 9 judge. Sir James agreed that thought should be given to amending the C110A form to enable the issue to be highlighted.

6. Where care proceedings have been allocated for case management and/or final hearing to a judge who is not a section 9 judge, but it has become apparent that there is a real likelihood that authorisation for a deprivation of liberty may be required, steps should be taken if at all possible, and without delaying the hearing of the care proceedings, to reallocate the care proceedings, or at least the final hearing of the care proceedings, to a Circuit Judge who is also a section 9 judge.

7. The care proceedings will remain in the Family Court and must ***not*** be transferred to the High Court (note that a District Judge or Circuit Judge has no power to transfer a care case to the High Court: see FPR 29.17(3) and (4) and PD29C). The section 9 Circuit Judge conducting the two sets of proceedings – the care proceedings in the Family Court and the inherent jurisdiction proceedings in the High Court – can do so sitting simultaneously in both courts.

8. If this is not possible, steps should be taken to arrange a separate hearing in front of a section 9 judge as soon as possible (if at all possible within days at most) after the final hearing of the care proceedings. Typically, there will be no need for the judge to revisit matters already determined by the care judge, unless there are grounds for thinking that circumstances have changed; indeed, the care judge should, wherever possible and appropriate, address as many of these issues as possible in the care proceedings judgment.

9. The evidence should include, in addition to all the other evidence required in the care proceedings, evidence on the matters referred to above. These matters should also, mutatis mutandis, be included in the section 31A care plan put before the court in the care proceedings.

10. Where the care proceedings have been concluded for some time, the process will be the 'standalone' one indicated above.

Review Continuing review is crucial to the continued lawfulness of any "confinement". What is required are:

1. Regular reviews by the local authority as part of its normal processes in respect of any child in care.

2. A review by a judge at least once every 12 months. The matter must be brought back before the judge without waiting for the next 12-monthly review if there has been any significant change (whether deterioration or improvement) in the child's condition or if it is proposed to move the child to a different placement.

3. The child must be a party to the review and have a guardian (if at all possible the guardian who has previously acted for the child).

4. If there has been no significant change of circumstances since the previous hearing / review, the review can take place on the papers, though the judge can of course direct an oral hearing. The form of the next review is a matter on which the judge can give appropriate directions at the conclusion of the previous hearing.

Comment

For those familiar with the *Re X* debates and process, the approach adopted by the President is unsurprising, save in one regard, namely the absence of any discussion of whether medical evidence of unsoundness of mind is required. We understand from Kate Burnell of St John's Building Chambers (instructed for the children's guardians) that there was discussion at the hearing – which does not feature in the judgment – as to which limb of Article 5 is in play in these cases. With children, unlike with those over 18, it would in some cases be possible to rely upon Article (1)(d) (i.e. deprivation of liberty for purposes of 'educational supervision'). A local authority applicant will need to consider which limb to hang its hat on and adduce evidence accordingly.

We also note that the Official Solicitor is still (!) waiting for the Legal Aid Agency to determine whether legal aid will be granted to apply for permission to appeal to the Supreme Court in the case of *Re D (a child)* [2017] EWCA Civ 1695, in which the Court of Appeal held that parents could in principle consent to the confinement of

their incapacitated child. In the meantime, however, we are aware of a case involving in February 2018 Charles J made an order authorising the deprivation of liberty of a 16 year old in a residential placement even where it appeared that the parent was consenting to the arrangements as being the child's best interests. Charles J appeared to take the view that the court was not precluded by Re D from making such an order where it was in P's best interests to do so notwithstanding that a parent could, in principle, consent to the arrangements. Unfortunately, there is no judgment publicly available as the position was agreed between the parties and endorsed by the court.

Short note: care proceedings and medical treatment

In *AB (A Child)* [2018] EWFC 3, Sir James Munby P made the following observations about when local authorities should bring care proceedings for purposes of seeking to ensure that a child receives a specific medical treatment:

> *i) Cases such as this (Re Jake (A Child) [2015] EWHC 2442 (Fam), [2016] 2 FCR 118, is another example) raise very complex issues, as yet little explored in the authorities, as to whether the appropriate process is by way of application for a care order or application under the inherent jurisdiction. Local authorities need to think long and hard before embarking upon care proceedings against otherwise unimpeachable parents who may justifiably resent recourse to what they are likely to see as an unnecessarily adversarial and punitive remedy.*
>
> *ii) A local authority does not need any specific locus standi to be able to invoke the inherent jurisdiction: see In re D (A Minor) (Wardship: Sterilisation) [1976] Fam 185. Section 100 does not prevent a local authority invoking the inherent jurisdiction in relation to medical treatment issues: see Re C (Children: Power to Choose Forenames) [2016] EWCA Civ 374, [2017] 1 FLR 487, para 97.*
>
> *iii) Whatever its strict rights may be, a local authority will usually be ill-advised to rely upon its parental responsibility under section 33(3)(a) of the 1989 Act as entitling it to authorise medical treatment opposed by parents who also have parental responsibility: see Barnet London Borough Council v AL and others [2017] EWHC 125 (Fam), [2017] 4 WLR 53, para 32, and the discussion in Re C (Children: Power to Choose Forenames) [2016] EWCA Civ 374, [2017] 1 FLR 487, paras 92-95. For a local authority to embark upon care proceedings in such a case merely to clothe it with parental responsibility is likely to be problematic and may well turn out to be ineffective.*
>
> *iv) If, on the other hand, in a case such as this, a local authority is thinking of embarking upon care proceedings with a view, as here, to removing the child from the parents, it needs to think very carefully not merely about the practicalities of finding an appropriate placement, whether institutional or in a specialised foster placement, but also about the practicalities of ensuring that the parents have proper contact with their child during what may be its last few months or weeks of life. And by*

> *proper contact I do not mean contact two or three times a week for a couple of hours a time if the parents reasonably want more, even much more. As I said in Re Jake (A Child) [2015] EWHC 2442 (Fam), [2016] 2 FCR 118, para 29, "In terms of simple humanity, parents must have as much time as they want, not least because it may be a distressingly short time, with their much loved baby." And it is simply unbearable to contemplate the reaction of parents unable to be with their child at the moment of death because of geography or, even worse, bureaucracy.*

Sir James therefore made it clear that it is not appropriate then for local authorities to use its parental authority obtained pursuant to section 33 of the Children Act 1989 to consent to a child's medical treatment in the face of parental objection. Such cases should be brought before the Court for orders pursuant to the Court's inherent jurisdiction. The President did not address the issue raised by Mostyn J in the case of *Re JM (A Child)* [2015] EWHC 2832 (Fam) in which the latter had held that it was appropriate for orders authorizing medical treatment to be granted by the Court by way of a single issue order pursuant to s.8 Children Act 1989. This is perhaps unsurprising given that none of the recent cases have been framed as s.8 orders, but it seems to us that the President's decision leaves this option open to local authorities.

Short note: litigants in persons – expectations and impossible positions

In *Barton v Wright Hassall LLP* [2018] UKSC 22, the Supreme Court made clear that "[u]*nless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take*" (para 18 per Lord Sumption). Given the ever-increasing numbers of litigants in person in the Court of Protection, one of the tasks of the ad hoc Rules Committee as it goes forward will undoubtedly be to ensure that it keeps under review both the accessibility and the clarity of the Rules and accompanying Practice Directions.

Conversely, in *J (DV Facts)* [2018] EWCA Civ 115, the Court of Appeal had to grapple with the "*very substantial difficulty engendered by a litigant in person whose case needs to be 'put' to a key factual witness, where the allegations that that witness makes need to be challenged and are of the most intimate and serious nature, and where the litigant and the witness are themselves the accused and accuser*." Seeking to outline the ways in which to navigate the option of direct questioning from the alleged abuser and the alternative of questioning by the judge, McFarlane LJ noted that there was:

> *73* […] *the possibility of affording rights of audience to an alleged abuser's McKenzie Friend so that he or she may conduct the necessary cross examination. The possibility of a McKenzie Friend acting as an advocate is not referred to in PD12J and, as has already been noted, the guidance on McKenzie Friends advises that, generally, courts should be slow to afford rights of audience. For my part, in terms of the spectrum of tasks that may be undertaken by an advocate, cross examination of a witness in the circumstances upon which this judgment is focussed must be at the top end in terms of sensitivity and importance; it is*

> *a forensic process which requires both skill and experience of a high order. Whilst it will be a matter for individual judges in particular cases to determine an application by a McKenzie Friend for rights of audience in order to cross examine in these circumstances, I anticipate that it will be extremely rare for such an application to be granted.*

McFarlane LJ held that:

> *74. […] where an alleged perpetrator is unrepresented, the court has a very limited range of options available in order to meet the twin, but often conflicting, needs of supporting the witness to enable her evidence to be heard and, at the same time, affording the alleged perpetrator a sufficient opportunity to have his case fairly put to her. Of the options currently available, the least worst is likely to be that of the judge assuming the role of questioner.*

Perhaps unsurprisingly, McFarlane LJ drew attention to proposals to address the problem of a litigant in person who wishes or needs to cross examine a witness contained in clause 47 of the Prison and Courts Bill which, in the event, fell when Parliament was dissolved prior to the General Election in 2017. These proposals, of importance to the family courts, would not apply in the Court of Protection – one might think that it would be sensible to ensure that if the Bill does get brought forward again, this court is included, as the issues could equally well apply in proceedings before it.

Short note: fact-finding and criminal proceedings

In *Re R (Children)* [2018] EWCA Civ 198, the Court of Appeal made important observations about the approach to take to fact-finding in relation to circumstances that had previously been considered in criminal proceedings. McFarlane LJ emphasised at paragraph 82 that:

> *a) The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a criminal court* […]*;*
>
> *b) The primary purpose of the family process is to determine what has gone on in the past, so that those findings may inform the ultimate welfare evaluation as to the child's future with the court's eyes open to such risks as the factual determination may have established* […]*;*
>
> *c) Criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court* […]*;*
>
> *d) As a matter of principle, it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts* […]*.*

McFarlane LJ also noted at paragraph 86 that:

> *On the basis of the guidance in PD12J, and on the basis of general principles, a family court should only embark upon a fact-finding investigation where it is both necessary and proportionate to do so,*

> *having regard to the overarching purpose of public law proceedings of (a) establishing whether the CA 1989, s 31 threshold criteria are satisfied and (b) determining the future plan for the child's care by affording paramount consideration to his or her welfare.*

Whilst there are no threshold criteria in Court of Protection proceedings nor (yet) the equivalent of PD12J to the FPR 2010, dealing with *Child Arrangements and Contact Orders: Domestic Abuse and Harm*, the approach set out above apply equally by analogy to the interaction between Court of Protection proceedings and criminal proceedings, as do the two pertinent concluding observations of McFarlane LJ on these issues:

> *90. Lastly, I would mention the specific matter of the use of language. The potential for the court to become drawn into reliance upon criminal law principles is demonstrated by the present appeal. Even where the family court succeeds in avoiding direct reference to the criminal law, it is important that, so far as it is possible to do so, the language of the judgment (and in particular any findings) is expressed in terms which avoid specific words or phrases which may have a bespoke meaning in the context of the criminal jurisdiction, for example 'self-defence', 'reasonable force' or 'the loss of self-control'. Phrases such as 'inappropriate force' or 'proportionate force' may reflect the judge's findings in a particular case, and avoid the risk that the judge's words may be misunderstood as expressing a finding based directly upon criminal law principles.*
>
> *91. At the end of the day, the often very difficult role of a judge once it has been determined that a finding of fact hearing is necessary can be reduced to the short statement that the family judge's task in such cases is simply to find the facts. Once any facts are found, they will then form the basis of a more wide-ranging assessment of any consequent risks to the child whose future welfare needs will then fall to be determined.*

Vulnerable clients

Professor Jo Delahunty QC, Gresham Professor of Law, delivered a lecture on 1 February 2018 at Barnard's Inn Hall in London entitled 'vulnerable clients and the family justice system'. You can hear the whole lecture here. In this thought-provoking lecture, she posed five questions (i) should a disability prevent someone from being a good enough parent; (ii) What disabilities does the court encounter, is vulnerability the same as disability; (iii) what does the family justice do to protect the rights of the disabled person to be a parent and of the child to be adequately parented?; (iv)How can a vulnerable person be helped to ensure their voice is heard in court and (v) Beyond the court room: do we really make a difference in society where it counts?

Of particular interest to mental capacity practitioners is the focus on the impact on children of disabled persons arising not from abuse at the parents' hands, but arising from the perceived risk of neglect arising from the parents' intellectual abilities, impact of social and economic deprivation. Professor Delahunty speaks eloquently of the difficulty in providing families with the support they need to allow the child to be effectively parented within the family home but warns that support should not become substitute parenting. Depressingly, she suggests that there has been little progress over the last

15 years in providing appropriate support to learning disabled parents, and also that there is little evidence of joint working between the adult social services concerned with supporting the adult, and the children's social services concerned with the child.

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Conferences

Conferences at which editors/contributors are speaking

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see here.

Central Law Training Elder Client Conference

Adrian is speaking at this conference in Glasgow on 20 March. For details, and to book see here.

Royal Faculty of Procurators in Glasgow Private Client Conference

Adrian is speaking at this half-day conference on 21 March. For details, and to book, see here.

Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see here.

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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 report will be out in early April. 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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