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MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE

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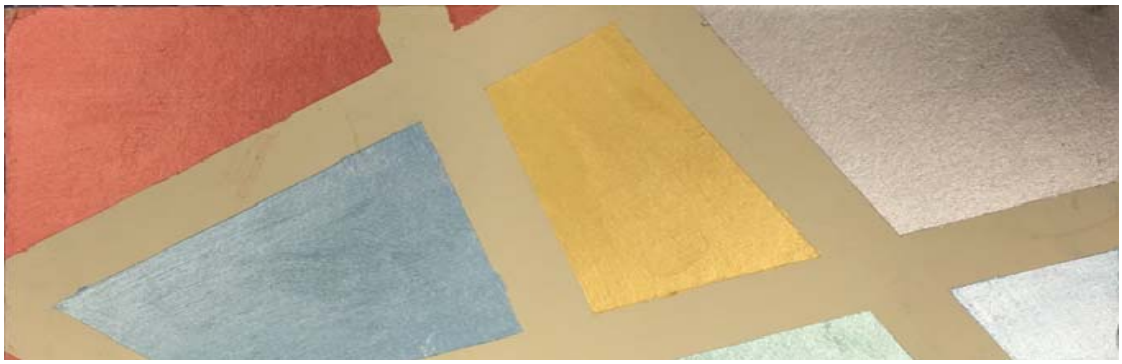

Welcome to the May 2017 Mental Capacity Report. Highlights this month include:

(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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Alex Ruck Keene
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Nicola Kohn
Simon Edwards (P&A)

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Adrian Ward
Jill Stavert

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.

Contents

Litigation capacity under the spotlight

London Borough of Brent v (1) SL (2) NL [2017] EWCOP 5 (DJ Glentworth)

Mental capacity – litigation

Summary

This case concerned SL, a 60 year old woman with a diagnosis of schizophrenia and obsessive compulsive disorder. The central issue in this case was whether SL had capacity to conduct proceedings in the Court of Protection in which she objected to the deprivation of her liberty in supported living accommodation.

There were three capacity assessments before the court:

- A COP3 capacity assessment which concluded that SL was unable to understand or weigh up all the relevant information in relation to her own needs, both mental and physical, or to weigh up the pros and cons of different types of accommodation as well as treatment and care in the community;
- A section 49 report which concluded that SL lacked capacity to conduct these proceedings because she did not understand the basis of the proceedings as she was preoccupied by the fact that she preferred to live at home;
- An independent expert report where the expert found it difficult to reach a conclusion about SL's litigation capacity but, if pressed, stated that he thought that she did not have capacity in that area.

District Judge Glentworth set out the relevant law in this area and considered that she had sufficient information in the reports to address the question of SL's litigation capacity without hearing oral evidence. The independent expert was clear in his diagnosis of SL which was accepted by the court. The independent expert was also clear that SL lacked capacity in relation to the issues which were the subject matter of the application namely her residence and care. The independent expert also concluded that SL did not have capacity to manage her property and affairs and that conclusion was accepted by the court.

In relation to litigation capacity, the independent expert and the court were mindful of the decision in *Sheffield City Council v E* [2004] EWHC 2808 where Munby J (as he then was) held that cases where someone had litigation capacity whilst lacking subject matter capacity are likely to be very rare. The expert's view was that the issue of SL's litigation capacity depended on the level of

detail which the court considered SL would be expected to understand in making the kinds of decisions she would need to make in the course of litigation. If it was sufficient for SL to understand the matter in broad terms then he thought that SL had litigation capacity. If SL was required to have a more detailed understanding of the various potential outcomes and their consequences, then SL lacked litigation capacity.

Having considered the evidence in the reports, the judge was satisfied that SL could understand the information relevant to the proceedings but was not satisfied that she was able to use and weigh the relevant information to make decisions and give instructions in relations to matters which were integral to the process of litigation.

Comment

This case does not lay down any new principles of law but is a useful example of how the law relating to litigation capacity was applied in practice. In analysing the independent expert's report, the court rejected the notion that it was sufficient for SL to understand the matter in broad terms in order to have litigation capacity. Rather what was required was for SL to use and weigh the relevant information to make decisions and give instructions in relation to matters which were integral to the process of litigation. It is a slight pity that the judgment does not spell out in more detail what the matters "integral to the process of litigation" were considered to be.

Practitioners may also wish to take note of the judge's comments on the letter of instruction that went to the independent expert. The letter of instruction, as we understand it, was modelled on the standard letter emanating from the Official Solicitor referred to an extract from the case of *The NHS Trust v Miss T* [2004] EWHC 2195. However, neither the expert nor the court could locate a copy of that case under that citation or by a more generalised search (although the case is referred to in the judgment of Munby J in the *E* case). Given the difficulty locating the case, the judge suggested that it would be appropriate for those responsible for the letter of instruction to consider whether reference to it should be included in future instructions.

A wider agenda at work?

In the Matter of SW [2017] EWCOP 7 (Sir James Munby P)

Practice and Procedure (Court of Protection) – Other

Summary

Re SW is a quite extraordinary case that came before Sir James Munby P in March of this year. The Applicant brought an application for a declaration that an allogeneic bone marrow transplantation from a living donor, SW, into her adoptive brother, SAN, would be both lawful and in SW's best interests. SAN was reported to be suffering from haematological cancer such that without the transplant, he would inevitably die.

The facts and relationships between the various actors in the case are complex albeit that the issues are relatively straightforward. The Applicant was the putative donor SW's son, acting under a Lasting Power of Attorney purportedly executed by SW in June 2015 and witnessed by a Dr Jooste. Dr Jooste was in turn

the physician who proposed to carry out the transplant, alongside his friend and colleague, a Dr David Anthony Waghorn. Dr Waghorn was also the Applicant's father and SW's husband.

The Applicant son sought a declaration from the Court of Protection that it was lawful for his father and his father's colleague to carry out the transplant of bone marrow from SW to SAN, "notwithstanding the [Human Tissue Authority's] refusal to consent" to the treatment. The Applicant notified the court that both Dr Waghorn and Dr Jooste had relinquished their membership with the GMC in order to continue their specialized medical practice in bone marrow transplantation.

This case followed an earlier failed application to the COP under an LPA purportedly being exercised on SAN's behalf and a failed judicial review by a company directed by Drs Waghorn and Jooste on the same issue. The instant application was similarly unsuccessful and was struck out.

Firstly, Sir James Munby P held that there was no evidence before the court that SAN did in fact wish any such treatment to be carried out and no attempt had been made to join him as a party.

Secondly, and more fundamentally, it was entirely unclear a) whether SW did indeed lack capacity to give consent to the transplant as was suggested by her son or b) if she did lack capacity, that any attempt had been made to ascertain her wishes and feelings on the matter. The sole evidence relied upon as to her capacity was a 15 year old letter from a clinical neuropsychologist noting that she had had a series of strokes following a road traffic accident and that there had been a drop in her IQ score; in addition to this there was a letter from a further neuropsychologist's report from August 2016 confirming that SW did *not* present as someone with dementia and that he could not form a conclusive opinion as to her capacity to consent to the operation. In fact the neuropsychologist himself voiced concerns that "assessment in mental capacity needs to be as specific as possible".

Sir James Munby P accordingly confirmed that the information put before him was well below the required threshold to make a declaration as to SW's lack of capacity, even on an interim basis, and that as a result the entire matter fell outside the jurisdiction of the Court of Protection.

Quite apart from the jurisdictional issue, referring to the pre MCA case of *In Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110 Sir James observed there was no authority upon which the Court could make a declaration that the proposed treatment was in SW's best interests in the absence of, among other things, expert medical evidence regarding the nature of the procedure, details of the clinicians carrying out the procedure, or confirmation that the donee did in fact wish the procedure to take place as proposed. He noted that there was no evidence as to SW or SAN's wishes and feelings, save for the assertion by the son that SAN would "obviously…. agree because no-one wants to die".

Noting that the son had further failed to confirm that both his father and Dr Jooste had been struck off and that his skeleton argument appeared to be about the value to the wider public of SW undergoing the procedure, Sir James questioned "is there some wider agenda

at work here, and, if so, whose agenda is it?" He observed that:

> *a prudent judge probably never says 'never', but I find it impossible to conceive of circumstances where the Court of Protection would ever contemplate authorising treatment of a kind referred to in PD9E… [serious medical treatment] where the treatment is to be given by a doctor who has been struck off (paragraph 25).*

Given these facts, it is perhaps not surprising that Sir James determined to depart from the usual order in welfare cases and made a costs order against the son for bringing the application. Significantly, despite the fact that they were not applicants in the proceedings, given that each had sought to be joined as a party and had "expressed themselves as consenting to the application", Sir James Munby P further determined that Dr Waghoorn and Dr Jooste should share the burden of the costs with the applicant son.

Comment

This is a striking case not least because of the facts. It is in this context that Sir James Munby P took the decision to name Dr Waghorn and Dr Jooste, the anonymisation of SAN, SW and the son notwithstanding, on the basis that there is a "*very strong public interest in exposing the antics which these two struck-off doctors have got up to*".

The decision itself is not surprising. It is a clear reiteration of the fundamental principle that the Court of Protection has no jurisdiction to determine the lives of those who are not found to lack capacity - and that a health and welfare LPA cannot be relied upon to make decisions on another's behalf in circumstances where they are capable of doing so themselves.

It is also entirely unsurprising that the requirement under the Human Tissue Act 2004 (Persons who Lack Capacity to Consent and Transplants) Regulations 2006 for the matter to have been referred to the Human Tissue Authority by a registered medical practitioner and properly deemed to be lawful could not be circumvented by an application to the Court of Protection, the Court having no jurisdiction or power to exempt anyone from such a statutory scheme.

Short Note: the *Al-Jeffery* saga concludes

Readers will recall the coverage of the Al-Jeffery case, in which the High Court confirmed that it had a residual nationality-based jurisdiction protect vulnerable British nationals abroad even if they are no longer habitually resident in England and Wales. You may be interested to note that it has now concluded at Ms Al-Jeffery's request, on the basis of her reconciliation with her father and his apparent change of heart as to her ability to leave Saudi Arabia should she wish. We will leave it to you to decide the extent to which this sits entirely comfortably with the picture painted previously.

Short Note: Radicalisation and young adults

In *A Local Authority v Y* [2017] EWHC 968 (Fam), Hayden J set out a very useful exegesis of both the duties upon statutory bodies and the possible steps that might be taken where a child at risk of radicalisation turns 18 and thereby moves beyond the remit of the Family Division of the High Court/Family Court. At the risk of

sounding like a stuck record, Alex notes that this may be another area in which – in the case of those who have capacity to take relevant decisions - current tools may be lacking and law reform may be in order.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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

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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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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

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

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

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.

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