



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the failed challenge to funding for DOLS, DOLS and conditions, and examples of judges grappling with both capacity and best interests in situations of complexity;

(2) In the Practice and Procedure Report: litigation capacity and the Court of Protection, and a strange saga of attempts to exploit the Court of Protection in the context of bone marrow donation;

(3) In the Wider Context Report: a reminder of the MCA and voting, new guidance on care for dying patients and a book corner reviewing relevant recent publications;

(4) In the Scotland Report: reflections in *AM-V v Finland* and law reform, recently decided cases shedding light on capacity and disability from a range of perspectives and a well-deserved honour for Adrian.

There is no Property and Affairs Report this month in the absence of a sufficient quantity of relevant material.

Remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

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

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### Authorising at any price?

*Liverpool City Council, Nottinghamshire County Council, LB of Richmond upon Thames and Shropshire Council v SSH* [2017] EWHC 986 (Admin) (High Court (Administrative Court) (Garnham J))

*Article 5 ECHR – DOLS authorisations*

#### Summary

This case was brought by four local authorities challenging what they described as the Government’s “ongoing failure to provide full, or even adequate, funding for local authorities in England to implement the deprivation of liberty regime”. The local authorities suggested that the financial shortfall suffered by councils across the country generally as a result of *Cheshire West* was somewhere between one third of a billion pounds and two thirds of a billion pounds each year and sought a mandatory order requiring the Secretary of State of Health (‘SSH’) to fill the gap. The local authorities relied on the New Burdens doctrine, a recent policy invention which provides that if it is the Government’s policy that authorities should do something and that this will cost them more money, the department responsible for the policy (within

central government) must ensure that the necessary funding is provided.

The local authorities lost because they had not issued their claim promptly. Central government funding decisions were made annually, and the claim had been issued 2 days short of the 3 month time limit for judicial review claims, which the court considered was not prompt enough given the prejudice to the SSH of having an annual budget decision quashed a quarter of the way through the year.

Garnham J did however go on to consider the merits of the local authorities’ claims.

The local authorities argued that a public authority must ensure that there is no systemic flaw in practice which creates an unacceptable risk of illegality, and that a system would be unlawful where the funding shortfall to those implementing it creates an unacceptable risk of illegality. Garnham J rejected the idea that there was any principle of public law that public authorities who establish a system of safeguards are under a duty to ensure that the system does not give rise to an unlawful risk of eligibility. Since the local authorities were not saying that the government’s underlying funding allocation was irrational, they could not successfully mount an argument based on the

risk of illegality. And in any event, said Garnham J, the local authorities were able to prevent any illegality by just rearranging their own budgets and making cuts in other areas – the local authorities had not filed evidence suggesting that having regard to their total budgets, they would be unable to meet the requirements of the DOLS systems.

Garnham J held that the New Burdens doctrine did not assist the local authorities as it did not say in terms that additional funding would be provided if required as a result of a change in policy and so gave rise to no legitimate expectation.

### Comment

This decision will no doubt be hugely disappointing to local authorities struggling to cope with the aftermath of *Cheshire West*, and wondering forlornly how long it will take for the Law Commission's proposals to make it to the top of the government's list of things to do (the General Election only having delayed matters further).

The suggestion that dealing with DOLS simply requires other budget cuts to be made is perhaps unrealistic, given the scale of cuts that have already taken place in recent years, unless one accepts that service provision will be reduced in order that procedural safeguards can be implemented. That would be a perverse effect of the Supreme Court's decision, which was premised on the need to support people with disabilities and to treat them equally.

It also seems odd to the authors to reject the claim on the basis of a lack of promptness since the problem is one that will inevitably arise again when the next Local Government Finance

Settlement is published. By then, the problems facing local authorities will no doubt be even worse - perhaps their evidence at that stage would show that squeezing funds from other areas of their budgets will only be able to happen if other statutory duties are missed.

The authors understand that no decision has yet been taken whether to seek permission to appeal the decision. It will be interesting to see what impact this decision has on any challenge brought following *Re JM* as to the provision of representation at DOLS hearings for incapacitated people. In this regard, we note also the Government's response to the *Re JM* decision (i.e. extra funding for s.49 visitors) and the less than enthused response of Charles J, both available [here](#).

### At the limits of best interests

*Newcastle-upon-Tyne City Council v TP and FW* [2016] EWCOP 61 (HHJ Moir)

*Best interests – residence*

### Summary and Comment

In a trilogy of judgments, HHJ Moir made findings of fact, determined mental incapacity, and made best interests decisions on behalf of a lady in her 60s with cerebral palsy. She had lived a very sheltered life with her parents in a large Victorian house in Gosforth until she was around 48 when her mother died. She strongly wanted to return to live with an individual, FW, in respect of whom the statutory authorities had very significant concerns, in particular in respect of the degree of (malign) control that he appeared to exercise over her.

The case is very fact specific but, in deciding that it was not in her best interests to return to FW, it provides an illustration of the overriding of P's clear wishes and feelings in the name of best interests. In terms of legal principles, the judge referred to, and endorsed, the keynote address of Peter Jackson J, given at the AMHPA conference, 'Taking Stock, Mental Health and Mental Capacity Reform', to supplement the MCA best interests checklist:

*21 ... In this address the learned judge suggests a framework which can be used as a checklist in Court of Protection cases. He sets out:*

*"Here is a checklist that might have appeared in section 4 but did not. I have stolen most of it from existing well-trying checklists. It requires a decision maker in personal welfare cases to consider all the relevant circumstances and, in particular, the following:*

- *Past and present wishes and feelings;*
- *Beliefs and values;*
- *Age, background, race, culture and language;*
- *Physical, emotional and educational needs;*
- *The extent to which they are being met; Relationships with relatives and other significant persons;*
- *The promotion of independence;*
- *The preservation of dignity;*
- *Harm or likelihood of harm;*
- *The effect of any change of circumstances;*
- *The range of services that are available; and finally, in cases concerning life preserving treatment,*

- *The right to life."*

*22. It is a useful suggested framework, or aide memoire, as to the relevant circumstances to consider... It is neither an exhaustive nor limiting list, but it is helpful in considering the factors which a person would wish to consider if he was able.*

Real enthusiasts might also want to "stress test" the process by which P's Article 8 rights were protected against the new (and – according to the ECtHR – CRPD compliant) test set down in AM-V v Finland, covered in our last Report.

### Who guards the guards?

Re W [2016] EWCOP 58 (DJ Ralton)

Article 5 ECHR – DOLS authorisations – DOLS RPR

### Summary

This recently published judgment from 2016 considers who is responsible for monitoring standard authorisation conditions. Managing authorities must comply with them, but who guards the guards? In the absence of an express statutory obligation, DJ Ralton held that supervisory bodies are under a duty to do so. This was for three reasons. First, a supervisory body has a discretion to carry out a review of the authorisation it has granted. It cannot exercise that discretion unless "it carries out its own function of considering the standard authorisation and monitoring the conditions that it has imposed" (para 13). Secondly, Article 5 ECHR requires continued justification of the deprivation of liberty which cannot be done passively by the decision-maker (para 14). And, thirdly, although "there is an obligation upon the RPR so far as

he/she is able to ensure that conditions are complied with", the RPR's function is not to monitor compliance and report back to the supervisory body. The RPR acts on behalf of P and does not owe an agency-type duty towards the supervisory body (para 12).

The second legal issue related to how frequently condition compliance ought to be monitored. The judge held that "*Frequency all depends*" (para 15) and it is essentially a question of fact in each case.

### Comment

The legislation's silence on this significant issue has always been a concern. Authorisation conditions can make a real difference to the person's care arrangements and well-being so an effective system for monitoring the managing authority's compliance with them is necessary. Supervisory bodies may well despair at the prospect of having to fulfil this duty, but that is because of the scale of the challenge rather than because of the correctness of the legal principle underpinning it. How they are going to achieve this monitoring role will require careful thought. In the pre-*Cheshire West* days, for example, we recall some supervisory bodies requiring managing authorities to report back on condition compliance on a regular periodic basis.

There are many other issues relating to conditions that have yet to be determined in the case law. For example, what are the legal implications when authorisation conditions are not fulfilled? Who is responsible for condition breaches? The MCA states that it is managing authorities that "must" comply. But often the work necessary to achieve the condition needs to be undertaken by some other body or person.

Hopefully further case law will explore these issues and plug the gaps left by the legislation.

### Short Note: capacity case study

By way of an (entirely fact-specific) but useful example of capacity assessment, we note the decision of HHJ Rogers in *Lincolnshire County Council v JK* [2016] EWCOP 59. The case concerned P's capacity to conduct proceedings and take decisions in respect of residence, care needs and finances. P was 73 and a widow. She was suffering from a severe bout of depression when she was admitted to a care home. At the time she was admitted to the care home there were concerns about the state of her home and her ability to care for herself. Following admission she was diagnosed with Alzheimer's dementia but recovered from the depression.

The judge began his assessment by reminding himself of the dicta of Baker J in *CC v KK* [2012] EWHC 2136 that the question of capacity needs to be approached in a detached and objective way where the natural desire to be protective of an adult individual should not drive the Court to a convenient outcome.

He referred to the recent judgment of *NHS Foundation Trust v C and V* [2015] EWCOP 80 for a recent exposition of the statutory framework and recent case law and adopted it as a starting point to analyse the facts in this case.

The judge set out the importance of P participating in proceedings, citing his recent judgment: *A County Council v AB and others* [2016] EWCOP 41. The judge in this case spoke to P on 3 occasions.

The judgment itself necessarily turns on its own facts but it provides useful guidance into the way

a judge applies the statutory framework and the guidance in the case law.

In this case the judge held that the presumption of capacity was displaced by all of the evidence which came broadly from 5 areas: the background non-controversial facts (photographic evidence as to the state of P's home for example); the evidence of the local authority social workers both written and oral; evidence from those representing P (attendance notes principally); expert psychiatric evidence and evidence from P herself.

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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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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

#### Mental Welfare Commission and Centre for Mental Health and Capacity Law Launch of Law Reform Scoping Exercise Report

Jill will be speaking at this seminar at Edinburgh Napier University (Craiglockhart Campus) on 30 May 2017. Please contact [Rebecca McGregor](#) for more details.

#### 'Supporting Employee Mental Health and Wellbeing'

Jill is speaking at this Holyrood Events/MHScot conference on 'Supporting Employee Mental Health and Wellbeing' on 1 June in Edinburgh details. For more details, see [here](#).

#### Learning Disability and the Mental Health Act

Jill's Centre is holding a seminar on this topic on 1 June, with speakers including Dr Ailsa Stewart (University of Strathclyde), Dr Gillian MacIntyre (University of Strathclyde), Dr Fergus Douds (State Hospital) and Colin McKay (Mental Welfare Commission) Please contact [Rebecca McGregor](#) for more details.

#### Essex Autonomy Project Summer School

Alex is speaking at the Essex Autonomy Project Summer School, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the [Summer School website](#).

#### 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](#).

### Advertising conferences and training events

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

Our next Report will be out in early June. 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](mailto:marketing@39essex.com).

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