MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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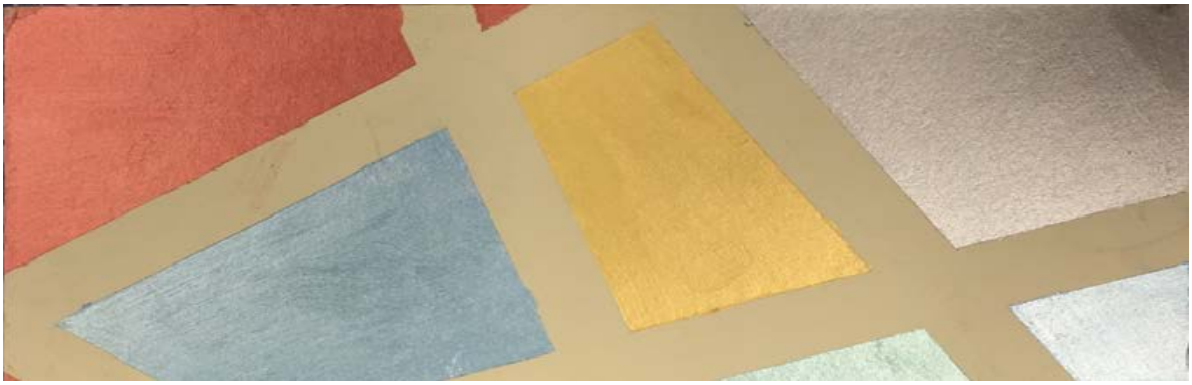

Welcome to the April 2017 Mental Capacity Report. Highlights this month include:

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

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

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

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

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

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

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

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

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

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

Summary[1]

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

The facts

The appeal arose from the decision taken in 2013 in relation to a young man, MN, with profound disabilities who lacked capacity to make decisions about his care. He was made the subject of a care order when he was 8 years old and placed in residential accommodation. On turning 18, he was moved to an adult residential placement and the clinical commissioning group took over funding for his placement, the local authority remaining involved in the proceedings. MN's parents accepted that he should live at the placement for the time being, but wished to

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

assist in providing intimate care to MN at the placement, and to have contact with MN at their home. The CCG did not agree that intimate care should be provided, and was not willing to provide the necessary funding for additional carers to facilitate home contact. At first instance, MN's parents contended that the court should nevertheless determine MN's best interests in respect of both matters. The local authority and the CCG submitted that the court was only able to choose between available options.

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

The issue

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

The proper approach to the determination of the issue

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

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

2. Lady Hale's 'respectful' agreement (at para 26) with the observations of Sir James Munby P in the Court of Appeal that, unless the desired order clearly falls within the ambit of s.15 (i.e. a declaration as to capacity and/or lawfulness, which may have a narrower ambit than can be made in the High Court), orders are better framed in terms of relief under s.16 MCA 2005. As she noted, an order under s.16(2)(a) simply makes the decision on behalf of the person,

with no need to declare that the decision made is in P's best interests;

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

4. Lady Hale's conclusion that courts and people taking decisions on behalf of those who lack capacity to do so have to do so in their best interests, and, following s.4 MCA 2005, a conclusion as to what is in a person's best interests "*is a decision about what would be best for this particular individual, taking into account, so far as practicable, his individual characteristics, likes and dislikes, values and approach to life*" (para 34).

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

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

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

Lady Hale outlined the extensive case management powers of the Court of Protection, noting (at para 41) that the court was therefore clearly entitled to take the view that no useful

purpose would be served by holding a hearing to resolve a particular issue. She continued:

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

Lady Hale concluded that, on the facts of the case before Eleanor King J, consideration upon the lines set out immediately above would have led to the conclusion that it was unlikely that investigation would bring about further modifications or consensus and that it would have been disproportionate to devote any more of the court's scarce resources to resolve matters. As she put it at para 44, this was "*a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those circumstances, the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing.*" Lady Hale accepted that Eleanor King J had not put matters in quite those terms, but that was the substance of what she was doing and she was entitled in the circumstances to do so, such that the appeal fell to be dismissed.

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

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

Comment

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

Many people may regret this decision as the "hollowing out" of the concept of best interests, as Beverley Clough memorably put it in a post prior to the hearing. Further, some may contend that the result is inconsistent with the CRPD, which had a cameo role in the hearing. However, for our part, we would suggest that our energies should be devoted more to ensuring that those mechanisms which exist to facilitate the involvement of those with impaired capacity in service provision decisions made for them under the relevant legislation (for instance advocacy

under the Care Act) are made meaningful. This is an area where real supports are required for the exercise of legal capacity under Article 12 CRPD (and also to make real the right to independent living under Article 19).

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

The Supreme Court did not comment upon whether the Court of Protection is able to hear claims brought under s.7 Human Rights Act 1998; both Eleanor King J and the Court of Appeal had held that, exceptionally, the court is able to consider a claim that a public body is acting unlawfully in the steps that it is taking towards P by reference to the ECHR, and we suggest that the Supreme Court's silence on this point should be taken as endorsement of this position. We note that this is different to the question of whether the Court of Protection should be able to make declarations and/or damages to reflect a public body's past actions breach the ECHR – there is no doubt that the court has the jurisdiction to do this, but, as is becoming increasingly clear the approach of the LAA, in particular, would seem to suggest that the much better course of action will normally be to bring separate proceedings in the county or High Courts.

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

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

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

Senior Judge Hilder

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

Court User Group meeting 26 April

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

Court of Protection (Amendment) Rules 2017

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

Mental Welfare Accreditation Scheme

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

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

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

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

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

3. It was appropriate for the Circuit Judge to refuse to dismiss the RPR in the context of

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

It is worth also noting here the decision in *Re SW & Re TW* [2017] EWHC 450 (Fam)) which can be added to the other cases concerning the interaction between care cases and HRA claim covered in our March Report, making it increasingly obvious that it will only rarely be appropriate to bring such HRA cases within the four walls of the CoP. Rather, separate County Court (or High Court proceedings) should be brought – or at least intimated, with settlement or other ADR being infinitely preferable.

Short note – limits of compulsory funding

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

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

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

> *There can be no criticism of any judge who determines that, bearing in mind the circumstances of a particular case, the party bearing the burden of proof shall be responsible for translation costs of a*

> *relevant document. The circumstances of other cases may reasonably inform a view that the party which requires the translation should bear the cost. Both of these views may be reasonable in the context of the case in hand, but cannot be considered as determinative of the issue across all cases.*

The Court of Appeal emphasised that the relevant procedural rules (there, the FPR, but in our context the COPR) "*require collaboration between parties to avoid the prospect of time consuming satellite litigation on the issue of identification of which documents, or parts of the same, it is necessary to translate and in summary or full, together with a non-partisan appraisal of which party it would be reasonable to invite the judge to order to pay, or contribute towards, the costs of the same.*"

Court of Protection Mediation Study

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

Court of Protection statistics

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

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

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

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

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

Family Court transparency report

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

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

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Conferences

Conferences at which editors/contributors are speaking

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity at this conference in Glasgow on 20 April 2017. For more details, and to book, see here.

Deprivation of liberty: what does the future hold?

Alex will be speaking at this event on 5 May in Consett, County Durham on 5 May. For more details, and to book, see here.

Advertising conferences and training events

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

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

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