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Mental Capacity Law Newsletter

Editors: Alex Ruck Keene, Victoria Butler-Cole, Neil Allen and Michelle Pratley

Introduction

Welcome to the March issue of the Mental Capacity Law Newsletter. We had hoped in this issue that we would be covering the decision of the Supreme Court in the *Cheshire West* case but it had still not come out by the time that this edition went to press – disrupting (we would note, as amongst the lesser consequences of the delay) increasing numbers of conferences fixed to assess its implications. The report of the House of Lords Select, also, was not out by the time that we went to press but should be by mid-March. Even without having seen it, it is clear that this will be a sufficiently important report that it will merit a standalone 'newsflash' email to draw its key conclusions and recommendations to your attention, so you are warned!

Starting with England and Wales, and to pick up on capacity cases first, we would highlight, in particular, the decisions in *LB Redbridge v G, C and F* (disentangling duress from impairment) and *JB* (a lucid distillation of the principles relating to capacity to consent to medical treatment). Turning to best interests, we would draw your attention to the case of *Manuela Sykes* (balancing risks and benefits where it was very clear what P would have wished). In the property and affairs field, Senior Judge Lush has handed down a judgment (*re DP*) illuminating the distinction between an investigation conducted by the OPG and one conducted by the police. The case of *JS v MP* also provides a salutary cautionary tale in relation to informal decision-making.

Other courts have also been busy shedding light on matters mental capacity related – most notably the Court of Appeal which, in allowing Cornwall Council's appeal against an ordinary residence determination of the Secretary of State, has rewritten the law relating to the identification of the ordinary (and also, potentially, habitual) residence of those without capacity to decide where to live. We would also draw your attention to the important decision of *JE (Jamaica)* in which the Court of Appeal has given guidance upon the application of a costs rule that anyone considering an appeal from the Court of Protection must be aware of.

Outside the courtroom, we cover guidance from OFSTED and the President of the Court of Protection upon deprivation of liberty in children's home and special schools, together with the most recent reports upon IMCAs and Welsh DOLS.

Our Scottish contributors are Adrian Ward, of TC Young Solicitors, and Jill Stavert, Reader in Law and Director of the Centre for Mental Health Law and Incapacity Law, Rights and Policy at Edinburgh Napier University. Developments for reporting in the Scottish section of the newsletter should be sent in the first instance to Adrian or Jill. In Scottish news this time, and in place of the Part 2 of the guide to relevant Scottish law, we report upon two matters with which Adrian has involvement, the first being a potentially highly significant case upon deprivation of liberty within the Scottish system, and the second being the Courts Reform (Scotland) Bill, paving the way for specialist Sheriffs to consider adult incapacity cases.

Where transcripts are publicly accessible, a hyperlink is included. As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk. We include a QR code at the end which can be scanned to take you directly to our previous case comments on the CoP

Cases Online section of our website.

We would also remind you of the facility to advertise conferences and other training events of interest to practitioners concerned with mental capacity/adult incapacity law. 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 be made to Alzheimer Scotland Action on Dementia. Please contact one of the editors if you would like to discuss placing a posting.

The survey

Thank you also to those of you who responded to our survey (and to the many very kind comments that you made). The majority of respondents indicated that they welcomed the breadth of coverage. We are, though, conscious that – largely thanks to the increasing numbers of judgments that are being reported – the newsletter is now getting very long. We are working on ingenious solutions, but in the meantime have divided up the contents page and the newsletter more clearly by theme so it is possible to navigate rapidly to the sections that are of interest. The majority of respondents also indicated that they broadly preferred the current format and would not wish us to move to (say) a slim-line newsletter together with a blog. We do not therefore propose any dramatic changes in this regard at this stage. Alex is, though, in the process of creating his own website relating to mental capacity law and policy which will – in part – serve as a satellite to this newsletter and upon which comments upon some cases will appear upon a rolling basis. More details will follow when this is ready to go 'live'.

Department of Health Guidance

The Department of Health has recently commissioned two guidance documents, one for non-legal professional advocates and family members/friends considering acting as litigation friends in CoP proceedings, and one upon capacity assessment in relation to financial decision-making.

ENGLAND AND WALES

SCOTLAND

Alex is producing the guidance upon litigation friends, and would very welcome the views of IMCAs/RPRS and other advocates (as well as family members) who may have been involved in CoP proceedings as litigation friend. If you would like to assist, please contact him directly.

The guidance upon capacity assessment in relation to financial decision-making is being produced by Empowerment Matters. They are keen to hear from people who have views about what such guidance should include and to find out what would best help practitioners who have responsibility for carrying out financial capacity assessments. They have a survey here which they would be very keen for you to complete; they are also looking for people to be members of a virtual reference group who would feedback on a draft version of the guidance. If you would like to be part of this please get in touch at info@empowermentmatters.co.uk.

Michelle

This will be Michelle's last newsletter for a while as she is now on maternity leave. We hope that you will all wish her well as she awaits the arrival of the littlest Pratley.

COURT OF PROTECTION: HEALTH AND WELFARE

Out with a bang, not with a whimper?

Westminster City Council v Manuela Sykes [2014] EWHC B9 (COP) (District Judge Eldergill)

Best interests – Residence – Media – Anonymity

Summary

Ms Manuela Sykes was by nature a fighter; a campaigner; a person of passion. Having been involved in many of the moral, political and

ideological battles of the last century, she was now 89 and fighting another battle: dementia. Diagnosed in 2006, she made a living Will – prioritising her quality of life over its prolongation – and campaigned for the rights of dementia sufferers (such as the Trebus project; her summarised life story is here). In 2011, she appointed a close friend under a property and affairs Lasting Power of Attorney, stating: "*I would not like my attorney to sell my property. My wish is to remain in my own property for as long as this is feasible*."

She had lived in a flat in central London for 60 years. A culmination of not accepting care, altercations with others, self-neglect, unhygienic and hazardous living conditions, weight loss (to 41 kg), wandering, and lack of awareness of personal safety, resulted in her compulsory admission to hospital under s.2Mental Health Act 1983 in October 2012.

In December 2012, it was considered to be in her best interests to be discharged to a nursing home where her deprivation of liberty was authorised, with her close friend appointed as her representative. Unhappy, a trial at home was suggested. But this came to nothing after senior management of the local authority advised that a 24-hour live-in carer at home would be too expensive given their budgetary constraints. With her continued opposition to the nursing home, the local authority sought the Court's review of their standard authorisation via section 21A of the Mental Capacity Act 2005, with her close friend appointed as litigation friend.

In a characteristically thoughtful judgment, District Judge Eldergill concluded that all of the standard authorisation requirements, save that of best interests, were met. Because of her dementia – with her short-term memory lasting less than a minute – Ms Sykes was unable to retain and weigh the information relevant to the decision. The no refusals requirement was satisfied because her living Will did not prohibit the treatment being provided in the nursing home; a place she was not ineligible to be. Moreover, all agreed that she was being deprived

of her liberty:

> *"In this case, MS is readily given permission (leave) to go out on outings with her friend RS, and the routines at QX Nursing Home are benign. RS can take her out to the cinema or for walks. She goes to St Martin's in the Field. However, it has not been argued that she is not deprived of her liberty, or that she is simply residing there in the same way as someone subject to guardianship under the Mental Health Act. This is because of the strength of her objections to living at QX Nursing Home, the fact that she is effectively prohibited from even visiting her own home, and it will be sold and she have to live out her life in residential care, unless the standard authorisation is lifted.*
>
> *In my view, that is correct when one looks at her specific situation, and the situation is not of the subtle Cheshire West kind where it is necessary to think in terms of comparators in order to reach a finding.*
>
> *Patently she is not free to go home or visit her home, and the state claims legal power to control her liberty and movements indefinitely, and not simply to define a place of residence for her; therefore she has been deprived of that usual liberty which the rest of us enjoy. No aspect of her liberty of movement remains under her own control."*

Importantly, District Judge Eldergill added the following:

> *"(If I am wrong on this then, having regard to Articles 6 and 8 of the Convention, in my view it would still be legally necessary for a court to review the fact that she is prevented from returning to and residing at her own home in a situation where the state intends that her home should be sold and this situation endure for the rest of her life notwithstanding her clear objections. I would still need to decide what I have been asked to decide, that is whether it is in her best interests not to return home and whether to permit such an interference with her Article 8 rights.)"*

Having met Ms Sykes at the nursing home, the Court undertook a carefully considered, *Aintree*-compliant, analysis of her best interests. It was noted that, "*it is her welfare in the context of her wishes, feelings, beliefs and values that is important. This is the principle of beneficence which asserts an obligation to help others further their important and legitimate interests. In this important sense, the judge no less than the local authority is her servant, not her master*." Significant problems and some distress lay ahead but, in a finely balanced decision:

> *"Several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress. If a trial is not attempted now the reality is that she will never again have the opportunity to live in her own home. Her home will be sold and she will live out what remains of her life in an institution. She does not want that, it makes her sufficiently unhappy that sometimes she talks about ending things herself, and it involves depriving her of her liberty."*

Her physical health had improved. She was calmer and her dementia was progressing at quite a slow rate. It was in her best interests for a one-month trial period to be attempted, the local authority having agreed to put in place a transitional plan. Her savings could be used and other financial resources, benefits, and private equity release schemes explored, if she remained at home. Moreover, her attorney for property and affairs had a key to her flat and it would not be unlawful for him to licence carers to enter it while she was out to clean, dust, wash her clothes, leave shopping, food de-clutter etc. This might reduce the risks of face-to-face conflict with carers over these care tasks. Accordingly the Court extended the standard authorisation until Ms Sykes returned home on trial.

Ms Sykes' strong wish was for her situation to be publicly reported in her own name. After explaining that the general rule that hearings are to be held in private to reflect the personal, private, nature of the information being considered, District Judge Eldergill went on to say:

> *"That is not the same as being secretive; a GP is not a 'secret doctor' because the press have no unqualified right to be present during patient consultations or to report what is said. All citizens have a right to expect that information about them will be held in confidence by their doctors and social workers, and to expect that any overriding, future, need to breach this right will go no further than necessary, and only exceptionally involve seeing it in national newspapers.*
>
> *Everyone benefits from, and enjoys, this level of privacy and therefore there is a strong public interest in privacy. Not to allow an incapacitated person the same general right to privacy or confidentiality that we claim it for ourselves would be to discriminate against them because of their mental illness and vulnerability.*
>
> *The one, highly important, difference is that whilst in an ideal world incapacitated people would have exactly the same right to privacy and confidentiality that the rest of us enjoy, when judges make decisions for them this brings into play the competing consideration that the public ought to know how courts of law function and administer justice: what kinds of decisions they are making, the quality of those decisions, and so forth.*
>
> *While it is sometimes necessary to distinguish between 'the public interest' and 'matters which the public finds interesting,' there is a high public interest in seeing that hearings which determine the rights of incapacitated people, and their families, are fair and properly administered."*

The Judge referred to the recent guidance on transparency in the Court of Protection issued by the President. He noted that the normal rule and expectation was to strictly preserve the anonymity of the incapacitated person and family members but to name the local authority and expert witnesses. Indeed, the case was compelling for naming this local authority, thereby "*enabling residents in the borough to know about such cases when they cast their votes, and to be able to ask their councillors suitable general questions about the allocation of resources and services to older people with dementia*."

There was good reason for permitting the press to attend the hearings, and for publishing the judgment. Carefully weighing the competing factors District Judge Eldergill decided on balance that the veil of anonymity should be lifted. Ms Sykes' personality was a critical factor: *"She has always wished to be heard. She would wish her life to end with a bang not a whimper. This is her last chance to exert a political influence which is recognisable as her influence. Her last contribution to the country's political scene and the workings and deliberations of the council and social services committee which she sat on."*

Comment

It is encouraging to see a local authority taking positive steps to, in effect, challenge themselves by initiating these proceedings. Not only does this accord with the positive obligations under Article 5, it enables the Court to determine the nub of the matter: namely the Article 8 dispute over residence and care. For whilst the deprivation of liberty safeguards provide the procedural vehicle for the right to liberty, they do not resolve the underlying welfare dispute as to where Ms Sykes should be living.

This is a textbook judgment on determining best interests, with Ms Sykes properly found at the heart of the decision. It contains numerous insightful judicial comments on a wide variety of issues, including:

- The interface between the MCA and public law: "*I accept that this court cannot direct the local authority (or the NHS) to provide services which they have assessed that Ms S does not require or which they have decided at their reasonable discretion not to provide.*"
- Article 6 and P: "*The person concerned should have access to a court and the opportunity to be heard in person or, where necessary, through some form of representation.*"

- Institutional risk-taking: "*Risk cannot be avoided of course. All decisions that involve deprivation of liberty or compulsion involve balancing competing risks, of which the risk that others may suffer physical harm is but one. For example, detention and compulsory care or treatment may risk loss of employment, family contact, self-esteem and dignity; unnecessary or unjustified deprivation of liberty; institutionalisation; and the unwanted side-effects of treatment.*"

- Special protection for children and adults with mental health problems: "*This protection involves imposing legal duties on those with power, conferring legal rights on those in their power, and independent scrutiny of how these powers and duties are exercised. The effectiveness of such schemes depends on whether, and to what extent, they are observed.*"

- Liberty and autonomy: *"The importance of individual liberty is of the same fundamental importance to incapacitated people who still have clear wishes and preferences about where and how they live as it is for those who remain able to make capacitous decisions. This desire to determine one's own interests is common to almost all human beings. Society is made up of individuals, and each individual wills certain ends for themselves and their loved ones, and not others, and has distinctive feelings, personal goals, traits, habits and experiences. Because this is so, most individuals wish to determine and develop their own interests and course in life, and their happiness often depends on this. The existence of a private sphere of action, free from public coercion or restraint, is indispensable to that independence which everyone needs to develop their individuality, even where their individuality is diminished, but not extinguished, by illness. It is for this reason that people place such weight on their liberty and right to choose."*

- Litigation friends: "*I did not agree that RS was unsuitable to be MS's litigation friend on the ground that in some way he was too partisan or insufficiently objective. A key part of his role as RPR is to represent 'P's' wishes and feelings*."

We also note the Judge's reference to sections 115 and 135 of the Mental Health Act 1983 which enable a speedy response in emergency situations that might arise from the trial at home. Highlighting a point which is often overlooked, the Judge states that "*these powers are not confined to situations where someone needs to be assessed for admission*." Section 115 thus authorises an approved mental health professional ('AMHP') to enter and inspect private premises (although not by force) if they have reasonable cause to believe that a mentally disordered person is not under proper care.

By virtue of section 135, the AMHP can obtain a warrant from the Magistrates' Court to enter private premises, if need be by force, if certain welfare criteria are met. This power has a dual purpose: the person can (not must) be removed to a place of safety with a view to the making of either (a) an application under the MHA 1983 or (b) "*other arrangements for his treatment or care*." Thus, for example, during Ms Sykes' trial at home, if there was reasonable cause to believe that she was unable to care for herself, a warrant could be obtained to enter her home to review matters and, if necessary, to remove her to a safe place without having to go anywhere near a hospital.

For the most extreme scenarios, urgent police intervention is available under section 17(1)(e) of the Police and Criminal Evidence Act 1984 to save life or limb or to prevent serious damage to

property. Risk of serious harm would suffice (*Baker v CPS* [2009] EWHC 229); mere concern for the person's welfare would not (*Syed v DPP* [2010] EWHC 81). Whilst this power would not authorise the person's compulsory removal, it would permit compulsory entry.

The modern day Mr C?

Heart of England NHS Foundation Trust v JB [2014] EWHC 342 (COP) (Peter Jackson J J)

Mental capacity - medical treatment

Summary

JB had suffered from paranoid schizophrenia for some time, and was also afflicted by many physical health problems including hypertension, poorly controlled insulin-dependent type II diabetes, diabetic retinopathy and anaemia. She had developed ulcers on her feet, and her right foot became gangrenous. She refused surgery to remove the foot, which became mummified and eventually detached from her leg. Surgeons subsequently wished to operate to remove part of her leg, to reduce the chance of infection. JB expressed differing views about the surgery, but was generally resistant to it. She was considered by her treating psychiatrist to lack capacity to consent to the operation, essentially because her ability to weigh the relevant information was 'compromised by her tendency to minimise and disbelieve what the doctors are telling her'. Other professionals who assessed JB reached different views about her capacity to refuse the operation. An independently instructed psychiatrist and surgeon concluded that JB had capacity to decide about amputation.

The court preferred the evidence of the independent psychiatrist and surgeon that JB understood sufficient information about the proposed operation and the consequences of deciding one way or the other, and was able to weigh that information notwithstanding her psychiatric disorder. At paragraph 26, Peter Jackson J noted that "[w]*hat is required here is a broad, general understanding of the kind that is expected from the population at large. JB is not required to understand every last piece of information about her situation and her options: even her doctors would not make that claim. It must also be remembered that common strategies for dealing with unpalatable dilemmas – for example indecision, avoidance or vacillation – are not to be confused with incapacity. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted*."

Even though surgery was the only sensible course of action, from a clinical perspective, JB did not have to agree with or accept the advice of her doctors. The court was not satisfied that JB's treating psychiatrist had established a causal link between JB's mental illness her alleged incapacity, nor that incapacity could be 'deduced from isolated instances of eccentric reasoning' such as agreeing to IV antibiotics but refusing the necessary cannulation.

The court noted that in various of the written statements about JB's capacity expressions had been used which suggested that the requirement to presume capacity, and the burden of proof of incapacity being on the person disputing capacity, had not been properly applied:

> "27. *At all events, it is for the Trust to displace the presumption that JB has capacity on a balance of probabilities. It is important that the right question is asked. When assessing JB in October, Dr O approached matters on the basis that JB was 'unable to clearly show that she had considered the option' of amputation. Similarly in January, Dr B remarked that 'one needs to be certain of her capacity' while in February, Dr O recorded that JB "'is unable to fully understand, retain and weigh information…'. These formulations do not sit easily with the burden and standard of proof contained in the Act*."

Discussion

This case, which has some striking resonances with the ground-breaking case of *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, is yet another illustration of the difficulty of separating

incapacitous decisions from unwise decisions. JB's previous refusal of unanimous and uncontroversial medical advice as to potentially life-saving surgery had clearly given rise to real concerns on the part of professionals responsible for her care. But the fact of JB's psychiatric disorder was not in itself sufficient to show that any defects in her reasoning abilities demonstrated incapacity within the meaning of the MCA 2005. The judgment illustrates the care that needs to be taken with assessments of capacity. Phrases such as '*unable to **fully** understand, retain and weigh information*' will be all too familiar to practitioners in the Court of Protection, but should raise warning flags about the standard of decision-making that is being demanded, particularly in respect of a person who is disagreeing with professional advice.

Getting capacity right: the crossover between the inherent jurisdiction and the Court of Protection

LB Redbridge v G, C and F [2014] EWHC 485 (COP) (Russell J)

COP jurisdiction and powers - Interface with inherent jurisdiction

Summary

This case (the subject of a rather alarmist article whilst ongoing, which we will deliberately not link to as we have now have the full facts) relates to the dividing line between the Court of Protection and the inherent jurisdiction of the High Court.

Russell J had to consider two applications made by the London Borough of Redbridge in relation to an elderly lady, G, considered to be a vulnerable adult. The first was an application for relief under the inherent jurisdiction. The second was a proposed application under the MCA 2005 in respect of the same woman following psychiatric evidence of a lack of capacity to take the material decisions.

The local authority and the Official Solicitor (who acted as litigation friend for G) submitted that G lacked capacity and fell within the MCA 2005. C (her current live-in carer) submitted that she did not lack capacity under the MCA nor had she been deprived of it by duress or the influence of C and F.

Russell J helpfully gave a summary of the case at the outset which suffices to identify the major points of significance:

> *"2. In this case the local authority were under a duty to investigate the circumstances of an old and frail lady following reports regarding the behaviour of C and F and their influence over G, her home and her financial affairs and with respect to her personal safety from multiple sources including private citizens and professionals, from agencies providing care support and from a lawyer engaged by C to act for G (to change her will in C's favour). The complaints came from G too; although she would later retract them. The obstruction met by the social worker when she tried to carry out her duties led to the attendance of the police more than once.*
>
> *3. The local authority had no alternative but to visit on numerous occasions and to attempt to see G on her own. Anything else would have been a dereliction of their duty to her as a vulnerable person about whom they had received complaints about possible financial predation. Local authority staff must be permitted to carry out their duty to investigate reports relating to safeguarding unhindered.*
>
> *4. The court has decided for reasons set out in full below that G lacks capacity under the provisions of the Mental Capacity Act 2005 and that further investigation needs to be carried out to decide how her best interests will be met and her comfort and safety assured. Her wishes and feelings will be taken into account at every stage as will her desire to remain in her own home. It is the*

court's intention that every measure that can be put in place to secure her in her own home is put place. There is an equal need to ensure that she is not overborne or bullied and that she can lead her life as she wants it led.

5. All the expert evidence put before the court was of the opinion that G was a vulnerable person who lacked the capacity to conduct this litigation and to decide on her financial affairs and the disposition of her property without the assistance of an independent professional appointed by the court. There was disagreement as to the reason for the lack of capacity; the court decided, on the balance of probabilities, that it was due to a impairment of G's mind or brain."

There are a few nuances that require amplification and/or which stand as useful practice points for the future:

1. Orders were initially made under the inherent jurisdiction in respect of C and F forbidding them from harassing or intimidating G or damaging or disposing of her possessions. The Court also made orders for the local authority to arrange and file an assessment of G's litigation capacity and capacity to manage her property and affair. Orders were made that C and F had to allow full access to G for the assessment to be carried out. In the event that G was found to lack litigation capacity the Official Solicitor (OS) was invited to act as litigation friend. These orders were made by a Circuit Judge, sitting as a Deputy High Court judge (paragraph 39): this is helpful confirmation that a Circuit Judge (whether or not they have the requisite designation to sit as a Court of Protection judge) can make such orders if they have a 's.9 ticket' – i.e. an authorisation granted by the Lord Chief Justice under s.9 Senior Courts Act 1981;

2. Russell J allowed C to rely upon the evidence of an educational and clinical psychologist, a Dr Lowenstein, who had been instructed by C with the assistance of a third party, despite the fact that his report was not approved by the court nor was disclosure to him of documents produced and filed within the proceedings. He had not received any formal instructions. Russell J agreed to allow the evidence so long as Dr Lowenstein's evidence could be challenged by cross-examination, because G was aware of it, having been taken to see Dr Lowenstein. As Russell J noted, "[i]*t is important for her to be aware that the court had heard all the available evidence about her capacity*," although she noted that "[t]*here can be little doubt that had the local authority sought to adduce evidence in this way Ms Hewson* [Counsel for C] *would have been vociferous in her condemnation of such an attempt*" (paragraph 41);

3. G was present in court "*displaying dignity and determination to get her views across*" (paragraph 49). The proceedings were also held in open court (it seems, because they were held under the inherent jurisdiction), with members of the public and the media present, although subject to a reporting restriction order;

4. Both an independent psychiatrist and an independent social worker had been instructed to report upon G's capacity to make decisions in the following areas as regards (1) the people who live with her; (2) contact with others; and (3) financial matters. Both agreed that G's capacity to reach decision was undermined by the influence and presence of C and F. The independent social worker was of the view that the lack of capacity was as a result of the undue influence, whereas the independent psychiatrist was of the view that G was suffering from an impairment or disturbance in the functioning of her mind or brain. Russell J preferred the evidence of the psychiatrist "*given his speciality, expertise and knowledge of the functioning of the mind and brain. The differences in their views reflect the difference in their disciplines and field of expertise*" (paragraph 62). Russell J placed little weight upon the evidence of Dr

Lowenstein because he had received no formal instructions, had conducted an entirely inadequate interview in the presence of C (which he acknowledged he should not have done), had not read or assimilated the documents that he been shown (without the leave of the court) and had minimal experience working with the elderly. He had, in any event, expressed concerns about her ability to manage her own affairs and to conduct litigation;

5. Russell J applied the two-stage diagnostic and functional test to decide whether G had capacity. She found, on the basis of the evidence of the independent psychiatrist, that G suffered from significant cognitive impairment which rendered her incapable of taking the relevant decisions. In particular, whilst G understood some of the information relevant to decision-making, for instance that "*C and F have taken control of her finances and has complained about being shouted at and physically shaken but she is unable to use the information to make a decision about her own welfare and care and allows them to remain in her home. This information about C and F living with her or not is relevant for the purposes of s3 (4) as it includes the reasonably foreseeable consequences of deciding one way or another or failing to make the decision. The decision as to contact with others and whether or not she should see other people falls into this same category. She does not foresee that to allow visitors would have benefits including oversight of her care and treatment at the hands of others. I accept that the influence and controlling behaviour of C and F described by the witnesses and in the documentary evidence before the court will have further compromised the ability of G to make decisions and understand what is happening to her*" (paragraph 81).

A final wrinkle is that G had executed two LPAs in favour of C, relating to property and affairs and health and welfare. There was a defect on the instrument for the property and affairs LPA which meant that it could not be registered (C not having submitted the relevant documentation to remedy the defect): Russell J did not therefore need to take any steps in relation to this LPA but could proceed immediately to appoint an independent panel deputy to administer G's property and affairs. The LPA was, however, registered because no objections were received within the statutory time frame – an order was made by the Circuit Judge hearing the case some seven days outside that time frame requesting that the OPG did not register the LPA, but this was too late. Rather, Russell J acceded to the proposal set out in a position statement filed by the OPG to direct C not to exercise any of the powers under the LPA pending the determination of the applications before the Court of Protection.

Comment

This is a helpful decision both in relation to the powers of the High Court under the inherent jurisdiction and also in relation to the assessment of capacity of those who are said to be subject to duress. It comes at a particularly sensitive time given the imminence of the report stage of the Care Bill in the House of Commons and the proposed amendment being advanced by Paul Burstow MP to introduce a power of entry into the Bill (for more on this, and the briefing paper prepared by Alex with Action on Elder Abuse, see the recent story in Community Care).

Whilst the transcript presents a compelling case that G lacked the material capacity, we would, though, respectfully note the fact that no mention was made of the decision of the Court of Appeal in *PC and NC v City of York* in which the court flagged up the danger of approaching capacity assessment in the two stages suggested by the Code of Practice, that danger being that "*that the strength of the causative nexus between mental impairment and inability to decide is watered down. That sequence - 'mental impairment' and then 'inability to make a decision' - is the reverse of that in s 2(1) – 'unable to make a decision … because of an impairment of, or a disturbance in the functioning of, the mind or brain' [emphasis added]. The danger in using s 2(1) simply to collect the mental health element is that the key words 'because of' in s 2(1) may lose their prominence and be replaced by words such as those deployed by Hedley J: 'referable to' or*

'significantly relates to'" (paragraph 58). Whilst there is a live debate as to the extent to which it is appropriate to consider the functional stage first where there could be no suggestion of any impairment/disturbance, the case before Russell J was one, we would suggest, in which it was particularly important to analyse the matter with the warning from McFarlane LJ clearly in mind because of the need to disentangle whether G's inability to take the decisions in question was a function of an impairment or of the 'spider's web' of relations in which the independent social worker identified her as being caught.

The evidence of the social worker – whom Russell J held to be "*highly experienced and well qualified*" and "*well placed to give an opinion on the relationships and inter-personal functioning within G's household*" (paragraph 61) – was clearly to the effect that the lack of capacity arose from the undue influence of C and F. Although Russell J preferred the evidence of the psychiatrist in this regard, it does seem that Russell J was, in fact, influenced in part by the evidence of the social worker because she found that G's capacity was "*further compromised by the influence and control of C and F*" (paragraph 81). Such influence and control is, not, however, relevant to the question of whether G was incapacitated for purposes of s2(1) MCA 2005 precisely because it falls outside the causative nexus identified by the Court of Appeal in *City of York*. Asking the questions in the reverse order: i.e. 'is G unable to take the relevant decisions?' and then 'is that inability to take those decisions because of an impairment of the mind or brain' would have made crystal clear that the influence and control of C and F was irrelevant. Russell J's approach made no difference upon the facts of this case, but we suggest that it does, still, serve as a useful illustration of the dangers highlighted by the Court of Appeal in *City of York*.

Gravely ill Jehovah's Witness's decision not to receive blood transfusion honored despite not being in writing

Newcastle-upon-Tyne Foundation Trust v LM **[2014] EWHC 454 (COP)** (Peter Jackson J)

Best Interests – Medical Treatment

Summary

This case concerns the lawfulness of withholding blood transfusions from a gravely ill Jehovah's Witness. The woman in question, LM, had a background history of depression and paranoid schizophrenia and in the past had received compulsory treatment. She had been a Jehovah's Witness since the 1970s at least. In the middle of January 2014, LM was seen by a consultant psychiatrist, who had known her for seven years. He felt that her mental health was as good as he had known it for a number of years. On 6 February 2014, LM was admitted to hospital by ambulance, having been found wandering and confused outside her home. She had a number of bruises, suggesting recent falls. From the outset of her admission it was known that she was a Jehovah's Witness and her notes were marked that she was not to receive blood products in any circumstances. Over the days following her admission, LM made some improvement, but on 11 February, she was found to be bleeding from a large duodenal ulcer. Tests revealed a falling and dangerously low haemoglobin level, the lowest figure being 37 against a normal measure of 120-150 and the figure at the time of the hearing being 47. On 11 February, a senior nurse from the liaison psychiatry team assessed LM. He found no evidence of active psychotic illness but some mild confusion. In general, she was not psychiatrically unwell and her presentation appeared appropriate. On 12 February, LM was seen by two doctors in the gastroenterology team. She told them that she was adamant that she would not want treatment with any blood products. They felt that she had full capacity to make this decision with an awareness of the consequences. A form to complete an advance decision complying with the provisions of s.24 MCA 2005 was available at the hospital, but it does not appear that it was offered to her, and there was no record of her wishes other than that recorded in the notes.

On the afternoon of 13 February 2014, LM's condition markedly deteriorated. She was admitted to the High Dependency Unit under the care of Dr C. By this time her physical condition

had deteriorated to the point that she required intubation, ventilation and sedation and clearly lacked capacity to make or communicate a decision.

The Trust made an application for a declaration that it would be lawful to withhold blood transfusions from LM. They did so on the basis that LM had clearly made her wishes known even with knowledge of death. Alternatively, if it was a matter of best interests, the Trust did not wish to act against her wishes, being concerned to respect her individual dignity.

The matter came before Peter Jackson J on 18 February in the urgent applications list, at a hearing conducted by video-link from Newcastle, with evidence being given by Dr C. Also present in Newcastle were Mr R, an elder of the Jehovah's Witnesses who had known LM since 1975, and Mr P, the Chairman of the Hospital Liaison Committee for Jehovah's Witnesses. In London, the hearing took place in open court and was attended by a representative of the Press Association.

By the stage that the matter was before Peter Jackson J, profound anaemia was significantly compromising LM's survival prospects. The medical view was that LM might not survive for as long as a day in the absence of a blood transfusion and that even if one was given, she might still die. As Peter Jackson J noted: "[a] *decision had to be taken there and then.*" He took the view that it was not practicable or necessary for a litigation friend to be appointed. He granted the application at the end of the hearing, declaring that "*It shall be lawful for the doctors treating LM to withhold blood transfusions or administration of blood products notwithstanding that such treatments would reduce the likelihood of her dying and might prevent her death.*"

LM died a few hours before the judgment giving Peter Jackson J's reasons was to be handed down on 26 February 2014. This gave rise to a question about reporting restrictions to which we return.

In his reasons for granting the application, Peter Jackson J found that:

> "*Prior to the afternoon of 13 February, LM had the capacity to decide whether to accept or refuse a blood transfusion. There is no evidence that her underlying mental illness rendered her unable to make a decision (MCA s.2(1)). The presumption of capacity (s.1(2)) was not displaced and the criteria for capacity (s.3) were on the balance of probabilities met. I am satisfied that LM understood the nature, purpose and effects of the proposed treatment, including that refusal of a blood transfusion might have fatal consequences." Further, "*[t]*he decision taken by LM prior to her loss of capacity was applicable to her later more serious condition. There was no difference in kind and I am satisfied that she intended her decision to be effective in the circumstances that subsequently arose*" (paragraph 22).

He therefore found that "*LM made a decision that the doctors rightly considered must be respected*" (paragraph 22).

In the alternative, Peter Jackson J found, "*if LM had not made a valid, applicable decision, I would have granted the declaration sought on the basis that to order a transfusion would not have been in her best interests. Applying s.4(6) in relation to the specific issue of blood transfusion, her wishes and feelings and her long-standing beliefs and values carried determinative weight. It is also of relevance that a transfusion might not have been effective to save her life*" (paragraph 23). As he noted "[t]*he right to life (Art. 2 ECHR) is fundamental but it is not absolute. There is no obligation on a patient with decision-making capacity to accept life-saving treatment, and doctors are neither entitled nor obliged to give it*" (paragraph 24).

As regards the question of whether the reporting restriction order that the Trust applied for on 24 February (i.e. two days before LM died) should be granted. As Peter Jackson J noted "[t]*he court has jurisdiction to make an order during the lifetime of a patient that will continue to have effect after death unless and until it is varied:* Re C

(Adult Patient: Restriction of Publicity After Death [1996] 1 FCR 605. The situation here is different in that the patient is no longer alive. The unusual circumstances raise interesting questions about the court's jurisdiction to restrict the reporting after a person's death of information gathered during proceedings that took place during her lifetime" (paragraph 26).

Whilst he had invited legal submissions upon the question Peter Jackson J took the entirely pragmatic step of making "*an order that preserves the situation until the time comes when someone seeks to present full argument on the question. I will say no more than that for the present*" (paragraph 27). He therefore granted a Reporting Restriction Order on materially identical terms (it would appear) to that which he would have granted had LM still been alive.

Comment

It may be that the judgment is overly compressed in the key part, but on its face it would appear that Peter Jackson J would appear to have accepted that LM's decision to refuse blood transfusion was a binding advance decision notwithstanding the fact that: (a) it related to treatment that must (in the context of her medical condition at the time) be considered life-sustaining; and (b) was made orally, rather than in writing and witnessed, as is required by the terms of s.25(5)-(6) MCA 2005.

This would be a striking conclusion. It would also contrast starkly with the decision in *W v M* [2011] EWHC 2443 (COP). In that case, the undisputed evidence before the Court was that M had, before she contracted viral encephalitis leading, ultimately, to her being in an Minimally Conscious State, made statements to the effect that she would not wish to live in a nursing home, would not wish to be dependent on others, if in declining health "*would want to go quickly*," and expressed views to the effect that it would be better to allow Tony Bland to die when reports about his case appeared on the television (see paragraph 230). Baker J, however, held that it would be wrong to attach significant weight to these statements: "[g]*iven the importance of the sanctity of life, and the fatal consequences of withdrawing treatment, and the absence of an advance decision that complied with the requirements previously specified by the common law and now under statute*" (paragraph 230).

The two cases can undoubtedly be distinguished on the facts, in that it is clear that LM had considered the question of blood transfusions with far greater care than M had ever considered the possibility of the withdrawal of artificial nutrition and hydration or whether she would wish such treatment to be withdrawn if in a minimally conscious state. As a matter of English law, however, either an advance decision to refuse life-sustaining treatment is valid and applicable (a necessary precondition of applicability being compliance with ss.25(5) and (6) MCA 2005) or it is not, and (on its face) both LM and M were, legally, in the same boat.

The approach adopted by Peter Jackson J sits very comfortably with the Supreme Court's emphasis in *Aintree* upon placing very significant weight upon what could reliably identified to be the views of LM (see also the discussion below of the case of *Re X, Y and Z*). But by classifying LM's views as determinative and – hence – a *de facto* advance decision it might be said that Peter Jackson J took one step further than he was permitted by the current state of the law (albeit a step that the Committee on the CRPD would undoubtedly welcome).

It may be that, on a proper analysis, the position before Peter Jackson J was that LM was not making a decision to refuse a blood transfusion at some future point, but rather (a) was making a decision to refuse a blood transfusion at the point of that decision which was intended to have a continuing effect; or (b) was making a decision whilst capacitous that she wished to refuse a specific blood transfusion at a fixed point in the future.

As to (a), whilst LM would have been able to refuse present treatment whilst capacitous without any need to commit such refusal to writing:

1. It is not immediately obvious from the judgment that this was the case, because it

does not appear that she was being offered, and was refusing, blood transfusion prior losing capacity. Rather, it appears that her physical condition significantly deteriorated, leading both to a loss of capacity and to a position where the doctors would, all other things being equal, would have contemplated administering a blood transfusion: see paragraphs 13-4;

2. Such 'continuing refusals' in the case of life-sustaining treatment are not altogether easy to square with the wording of ss.24 and 25 MCA 2005.

As to (b), there must be a question as to the time-lag that is required between the point at which the question is asked of the patient whether they consent and the point at which it is proposed to carry out the treatment before the decision can be said to be an 'advance' decision. A (possibly ridiculous) hypothetical example may make the point. Imagine a patient being scheduled to undergo a surgical procedure at 10:00 and the surgeon came to 'consent' the patient at 9:00 am. If the patient refused but then fell from the bed at 9:05, thereby rendering themselves unconscious, one suspects that the surgeon would find themselves on the receiving end of some awkward questions if they carried out the procedure at 10:00, whether or not the patient had committed their views to paper in the form of an advance decision. As far as we know, this question has not been canvassed in a reported case, but in any event it is not immediately obvious that the facts of Ms LM's case could fit such an approach, given that the blood transfusion was not (as far as we can see) to be provided at some specific point shortly after 13 February, but rather was – properly – to form part of the treatment options for the management of her clinical condition.

It will be interesting to see how future judges analyse this decision when it is brought to their attention by the representatives of patients or their families in a similar position to that of Ms LM.

The decision is also of interest as regards the approach adopted to the RRO: the pragmatic solution adopted by Peter Jackson J would appear to be entirely sensible and would also accord with the fact that (as per *Re C*), there would be a potential effect on medical and other staff's care of a patient the subject of an application to the CoP if they knew that, with the death of the patient, their anonymity might be lost; a factor which would also apply (where relevant) to the family members of the patient.

Damages for deprivation of liberty

A City Council v Mr and Mrs J (2013) and A Local Authority v Mr and Mrs D [2013] EWHC B34 (CoP)

These two cases concern damages settlements for breaches of Article 5 ECHR. We have previously commented on the lack of publicly-available information about such settlements, which can make advising clients on either side of such disputes a rather tricky affair. In the first case (a consent order approved by Peter Jackson J, to which Kevin Lloyd of Hogans has drawn our attention), Mrs J had apparently been placed in a care home with no DOLS authorisation and no application to the Court of Protection made for a period of around 3 months. She accepted £1,000 in damages plus her costs of around £10,000.

In the second case, Mrs D, who suffered from Huntington's Disease, had been prevented from returning home from a respite placement, and no DOLS or court authorisation had been obtained for the first six weeks of her continued stay. Subsequently, DOLS authorisations were put in place, but despite being made conditional on applications being made to the Court of Protection, no such application was made for a further six months. When the application was eventually made by the local authority, it was not identified to the court as an Article 5 case and so was not expedited. That resulted in a further four month period when there was no DOL authorisation or court order in place at all. Ultimately, following the commission of independent expert reports which supported a return home, the local authority agreed that Mrs D could return home without requiring a final hearing on the question. The local authority made no admissions of liability, save for the four

month period after the issue of proceedings when there was no DOL authorisation or court order in place, but offered Mrs D £15,000 plus her costs, and Mr D £12,500 plus his costs, an offer which was approved by District Judge Mainwaring-Taylor on Mrs D's behalf. In reviewing the limited jurisprudence upon damages, the District Judge noted that the sum of £15,000 was a reasonable sum, although towards the lower end of the range if the award approved in Steven Neary's case of £35,000 was taken as the bench mark rather than the highwater mark.

Although the full facts of both cases are not known, it appears that in Mrs J's case, the damages reflected procedural failures only in respect of her Article 5 rights. One imagines that if Mrs J's deprivation of liberty had not been in her best interests, even for a period of three months, an appropriate damages award would have been considerably higher. In Mrs D's case, the larger amounts appear to reflect the fact that eventually, the local authority conceded that it was in Mrs D's best interests to return home, and thus it was arguable that had the proper processes been followed, she would have returned home some 10 months earlier.

It is interesting to compare the settlement figures in these two cases with the Ombudsman decision we reported in our December 2013 issue, where a sum of £1,750 was paid to the couple who had been affected by the local authority's maladministration, and £250 to their son. The local authority in that case at least avoided having to pay the legal costs involved, which for both Mrs J and Mrs D no doubt exceeded the damages figures by a significant degree.

COURT OF PROTECTION: PROPERTY AND AFFAIRS

Substantial payments to foster carer approved on behalf of brain injured mother

Re X,Y and Z (Minors) **[2014] EWHC 87 (COP)**
(Baker J)

Deputies – Property and Affairs

Summary

This case relates to the authorisation of payments made to facilitate the care of children from funds held in trust by their mother.

The mother, P (who was 36 at the time of the hearing before Baker J), married a man, F, in 1998 and had three children, X, Y and Z. The marriage was characterised by repeated acts of serious physical violence perpetrated by F upon P, resulting in divorce proceedings and a series of applications for injunctions and ultimately criminal proceedings as a result of which F was convicted and sentenced in July 2003 to a total of 42 months imprisonment. In the interim, P had been involved in a catastrophic road accident when P was one of three passengers in a motor car being driven by her sister. The other three occupants of the car were killed. P survived but sustained very serious injuries, including a spinal fracture resulting in complete paraplegia, a range of other fractures and internal injuries, and a significant and severe head injury which has affected her personality leading to very challenging behaviour over the years since the accident. P's children were looked after by a team of nannies employed by the mother, of whom one, S, had formed a particular relationship with the children.

Personal injury proceedings brought on her behalf by a deputy appointed by the COP in 2009 resulted in a settlement of a lump sum totalling

£4.25 million, together with periodical payments for care to age 60 in the sum of £175,000 per annum and thereafter in the sum of £215,000, such sums to be increased in line with inflation. The lump sum awarded included compensation for the cost of employing nannies to look after the children prior to the settlement in a sum of approximately £508,000 and future payments for employment of nannies capitalised at approximately £400,000. The terms of the settlement did not provide that this sum should be "ring fenced" for the exclusive use of meeting child care expenses. Whilst the cost of employing nannies had been very close to the estimated figure, P's own care costs, however, were significantly greater than anticipated, leading to a shortfall in the periodical payments which in turn had obliged the deputy to make further drawings on the capital lump sum. It therefore appeared that P's capital sum would be exhausted within (at the very most) 10 years, there being no suggestion that her life expectancy being significantly affected as a result of the accident.

As a result of P's difficulties in caring for her children arising out of her injuries, the local authority brought care proceedings. It was clear that the best outcome for the children would be a care order placing the children with S as foster carer. S was, however, unwilling to taken on the responsibility unless she received a further payment from P over and above the fostering allowance which will be paid by the local authority under the care order. This insistence – described as perfectly understandable by Baker J – was supported by the local authority and the children's guardian.

In the care proceedings, P's deputy, however, argued (non-adversarially) that such payments might not be in P's best interests, having regard to the fact that there was currently a shortfall between P's income and expenditure on her own needs. Secondly, it was contended that there were insuperable legal difficulties militating against P continuing to employ S under a contract of employment. Baker J therefore invited the local authority to file an application in the Court of Protection seeking a declaration that the continued employment of S as the children's nanny was appropriate expenditure from the funds held on the P's behalf and administered by her deputy. That application was transferred to him and listed alongside the care proceedings.

Baker J endorsed the agreed position that P lacked the requisite decision-making capacity. Turning to the best interests analysis, he noted that, whilst the specific provisions relating (inter alia) to payments for benefits of the patient's family in ss. 95 and 96 MHA 1983 (as it stood prior to 1 October 2007), no party had suggested that the general powers under ss.16 and 18 MCA 2005 did not extend to permitting the court to make orders for payment for the benefit of P's children, provided the court was satisfied that such payments are in P's best interests.

Baker J further derived assistance from a number of observations from first instance judgments as to the application of the best interests test. We return to these in the comment section.

Baker J had no hesitation in concluding that the proposed payments to S from P's estate were in P's best interests, holding thus at paragraphs 45-7:

> *"45… I accept that the court has power under the 2005 Act to approve payments for the maintenance or other benefit of members of P's family, notwithstanding the absence of an express provision to that effect in the Act, provided such payments are in P's best interests. Such payments might be called altruistic, but are more characterised as falling within the broad meaning of the concept of "best interests" under the Act. Where a parent loses mental capacity at a time when she is still responsible for her children, those responsibilities are part of her "interests" which have to be addressed by those making decisions on her behalf, and payments to meet the reasonable needs of those children are manifestly capable of being described as in her "best interests". As set out above, the powers available to the court and the deputy under s.18 when acting in her best interests include the power to*

discharge any of P's obligations, "whether legally enforceable or not" and the settlement of any of P's property, whether for P's benefit or for the benefit of others. Whether or not such payments are in her best interests depends on all the circumstances, applying the criteria in the Act.

46. Plainly P's wishes and feelings are of great importance in determining whether in these circumstances it would be in her best interests for payments to be made. She has expressed the wish that her funds should be used in support of the children. It is said that, in expressing that view, she does not appreciate the fact that her own care needs are now costing more than her income. In my judgment, however, were she to have a full understanding of the shortfall, she would nevertheless support the payment of sums to S to safeguard the future of her children, preferring to make savings in the costs of meeting her own care needs. The new arrangement will significantly reduce the sums being paid towards the children out of her estate, and as a result the deputy and those responsible for managing her affairs will have greater flexibility in adjusting arrangements to enable her to make savings. I find that P's wishes and feelings are, in the words of Munby J Re M, ITW v Z at paragraph 35, "responsible and pragmatically capable of sensible implementation in the circumstances" and 'can properly be accommodated within the court's overall assessment of what is in her best interests'.

47. Furthermore, by agreeing to an order of the sort proposed by Mr. Burns [specialist employment Counsel who had provided advice for the benefit of the Court as to the arrangements that would need to be in place vis-à-vis S] *the court is enabling the deputy (subject of course to any application to the Court of Protection) to retain the power to terminate or reduce the payments to S, should P's own care needs justify that course.*"

Baker J therefore endorsed a detailed order in the Court of Protection proceedings before proceeding to approve a final order in the care proceedings.

Comment

There can be no sensible disagreement with the best interests decision made by Baker J. We would, however, wish to pick up on the observations made by Baker J in relation to the approach to be adopted to the best interests exercise, where:

1. Relying upon observations of Munby J (as he then was) in *Re M: ITW v Z* [2009] EWHC 2525 (Fam), Baker J held that is no hierarchy between the various factors that had to be borne in mind under the s.4 exercise, and the second is that "*under s.4(6) P's wishes and feelings, and the beliefs and values that will be likely to influence her decision if she had capacity, must be considered by the court, so far as reasonably ascertainable. Although part of the relevant considerations, they are not, however, determinative of the matters but, rather, factors to be considered as part of the overall best interests analysis. Whilst P's wishes and feelings will always be a significant factor to which the court must have regard, the weight to be allocated to those wishes and feelings will, as with any other factor, always be case-specific and fact-specific*" (paragraph 30);

2. Relying upon observations made by Lewison J in *Re P (Statutory Will)* [2009] EWHC 163 (Ch) [2010] Ch 33, he noted that the best interests test is materially different to the test applied under the previous law of substituted judgment where by the court identified and adopted the decision that the incapacitated individual would have made if he had capacity;

3. Relying upon observations of Morgan J in *Re G (TJ)* [2010] EWHC 3005 (COP), he

> noted that the concept of 'substituted judgment' may have some relevance where it is possible to identify what decision P would have been likely to have made, such decision being a matter that can be taken into account.

We would respectfully suggest that these dicta – and in particular those of Munby J in *Re ITW* – require revisiting in light of the clear dicta of Baroness Hale in *Aintree* as to the purpose of the best interests test, namely "to consider matters from the patient's point of view," so as to make "*the choice which is right for him as an individual human being*" (paragraph 45). As discussed in more detail in an article by Alex, Tor and Vikram Sachdeva on the *Aintree* case forthcoming in the next issue of the Elder Law Journal, we would suggest that fidelity to the structure of the MCA 2005 and of the UN Convention on the Rights of Persons with Disabilities means that (1) there is, in fact, a hierarchy within the s.4 exercise; (2) where it is possible reliably to identify what choice P would have made between the options available to them, then that should give the answer as to what is in their best interests; and (3) in such a case the distinction between an objective best interests test and a substituted judgment all but collapses. In this case, the alignment between what could be identified as being P's choice and what objectively appeared 'right' was – fortunately – exact. The much harder cases, and the ones that rightly challenge both practitioners and the judiciary, are where there is a mismatch.

When informality in decision-making goes wrong

JS v KB and MP (Property and Affairs Deputy for DB) [2014] EWHC 483 (COP) (Cobb J)

Lasting Powers of Attorney – Revocation

Summary

This decision in relation to costs is, as Cobb J noted at the outset of his judgment, a cautionary tale which illustrates vividly the danger of informal family arrangements being made for an elderly relative lacking mental capacity, made without proper regard for (i) the financial and emotional vulnerability of the person who lacks capacity; and (ii) the requirements for formal, and legal, authorisation for the family's actions, specifically in relation to property and financial affairs.

The case concerned a 90 year old woman called DB, suffering from progressive dementia. She had been cared for by JS (her daughter) and MS (her son-in-law) for over three years, in line with a family arrangement first discussed with KB (DB's son) over their Christmas day meal in 2009.

The actual care arrangements were described by Cobb J as being many ways excellent. However, the full story of the (mis)management of DB's finances makes very sorry reading indeed. For purposes of this newsletter sufficient of it can be found in the summary set out by Cobb J at the outset of his judgment. As he noted, the informal and formal means by which DB's finances were utilised by JS to fund the current care arrangement led to the sale of the home in which she had lived for over fifty years effectively 'over her head', and the proceeds of sale being placed out of her immediate reach, rendering her financially highly exposed; state benefits and retirement pension payable to DB have subsequently been diverted into an account in JS's name. All of this was done without legal authority. Only with the intervention of the court appointed deputy was the situation regularised. Regrettably, the actions of JS, of which DB would have been largely unaware, and which were in some important respects kept secret from KB, caused a deep schism within the family, generated lengthy and avoidable litigation, and caused the parties to expend considerable sums which they can little afford in legal costs. As Cobb J found, KB was not entirely blameless in the tale. He knew or reasonably believed that his mother lacked capacity to manage her financial affairs when arrangements were being made to establish the current care regime, made no enquiries of his own, and (at least for a period of time) acquiesced in the arrangements.

The matter came to the attention of the court by way of an application by JS to be appointed DB's property and affairs deputy, by which she sought

to have the authority to continue to make decisions on behalf of DB (which she had been making for some time) given that DB was unable to make such decisions for herself, in relation to her property and financial affairs. That application was initially dismissed summarily on the papers by a District Judge who note that JB had a significant conflict of interest, and appointed a local solicitor, MP, as panel deputy for DB. JB persisted in seeking to be appointed a deputy until, finally, the matter was resolved save for the question of costs, by HHJ Hodge QC on 6 September 2013. By order made on that date (which was consensual), it was recorded *inter alia* that JS agreed not to pursue her application to be appointed as DB's property and affairs deputy.

The costs issue was left unresolved. The total bill of costs of the three parties was in the region of £70,000. Cobb J was asked to decide whether the costs of this litigation incurred by KB and MP (on behalf of DB) should be paid by JS, or paid by DB or charged to her estate.

Cobb J directed himself as to the rules relating to costs in s.55 MCA 2005 and Part 19 of the COPR 2007. He also referred to the reported cases (identifying them all, as far as we are aware), but noted that they were all "*essentially, no more or less than illustrations of the rules*" (paragraph 12). That said, he noted in particular that *in* *D v R (the Deputy of S) and S* [2010] EWHC (COP) (a property and affairs case), an award of costs (departing from the general rule) was made where the Judge concluded that the litigant's conduct had led to the hearing being substantially longer and more complicated than it should have been. He also directed himself by reference to *R (Boxall) v Waltham Forest LBC* (2001) 4 CCL Rep 258 QBD (Admin), Scott Baker J confirmed that the court has power to make a costs order when the substantive proceedings have been resolved without a trial, but when the parties have not agreed about costs; specifically in relation to compromised cases (§22) he observed that: "*at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties*."

In order to resolve where the incidence of costs should lie, Cobb J heard limited oral evidence as to and determined a number of important factual matters relating to early history of the saga so that he could form conclusions as to the provenance of the dispute before the court. As he noted, he was also entitled to take into account for purposes of r156 the conduct of the parties before and during the proceedings.
Both Counsel, unusually, invited Cobb J to depart from the normal costs rule that the costs of proceedings relating to P's property and affairs should be charged to their estate. He agreed that it would be unconscionable for DB to bear the costs of these lengthy proceedings. The ultimate order that he made was that JS should pay 4/5 of the litigation costs of the deputy MP, to date, and 2/3 of the costs of KB. He took into account, in particular that (1) none of the parties were well-placed financially to shoulder their own responsibility for their own costs, let alone those of others; (2) JS provided good quality daily care for her mother and had made life-style sacrifices to do so; (3) JS's deputyship application was doomed to failure given her obvious conflict of interest, and she should not have sought to pursue it for over a year; (4) it was not prudent of her to pursue an associated claim to a share of the beneficial interest in the property that was purchased with the proceeds of the sale of DB's home ('Beech Avenue') when it must have been clear to her, particularly when she had legal advice, that the manner in which she had placed her mother's funds in her name was (at best) highly questionable, or (at worst, and in the words of MP) "financially abusive"; but (6) KB was not blameless. Cobb J noted, however that it was likely that had JS not pursued her own claim for deputyship, KB would have made application to the Court of Protection; had that occurred, a professional deputy may have been swiftly appointed. There would have been modest costs to DB in this process.

Rather creatively, given the possibility that JS would be unable to fund the costs within a

reasonable time, either from the sale of property owned by JS in Spain or otherwise, Cobb J gave permission to MP to explore the mechanics of an equity release scheme to permit JS to discharge her liability for costs by way of a loan against the equity in Beech Avenue, and gave permission to MP to apply for such a scheme. The relief was granted to MP on the basis that any equity released shall clearly be a loan against the equity in the Beech Avenue property, to be repaid by JS. If, at the date of DB's death, the loan has not been repaid by JS, the loan will be an asset of DB's estate, with the amount to redeem the loan being set off against the half-share which JS will be entitled to from DB's residuary estate. Cobb J further gave leave to MP to investigate, and if the need arises to bring proceedings on behalf of DB in respect of any loss she had suffered by virtue of the actions of a firm of solicitors which had acted (contrary to the clear guidance in the SRA Code of Conduct) for DB on the sale of her property and JS on the concurrent purchase at a time when (as indicated at §19 above) it is now agreed that DB lacked capacity to manage her financial affairs.

Comment

As Cobb J noted, this case is an illustration of the application of the costs rules to a particularly sorry set of facts. The judgment merits reading in full as it details how informal decision-making spiralled out of control. Whilst the analysis of who should bear the costs was scrupulous, we would note one small point of detail. The *Boxall* case upon which reliance was placed has now been superseded by *M v Croydon LBC* [2012] EWCA Civ 595, and the Court of Appeal has made it clear that *Boxall* should no longer be cited - see *Peace Emezie v SSHD* [2013] EWCA Civ 733. The guidance in *M* is to similar effect as in the passage from *Boxall* (see, in particular, paragraphs 50-1).

How does an OPG investigation differ to one conducted by the police?

Re DP (Revocation of Lasting Power of Attorney) CoP Case No: 12351387 (Senior Judge Lush)

Lasting Powers of Attorney – Revocation

Summary

This is the first 'Munby-compliant' case for which permission to report has been given in accordance with the provisions of the Guidance issued by the President on 16 January 2014. It is a decision upon an application by the Public Guardian to revoke and direct the cancellation of the registration of a Lasting Power of Attorney ('LPA'), a class of decision in respect of which permission to report must be given absent compelling reasons to the contrary.

DP, the subject matter of the proceedings, had known JM, since 2006. He was her former gardener. In August 2011, she executed her last will and testament in which she (1) appointed JM and her accountant to be her executors; (2) gave 10% of the net proceeds of sale of her house in Orpington to Brookwood Cemetery (where her husband was buried after his death in 1997) and another 10% to the Russian Orthodox Church; and gave the remaining 80% of the net proceeds of sale of the house and her entire residuary estate to JM. In October 2011, she executed a property and affairs LPA in which she (1) appointed JM to be the sole attorney; (2) did not appoint a replacement attorney; (3) did not impose any restrictions or conditions on the attorney's authority; (4) did not set out any guidance for him to follow; (5) did not agree to pay him for his services as attorney; and (6) named nobody who was to be notified when an application was made to register the LPA. The LPA was registered in February 2012, and DP moved to a residential care home in April 2012.

An investigation was started by the OPG in March 2013 after a tip-off was received from Aviva regarding JM's conduct in relation to attempts to encash an investment bond owned by DP and to transfer the proceeds into his own name. It is clear from the judgment, however, that DP had been on the OPG's radar for some considerable period by then, a social worker from the relevant NHS Foundation Trust having contacted the OPG in January 2012 to express her concerns about JM's conduct after DP had been admitted to hospital which had given rise to a safeguarding alert. The OPG had not considered he was in a position to

intervene because the concerns related to DP's personal welfare, and the LPA was a property and financial affairs one. It appears that the police decided that there was insufficient evidence to pursue an investigation at that stage.

The OPG's investigation revealed a number of significant irregularities in JM's conduct, including the making of a gift to himself of approximately £38,000 in November 2012, roughly the amount of compensation that had been awarded to DP by the Financial Ombudsman Service as a result of a complaint brought on her behalf by DP. He also paid himself a salary for 'house clearance and rubbish removal' and gardening services, and leased a car under the Motability scheme for his wife.

The OPG applied for the LPA to be revoked in April 2013, and the matter ultimately came on for hearing in January 2014.

Senior Judge Lush had little hesitation in concluding that it was in DP's best interests for the LPA to be revoked. As he noted, it was unusual to have referrals made to the OPG from two entirely separate sources. He also held (at paragraph 39) that by making a gift of £38,000 to himself, JM contravened the provisions of s.12 MCA 2005; in order to have made a gift of this magnitude, he should have applied to the Court of Protection for formal authorisation pursuant to s. 23(4) of the Act. As regards the payment of the 'salary,' Senior Judge Lush noted (at paragraph 40) that:

> "*Regardless* [of] *the inherent artificiality of his claim for remuneration at a rate of £20 a day for 365 days' house clearance and rubbish removal and £20 a week for 52 weeks' gardening, JM contravened his authority by awarding himself a salary. Section 7 of the LPA, 'About paying your attorneys', was left blank by DP. The guidance to that section states: 'You can choose to pay non-professional attorneys for their services, but if you do not record any agreement here, they will only be able to recover reasonable out-of-pocket expenses.' JM had no authority to charge for his services under the LPA itself and, if he wished to receive a salary, he should have applied to the Court of Protection for directions under section 23(3)(c) of the Act, whereby the court can authorise an attorney's remuneration or expenses*."

Senior Judge Lush further found that JM was in breach of his fiduciary duties as an attorney by failing to keep proper accounts and financial records, and was unimpressed with the various reasons advanced by JM why revocation of the LPA would leave him in a position where he could no longer maintain a Motability vehicle and visit DP. After all, Senior Judge Lush noted rather tartly at paragraph 42, he was surprised that "*having received a substantial gift of £38,000 from DP's estate as recently as November 2012, JM should have insufficient resources to keep up the payments on the vehicle*."

In response to JM's submission that the police had concluded that 'there was no case to answer,' Senior Judge Lush helpfully spelt out the difference between an investigation by the police and one conducted by the OPG thus:

> *"44. There are significant differences between a police investigation and an investigation conducted by the OPG. When the police investigate an alleged crime, they need to consider whether there is sufficient evidence to present to the Crown Prosecution Service ('CPS') to guarantee a realistic prospect of conviction, which in this case would have been on a charge of theft or fraud by abuse of position. The CPS would have had to prove that JM was aware that he was acting dishonestly and they would have had to prove this 'beyond reasonable doubt', the standard of proof in criminal proceedings. The decision not to prosecute him simply means that the CPS was not totally confident that it would be able to prove JM's guilt so as to ensure a conviction. It does not imply that his behaviour has been impeccable.*
>
> *45. By contrast, an investigation by the OPG is concerned primarily with establishing whether an attorney or*

deputy has contravened his authority under the Mental Capacity Act 2005, or has acted in breach of his fiduciary duties under the common law of agency, or has behaved in a way that is not in the best interests of the person who lacks capacity. The standard of proof, 'on the balance of probabilities', is lower than the criminal standard.

46. Like the police and the CPS, the OPG carries out a comprehensive sifting process, and the Public Guardian will only make an application to the Court of Protection in cases where he has good reason to believe that an attorney or deputy has acted inappropriately and that it is in the best interests of the person who lacks capacity for the attorney or deputy to be discharged.

47. In fact, the OPG make comparatively few applications to the court. According to the Office of the Public Guardian Annual Report and Accounts 2012-2013, at pages 6 and 7, the Public Guardian received a total of 2,982 safeguarding referrals during the financial year 2012/13. 728 (24%) were referred for full investigation and the Public Guardian approved 480 investigation case recommendations. Of these, only 136 resulted in an application to the Court of Protection for the removal of an attorney or deputy."

Senior Judge Lush therefore revoked the LPA and appointed a panel Deputy.

As a further point, Senior Judge Lush noted the fact that the sale of JM's house in February 2013 meant that the subject matter of the gifts to Brookwood Cemetery and the Russian Orthodox Church no longer formed part of DP's estate, so the gifts failed or, to use the technical legal term, they 'adeemed'. This ademption was, Senior Judge Lush found, unavoidable given that Aviva had frozen the encashment of JM's investment bond and it was appropriate for JM to sell DP's house to make funds available to pay her care home fees. Senior Judge found that there was no intentional interference on JM's part with the succession rights under DP's will, even though he was aware of the contents of the will and stood to gain substantially from the ademption as the residuary beneficiary. Senior Judge Lush noted the complexity of the law in the area, and highlighted the leading – conflicting – cases in the area from common law jurisdictions. He found, however, that there was no need to consider them because the problem they addressed could easily be averted during DP's lifetime by the execution of a statutory will on her behalf. He therefore anticipated that one of the first tasks to be undertaken by the panel deputy after their appointment as DP's deputy would be to apply to the court for an order authorising them to execute a statutory will, which will give effect to her wish that Brookwood Cemetery and the Russian Orthodox Church should receive some kind of financial benefit on her death.

Comment

Aside from the historical significance of the judgment as being the first to be published under the new regime, this judgment is also of no little instrinsic interest, above all for its spelling out of the distinction between police investigations and those carried out by the OPG and the obiter comments upon the problems of the law relating to ademption.

At a very practical level, however, it is perhaps of some concern that steps were not taken in January 2012 to investigate the conduct of JM by reference to the standards to which he was held under the MCA 2005 (whether or not they amounted to criminal conduct which would have justified proceedings being brought by the CPS). It is perhaps too easy in retrospect to identify missed opportunities, but it is perhaps not entirely unfair to say that it is troubling that conduct which, on its face, was cause for considerable concern as to whether JM had DP's best interests at heart did not come before the Court of Protection until well over a year later, by which time JM had already enriched himself substantially at DP's expense. That that conduct related to JM's decisions in relation to DP's welfare as opposed to her property and affairs is, not, perhaps, a distinction that DP would appreciate were she in a position to

do so.

As a final footnote, and to prove that we do operate a filter upon the reporting of cases, we note that Senior Judge Lush has subsequently handed down another 'Munby-compliant' judgment relating to the appointment of a solicitor as a deputy rather than a panel deputy which we do not consider contains any matters that we need to bring to the attention of our readers. One consequence of the Guidance issued by the President is likely to be a substantial increase in the number of available transcripts of cases which, whilst of great importance to the individuals concerned, are entirely routine. We would respectfully suggest that that is as it should be, although it does (if we may) stand as a plug not just for this newsletter, but also for the Court of Protection Law Reports as the place for the considered reporting of those cases which properly set a precedent or otherwise contain some matter of significance which would merit citation in some future case.

OTHER CAPACITY CASES

Court of Appeal rewrites the rules relating to ordinary (and habitual?) residence of incapacitated adults

R (Cornwall Council) v SoS for Health & Ors **[2014] EWCA Civ 12** (Court of Appeal (Elias, Lewison and Floyd LJJ))

Mental capacity – Residence

Summary

This very important decision of the Court of Appeal overturns the decision of Beatson J that we reported upon in December 2012 and will require the Department of Health to revisit its guidance upon the determination of ordinary residence insofar as it relates to the determination of the ordinary residence of adults unable to decide where they wish to live. It is also of relevance to the questions of the determination of habitual residence for purposes of the Court of Protection's cross-border jurisdiction under Schedule 3 to the MCA 2005.

The case arose out of a dispute between local authorities as to the ordinary residence of 'Philip,' a man with severe disabilities lacking the capacity to decide where he wished to live and in need of a substantial care package (amounting to some £80,000 per year). The Secretary of State, asked to decide as to Philip's ordinary residence, determined that his ordinary residence when he turned 18 was Cornwall where his family home was. It was common ground that Wiltshire was Philip's place of ordinary residence until the age of 18; and in accordance with the guidance, there was a presumption that his place of ordinary residence would not change, but that this may be rebutted on the facts. The Secretary of State found that it had been rebutted in the particular circumstances of the case for the following reasons: (1) Philip was not ordinarily resident in Wiltshire because he no longer had any links at all with that area. The child did not live there; the parents and siblings had moved away from the area, as had the maternal grandparents; and the only link was the fact that Wiltshire had been the authority with responsibility for him under the Children Act 1989 Act: (2) the facts were very similar to *R v Waltham Forest LBC, ex p. Vale*, 25 February 1985, and whilst it was recognised in the guidance that the principles enunciated in the first test (which, in essence, equated an incapacitated adult with a dependent child) in that case should be adopted with caution, the Secretary of State was satisfied that it could appropriately be applied here; (3) applying 'Vale 1,' Cornwall should be treated as the place of ordinary residence, notwithstanding the relatively infrequency of Philip's visits, primarily upon the basis of the continued close contact with his family there.

Cornwall sought to challenge that decision – unsuccessfully – before Beatson J and appealed to the Court of Appeal.

The Court of Appeal rejected the first ground of Cornwall's appeal – that the Secretary of State did not jurisdiction to determine the issue of ordinary

residence – for reasons which need not detain us here.

The Court of Appeal, however, upheld the second ground of Cornwall's appeal, namely that the Secretary of State had misdirected himself as to the meaning of the phrase 'ordinary residence' in the context of adults lacking the capacity to decide where to live. In so doing, it had cause to consider whether the case of *Shah R v Barnet LBC ex parte Shah* [1983] AC 309 in fact provided the starting point that it has traditionally been assumed to. The reasoning of Elias LJ giving the judgment of the Court on the question of ordinary residence in the case of incapacitated adults is sufficiently important that it merits replication in full:

> *"74. Since the place of ordinary residence is a question of fact, it is perhaps misleading to describe Shah as laying down a test as such at all. Rather, Lord Scarman has identified the paradigm case where an adult will typically be found ordinarily resident - where he has a settled abode as part of the regular order of life, voluntarily chosen. As such it helps to inform cases which depart in various ways from that paradigm. But whatever the merits of that approach for adults, as the Supreme Court held in Re A, Shah should be abandoned as the appropriate test to apply when considering the ordinary residence of young children, because they cannot sensibly be said voluntarily to choose where they live nor to have a subjective settled purpose with respect to it. Precisely the same difficulties arise with respect to those who are severely mentally disabled as Vale itself recognised. Shah provides no real assistance in those cases either.*
>
> *75. However, in my judgment the first test in Vale establishes something akin to a rule of law. The actual test adopted by Taylor J (set out in para. 25 above) was that where the adult so lacks capacity that he is totally dependent on his parents, then at least in cases where the parents are living together, their place of ordinary residence must be taken to be that of their child. On the facts of that case, the decision is no doubt correct; and it may be that the judge meant the test to be read in that context. Indeed, the test will almost inevitably provide the right answer when the parents are actually caring for their child, because in those circumstances the child will in fact reside with the parents. That was indeed the situation in Vale, albeit for a short period only. Taylor J himself recognised that the position is more complicated when the parents delegate the care of the incapacitated child to others. He said that their child may then acquire what he described as a second ordinary residence. But for the purposes of attributing liability, there can only be one place of ordinary residence since only one authority is ultimately responsible for providing the relevant care and attention; and the Secretary of State must identify which area most satisfies the ordinary residence test.*
>
> *76. In my judgment, the Secretary of State did apply the Vale test without proper consideration of Philip's actual place of residence and as if it were a rule of law. I accept that he did carefully consider the facts but that was in the context of determining whether the conditions for the application of the test were met. Once he was satisfied that the facts were sufficiently similar to the circumstances in Vale, he necessarily concluded that Philip's ordinary residence was determined by the ordinary residence of the parents, which at the material time was Cornwall. He described this as Philip's base. Even if that is a helpful concept, I do not accept that Cornwall could properly be so described. It was not a place where Philip had any settled residence at all; it was simply a place which he occasionally visited for holidays. His parents visited him in South Gloucestershire more frequently than he visited them in*

Cornwall. Philip's parents' house was not, to use Lord Denning's phrase, "a place where he goes out and to which he returns." Indeed, in so far as it is helpful to adopt the concept of his base at all, this was surely South Gloucestershire. It was there where he lived day by day; it was from there that he left on his very occasional visits to Cornwall and to which he returned; and it was there that he received the visits from his parents.

77. In my judgment, the first test in Vale ought not to be followed. The words 'ordinary residence' should, unless the context indicates otherwise, be given their ordinary and natural meaning. The effect of applying the Vale test without any real regard to the actual place of residence is that Philip is found to be ordinarily resident in a house which has never been his residence and indeed is not a suitable place for him to reside (hence the reason why he was accommodated under section 20). The occasional visit to his parents for holidays does not begin to justify a conclusion that he resides with them, let alone that it is his place of ordinary residence.

78. The observations of Lord Slynn in Mohammed and the judgment of the Supreme Court in Re A [2013] UKSC 60 recognise the significance of the place of actual residence. I appreciate that these cases were concerned with different statutory contexts but they cannot simply be ignored on that ground. The courts in those cases were equally concerned to identify a place of residence with which the individual had a close connection. In my view, where the vulnerable adult like Philip has as a matter of fact been living in one place and only one place for many years, that will almost inevitably compel the conclusion that it is his ordinary place of residence. It is not, in my view, legitimate to avoid that common sense conclusion by the application of an artificial rule which effectively gives no weight to the fact of residence at all.

79. I do not say that the link with the parents is irrelevant; in some contexts it might carry real weight. Moreover, contrary to the submission of Mr Lock, I accept that the Secretary of State was entitled on the evidence to conclude that the parents in practice made the relevant decisions on Philip's behalf. But even having regard to that factor, it could not in my view justify treating Cornwall as Philip's place of ordinary residence.

80. Although we did not hear argument specifically on the point, there is in my view much to be said for the court adopting in the context of severely incapacitated adults a test of ordinary residence similar to the test of habitual residence adopted for dependent children in Re A, namely where he is integrated into a social and family environment. I recognise that both the context and indeed the precise test in Re A was different - habitual rather than ordinary residence - but in my judgment those considerations should not lead to a materially different approach There is this difference, however: in the jurisdictional context a court might properly conclude that a person - adult or child - is not habitually resident anywhere whereas for the purposes of fixing responsibility for providing care, the child must be ordinarily resident somewhere.

81. In this context, by analogy with the test for children adopted in Re A, the ordinary residence would be the place which can properly be described as the centre or focus of the child's social and family environment. That may not always be easy to determine where he is subjected to two sets of relationships, with both his parents and the carers who foster him, and spends time with both. No doubt the place of ordinary residence

> *may sometimes be with the parents even though he may spend more time with carers. The greater emotional pull of the parents may justify the conclusion that the parents' residence can properly be considered the place where his emotional and social life is most focused (he might perceive it as his real base) even though he spends more time with the carers. But it seems to me that he would at least have to have a pattern of regular living with the parents before it would be possible to describe this as his own place of ordinary residence. The fact that Philip's placement has been deliberately chosen so that he is in close proximity to the family home, a factor relied upon by the Secretary of State, does not make it in any sense his residence or justify treating the parents' home as his base. It facilitates visits both ways. Applying the Re A test, in my view, the place where he has the closest social and family environment also points ineluctably to South Gloucestershire. That is where he is integrated socially and emotionally with his foster parents; and that is where he frequently sees his own parents*" (emphasis added).

Two secondary grounds of arguments were advanced on behalf of Cornwall. The first was that the Secretary of State had erred in taking as his starting point a presumption in favour of Wiltshire being the place of ordinary residence because Wiltshire had had the responsibility for Philip as a child. Elias LJ noted that the Secretary of State was simply acting in accordance with the guidance, but he agreed that it was not helpful to adopt this as a presumption, at least in cases where the child had been placed out of the borough.

The second was that "*insufficient focus had been directed to considering the wishes of Philip*." Elias LJ noted that "[t]*his point had not been advanced below and it would not be right to consider it now, quite apart from the fact that given Philip's very severe handicap, he is not capable of communicating his wishes. Nor do I see how his wishes as such can be relevant to a consideration of his ordinary residence. No doubt in an appropriate case and for a less severely handicapped individual it will be necessary to have regard to the state of mind (rather than the wishes) of the child in relation to his perception of the nature and quality of his residence. That could be relevant to a consideration of ordinary residence in much the same way as the Supreme Court has recently held the state of mind of an adolescent child is relevant in determining his habitual residence: Re LC (Children) [2014] UKSC 1. But that is not this case*" (paragraph 84).

The Court of Appeal therefore found that the Secretary of State had misdirected himself in law. The decision was not, however, remitted for a fresh determination because there was only one conclusion properly open to the Secretary of State – namely that Philip's place of ordinary residence was South Gloucestershire: "[i]*t could not be Wiltshire, because he ceased to have any connection with it at all. At that stage he had never lived in Somerset and had no connection with it. And for reasons I have given, the mere fact that his parents' place of ordinary residence was in Cornwall could not justify finding that to be Philip's place of ordinary residence*" (paragraph 85).

Comment

In our comment upon the first instance decision of Beatson J, we noted that, whilst "'*test 1'" in Vale undoubtedly serves a pragmatic purpose, viewed in the abstract it does not sit very easily with the principle of autonomy enshrined in the MCA. In its direct equation of the position of an incapacitated adult with that of a small child, it also stands at odds with the clear thrust of COP case-law, which is to the effect that the two can and should be treated as conceptually distinct (note, for instance, the clear rejection by the Court of Appeal in K v LBX & Ors [2012] EWCA Civ 79 that there is any presumption when determining the best interests of an incapacitated adult that they should reside at home with their family). "Test 2," by contrast, does not give rise to the same problems.*" We also drew attention to the potential parallels with the fact that an incapacitated adult can change their habitual residence for purposes of Schedule 3 (citing in support *Re MN*)

We therefore welcome the decision of the Court of

Appeal, which lays down once and for all that the 'Vale 1' test is incorrect as a matter of law and should not be followed for purposes of determining ordinary residence. A close focus will therefore be required upon the circumstances of the incapacitated adult and – where appropriate – their state of mind in determining where they are ordinary resident.

We note that this decision will be of relevance not merely for purposes of community care provision but also:

1. For purposes of deciding which local authority is the supervisory body for purposes of the DOLS regime: paragraph 182 of Schedule A1 to the MCA 2005.

2. Beyond England and Wales, given that the Scottish Government Guidance on ordinary residence expressly bases itself upon the English case law, and, in particular, *Vale*.

The decision also chimes neatly with the decision of the President in *Re PO* in relation to habitual residence under Schedule 3 to the MCA 2005, standing as clear (albeit obiter) endorsement of the inapplicability of *Shah* to incapacitated adults for these purposes, as well as of the potential relevance of the adult's state of mind.

Clarification of test of capacity to consent to sexual relations in criminal context

R v Avanzi [2014] WLR (D) 55 (Court of Appeal (Macur LJ, Burton J, Judge Batty QC))

Mental capacity – sexual relations

Summary

In this case the Criminal Division of the Court of Appeal held that where proceedings are brought under the Sexual Offences Act 2003 ("SOA"), alleging that a complainant lacked the capacity to consent to the relevant sexual acts, the Crown must prove the complainant's incapacity beyond reasonable doubt. The appellant in the case had been convicted of sexual assault, contrary to section 3 of the SOA and appealed on the ground that the judge had applied the wrong standard of proof in his directions to the jury on the issue of capacity. The Crown conceded the appeal and Macur LJ, who gave a short ex tempore judgment on behalf of the court, held that it was correct to do so. Macur J recognised that the appeal raised a novel point of law but was clear that the criminal standard of proof applied.

Macur J said that although the SOA does not define capacity in the same way was sections 2 and 3 of the MCA, and the MCA contains a different standard of proof applies, it is desirable that there should be no inconsistency between the criminal and civil law and there is no reason for jurisprudence or related statutory terminology to be inconsistent. Macur LJ commented that the guidance provided by the MCA 2005 might form a beneficial checklist for any court called upon to determine the issue of capacity.

Macur LJ was critical of the expert evidence that was given in the court below on the question of capacity as it went beyond the expert's remit and did not address the issue of capacity. She noted that the capacity of the complainant to consent to the act in question was fact specific and it was important that, when expert evidence was given to assist the jury in relation to matters outside their common experience, such evidence was relevant and only dealt with the matter in issue, (see *IM v LM* [2014] EWCA Civ 37).

Comment

We respectfully welcome this confirmation from the Court of Appeal that, while different standards of proof apply under the SOA and MCA, it is desirable that there should be no inconsistency between the criminal and civil law. The note of the short ex tempore judgment does not contain any detail about the nature or shortcomings of the expert evidence in this case, but the comments from Macur LJ on the importance of relevant expert evidence chime with the emphasis that has been given to this in recent cases concerning the MCA. It may assist experts assessing capacity in the criminal context if their instructions draw attention to the

definition of capacity under the MCA and the associated caselaw and guidance.

We note the recent media reports of an unpublished document prepared by the Metropolitan Police, due to be presented to the LSE shortly, which apparently shows that people with learning difficulties who report sexual assault and 67% less likely to have their case referred to the police for prosecution, and that people with mental health problems 40% less likely. These statistics, and the comments made about how exploitation is seldom recognised, are, in the minds of the editors, very relevant to the question of the Court of Protection's approach to cases involving capacity to consent to sexual relations.

PRACTICE POINTS FROM OTHER PROCEEDINGS

Appeals to the Court of Appeal from the CoP: securing against the risk of costs

JE (Jamaica) v SSHD [2014] EWCA Civ 192 (Court of Appeal (Laws, Jackson and Black LJJ))

COP Jurisdiction and powers - Costs

Summary

This is an important decision of the Court of Appeal upon CPR r.52.9A, a provision of the Civil Procedure Rules 1998 brought in as of 1 April 2013 by the sweeping reforms instigated after the Jackson review of costs in civil litigation. It suggests – by analogy – steps that appellants to the Court of Appeal from proceedings before the Court of Protection can take to secure against the operation of the conventional costs rules in the Court of Appeal that costs follow the event. If they do not take the steps outlined in the judgment, then – in contrast to the position that prevails when a case is being heard in the Court of Protection before any judge up to an including a puisne judge of the High Court sitting in the Court of Protection – the loser of the appeal pays the costs of the winner.

By way of background, we remind readers that the Court of Appeal in *Cheshire West No 2* [2011] EWCA Civ 1333 rejected an argument made on behalf of the unsuccessful party, P, that there should be no order as to costs because proceedings in the Court of Protection were analogous to public law family proceedings (and appeals therefrom) which are exempt from the material provisions of the CPR (these are now contained in CPR r.44.2(3)(a); prior to 1 April 2013 they were contained in CPR r.44.3(3)(a). Munby LJ held at paragraph 6 (with references to the CPR amended to reflect the position that prevails post 1 April 2013):

> *"I cannot accept Mr Gordon's argument of principle* [on behalf of P]. *It comes perilously close to an impermissible invitation to us to re-write* [CPR r.44.2], *whether by incorporating within it the principle in r 157 of the Court of Protection Rules or by adjusting CPR r* [44.2(3)] *to include a reference to the Court of Protection. Our task is to apply CPR r* [44.2]. *I accept, of course, that we can properly have regard to the fact that the appeal concerns a vulnerable adult in the context of the court's protective functions and not, for example, a valuable cargo in the context of a commercial dispute, but this is not because of some supposed analogy with either CPR r 44.2] or r 157 of the Court of Protection Rules. It is simply because it is one of the 'circumstances' – and, it may be, one of the more important of the circumstances – to which CPR r 44.3(4) bids us have regard.*

In *Cheshire West No 2*, the Court of Appeal in fact made no order for costs, but left open the possibility that an order for costs could flow in a different case.

CPR r.52.9A may well not have crossed the radar of many CoP practitioners (it is clear from the decision in *JE* that is unknown territory for others too), but it provides that:

> *(1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.*
>
> *(2) In making such an order the court will have regard to—*
>
> *(a) the means of both parties;*
>
> *(b) all the circumstances of the case; and*
>
> *(c) the need to facilitate access to justice.*
>
> *(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).*
>
> *(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.*

The Court of Appeal in *JE* considered an appeal from the Upper Tribunal in an immigration case. The Appellant sought, in the guise of an application under CPR r.52.9A, a 'one-way costs shifting order' – i.e. an order that the Respondent Secretary of State should be prevented from recovering any costs (save for misconduct) from the Appellant in any event, but that, in the event that the Appellant were to be successful in her appeal in full or in part, the usual costs rules apply.

Lord Justice Jackson, giving judgment on behalf of the Court of Appeal, had no hesitation in finding that this application was entirely misconceived as the Court had no power to grant the order sought under CPR r.52.9A. He took the opportunity to spell out, however, precisely what the rule is intended to address and how it should be used. At paragraphs 7-13, he held thus:

> *"7. Rule 52.9A is part of a package of rules which were introduced on 1st April 2013 in order to implement recommendations made in the Review of the Civil Litigation Costs Final Report (January 2010). The specific mischief against which that rule is directed is set out on pages 340-341 of that report.*
>
> *8. Rule 52.9A (1) refers to 'the recoverable costs of an appeal'. That phrase means the costs recoverable by the winning party, whoever the winner may turn out to be. The rule deals with appeals coming up from a 'no costs' or a 'low costs' jurisdiction. It enables the appeal court to put in place a similar regime to that which applied in the court or tribunal below. The rule does not contemplate an order in favour of just one party, win or lose.*
>
> *9. Three further considerations support the interpretation set out in the previous paragraph. First, the opening lines of rule 52.9A (1) set the context. The rule is specifically concerned with appeals from jurisdictions in which all parties are subject to the same restrictions upon recoverable costs. Secondly, as Laws LJ pointed out in argument this morning, the three considerations set out in paragraph (2) of the rule are relevant to considering whether or not to maintain a 'no costs' or 'low costs' regime upon appeal. Thirdly, there are separate rules which provide for qualified one-way costs shifting in specified cases. In my view rule 52.9A is not concerned with one-way costs shifting.*
>
> *10. If an appeal is brought from a 'no costs' or 'low costs' jurisdiction, both parties should give prompt consideration*

to whether they (a) want and (b) would qualify for such an order. Very often they will not want such an order, because they desire to recover their costs if they win. So be it.

11. It is important that any application for an order under rule 52.9A is made at an early stage, so that both parties know the costs regime under which they are proceeding. Rule 52.9A (4) requires the application to be made "as soon as practicable". That does not mean immediately. It envisages that both parties will require a reasonable time in which to consider their position.

12. If the appellant seeks an order under rule 52.9A, it may be convenient and economic to include such an application in the appellant's notice, but the rule does not require that. Mr Paul Joseph for the Secretary of State points out that both parties may need time to consider to their position once they know whether permission to appeal has been granted and upon what grounds. He suggests that a sensible cut-off point would be two weeks after the grant of permission has been notified to the respondent. That is the date by which the respondent must serve the respondent's notice if any. I can see force in that submission, but it is not necessary to decide that question in the present case. Furthermore it would be undesirable to attempt to cater for all the factual circumstances which may arise. Anyway it is not the function of this court to re-write the rule.

13. Once made the application can then be dealt with in writing at modest cost, unless the court otherwise orders. Any challenges to the court's decision will not be entertained unless the court has made a clear error of principle."

Whilst the Jackson Report did not consider appeals from the Court of Protection at the material point referred to by Jackson LJ, it seems to us that – at least in relation to welfare proceedings – it can properly be said that the Court of Protection is a 'no costs' regime, because r. 157 expressly provides that the general rule is that "*there will be no order as to the costs of the proceedings or that part of the proceedings that concerns P's own welfare*."

It therefore seems to us that – as Jackson LJ highlights at paragraph 10 – both (or, where appropriate, all) parties to an appeal to the Court of Appeal from a decision of the Court of Protection in a welfare case should consider whether they (a) want or (b) would qualify for such an order. It may also be appropriate to consider making such an application in a case relating to P's property and affairs on the basis that r.156 could be said either to limit or to exclude the recovery of costs (at least as understood on the conventional basis – i.e. by the 'winner' from the 'loser) because it provides that the costs will, in general, be paid by P or charged to his estate. It may well be that judicial guidance will be needed in due course as to this latter scenario.

Is notification of foreign nationals required where P is detained or a litigation friend or deputy appointed?

Re E (A Child) **[2014] EWHC 6 (Fam)** (Sir James Munby P)

COP jurisdiction and powers – International jurisdiction

Summary

We make note of this case arising under Council Regulation 2201/2003 ('Brussels IIR') because of the suggestions made by the President at the end of his judgment about practice points that arise in relation to cross-border cases involving incapacitated adults.

In passing, however, we note that at least some of his comments in relation to the wider context within which the English family justice system operates ring true in relation to the nascent framework for the international protection of

adults enshrined in the 2000 Hague Convention (which, although not ratified in relation to England and Wales, nonetheless finds statutory force in England and Wales through Schedule 3 to the MCA 2005). At paragraphs 17, the President held as follows:

> "*17. The English family justice system is now part of a much wider system of international family justice exemplified by such instruments as the various Hague Conventions* [in this context, the 1980 Child Abduction Convention and the 1996 Convention on the Protection of Children] *and, in the purely European context, by BIIR. Looking no further afield, we are part of the European family of nations. We share common values. In particular in this context we share the values enshrined in BIIR.*
>
> *18. In In re T (A Child) (Care Proceedings: Request to Assume Jurisdiction) [2013] EWHC 521 (Fam), [2013] Fam 253, para 37, Mostyn J expressed his complete disagreement with an approach which he characterised as 'a chauvinistic argument which says that the authorities of the Republic of Slovakia have got it all wrong and that we know better how to deal with the best interests of this Slovakian citizen.; He added that the court 'should not descend to some kind of divisive value judgement about the laws and procedures of our European neighbours.' I profoundly and emphatically agree. That was a case which, as it happened, also involved Slovakia. But the point applies with equal force in relation to every country which is a member of the European Union.*
>
> *19. On appeal in the same case, Re K (A Child) [2013] EWCA Civ 895, para 24, Thorpe LJ said that:*
>
> > *'there is a fundamental flaw in [counsel's] submission since it essentially seeks to elevate the professional view of experts in this jurisdiction over the professional view of experts in the jurisdiction of another Member State. That is, in my view, impermissible. We must take it that the child protection services and the judicial services in Slovakia are no less competent than the social and judicial services in this jurisdiction.'*
>
> *Again I emphatically agree.*
>
> *20. Perhaps I may be permitted in this context to repeat what I said in an address at the International Hague Network of Judges Conference at Windsor on 17 July 2013:*
>
> > *'Over the last few decades interdisciplinarity has become embedded in our whole approach to family law and practice. And international co-operation at every level has become a vital component not merely in the day to day practice of family law but in our thinking about family law and where it should go …*
> >
> > *For the jobbing advocate or judge the greatest changes down the years have been driven first by the Hague Convention (now the Hague Conventions) and more recently, in the European context, by the Regulation commonly known as Brussels IIR. They have exposed us, often if only in translation, to what our judicial colleagues in other jurisdictions are doing in a wide range of family cases. They have taught us the sins of insularity. They have taught us that there are other equally effective ways of doing things which once upon a time we assumed could only be done as we were accustomed to doing them. They have taught us that, beneath all the apparent*

differences in language and legal system, family judges around the world are daily engaged on very much the same task, using very much the same tools and applying the same insights and approaches as those we are familiar with. Most important of all they have taught that we can, as we must, both respect and trust our judicial colleagues abroad.

It is so deeply engrained in us that the child's welfare is paramount, and that we have a personal responsibility for the child, that we sometimes find it hard to accept that we must demit that responsibility to another judge, sitting perhaps in a far away country with a very different legal system. But we must, and we do. International comity, international judicial comity, is not some empty phrase; it is the daily reality of our courts. And be in no doubt: it is immensely to the benefit of children generally that it should be.'

At paragraphs 38ff, the President had cause to consider the application of the Vienna Convention on Consular Relations. As he noted, they are probably not very familiar to most family lawyers; nor, we would add, to most who have cause to appear before the Court of Protection. We therefore set out the relevant Articles:

1. Article 36 is headed: "Communication and contact with nationals of the sending State." It reads as follows:

"1 With a view to facilitating the exercise of consular functions relating to nationals of the sending States:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2 The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the

proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

2. Article 37 is headed "*Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents*." The only part that is relevant for present purposes is Article 37(b):

> "*If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:*
> *…*
> *(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments; …*"

Sir James Munby P expressly disavowed any intention to set out what the obligations of public authorities (as competent authorities) would be under the provisions of the Convention. Rather, he suggested how "*as a matter of good practice family judges, when hearing care and other public law cases, should from now on approach these provisions*."

At paragraphs 45 ff, the President held as follows:

> "*45. In considering the possible implications of Articles 36 and 37 of the Convention, family judges should assume that, in appropriate circumstances, the court may itself be a 'competent authority'. They should also assume that there is a 'detention' within the meaning of Article 36 whenever someone, whether the child or a parent, is being deprived of their liberty within the meaning of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, in accordance with sections 2 or 3 of the Mental Health Act 1984 or, in the case of a child, in accordance with section 25 of the Children Act 1989.*
>
> *46. In cases involving foreign nationals there must be transparency and openness as between the English family courts and the consular and other authorities of the relevant foreign state. This is vitally important, both as a matter of principle and, not least, in order to maintain the confidence of foreign nationals and foreign states in our family justice system. To seek to shelter in this context behind our normal practice of sitting in private and treating section 12 of the Administration of Justice Act 1960 as limiting the permissible flow of information to outsiders, is not merely unprincipled; it is likely to be counter-productive and, potentially, extremely damaging. If anyone thinks this an unduly radical approach, they might pause to think how we would react if roles were reversed and the boot was on the other foot.*
>
> *47. Given this, it is highly desirable, and from now on good practice will require, that in any care or other public law case:*
>
> *i) The court should not in general impose or permit any obstacle to free communication and access between a party who is a foreign national and the consular authorities of the relevant foreign state. In particular, no injunctive or other order should be made which might interfere with such communication and access, nor should section 12 of the Administration of Justice Act 1960 be permitted to have this effect.*

ii) Whenever the court is sitting in private it should normally accede to any request, whether from the foreign national or from the consular authorities of the relevant foreign state, for

(a) permission for an accredited consular official to be present at the hearing as an observer in a non-participatory capacity; and/or

(b) permission for an accredited consular official to obtain a transcript of the hearing, a copy of the order and copies of other relevant documents.

iii) Whenever a party, whether an adult or the child, who is a foreign national

(a) is represented in the proceedings by a guardian, guardian ad litem or litigation friend; and/or

(b) is detained,

the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay.

45. If, in any particular case, the court is minded to adopt a different or more restrictive approach it is vital that the court hears submissions before coming to a decision and that it then sets out quite explicitly, both in its judgment and in its order, the reasons for its decision."

Comment

As noted above, the principles set out above would seem on their face to relate equally to proceedings in which the Court of Protection (a) appoints a litigation friend to act for P or any other party to the proceedings; (b) authorises the deprivation of liberty of a foreign national under the provisions of s.16 MCA 2005; or (c) appoints a deputy for a foreign national. They would also appear to relate to proceedings in which the Court of Protection becomes aware of the fact of a detention (whether under the provisions of Schedule A1 to the MCA 2005 or the MHA 1983).

We should emphasise, however, that this is a matter upon which it is necessary that Sir James Munby P expresses an opinion in his capacity as the President of the Court of Protection. Sir James disavowed any intention to spell out the obligations imposed by the Convention on public authorities – and he was undoubtedly choosing his words here with care. Neither Articles 36 nor 37 of the Vienna Convention have the force of law in England and Wales (not being included in the material provisions of the Consular Relations Act 1968, as amended: see also the commentary in paragraphs 413 and 499 of the 2010 edition of Halsbury's Laws (International Relations Law). There also remains something of a debate in international law circles about the extent to which the Convention itself gives rise to an individual right upon the part of the detained individual to consular access as opposed to imposing rights and obligations as between the two States in question.

Bringing matters back to home, however, as matters stands public authorities are under no obligations imposed by English law to take steps to give effect to either Article 36 or 37 of the Convention.[1] A hospital trust receiving an application to detain a foreign national patient under the provisions of the MHA 1983 or a

[1] The Police are under obligations in relation to consular notification by virtue of Codes C and H to the Police and Criminal Evidence Act 1984, but these are not limited to nationals of States parties to the Convention. There are also a number of bilateral conventions which require consular notification even if the detainee does not request it, details of which can be found here.

hospital or care home detaining a foreign national patient under the provisions of Schedule A1 to the MCA 2005 is (if the patient requests) not required by any obligation deriving from the Convention to notify the consul of the country of that national (assuming that country is a party to the Convention). That having been said, a refusal by a hospital or care home to accede to a request to notify a consul might well be unlawful – not as a breach of any right or duty that might arise under the Convention, but as a breach of Article 8 ECHR.

If the good practice guidance set out in paragraphs 45-8 of *Re E* is applied in the Court of Protection, it would undoubtedly assist in securing the greater flow of information between jurisdictions. We would hope, though, that CoP judges would be astute to ensure that the views of incapacitated adult who are subject to detention as to notification of their consular officials would be taken into account for two reasons:

1. Article 36 expressly provides that notification is at the behest of the detained individual (the requirement that the individual be notified of their right to contact the consular staff if mandatory): this reflected a careful compromise in the drafting of the Convention (see, for a summary, the entry upon the Convention in the Max Planck Encyclopaedia of International Law). As noted in the footnote, there are bilateral conventions in which the notification obligation arises even absent a request being made, but any guidance drawing inspiration from the Convention should, we suggest, be careful to respect the terms of the Convention.

2. Requiring notification to consular officials absent a request by a detained individual or (more starkly, in the face of objections by that individual) may also give rise to troubling consequences for that individual. To take one instance (and ignoring for a moment the status of diplomatic relations between the United Kingdom and Iran), it is not immediately obvious that Dr A would have wished the fact of his hunger strike and the consequent deprivation of his liberty for purposes of force-feeding to be brought to the attention of the authorities of the very state to which he was seeking not to be deported.

We would, perhaps, conclude with a note that this is an issue upon which clarification will be likely to be required in due course as we are aware of a case before the CoP at the moment where a foreign national is detained, the subject of a deputyship, and also had the Official Solicitor appointed to act as litigation friend (he would also, incidentally, very much wish to leave the care home in which he is placed to return to his home country).

Fact-finding and probability: the importance of asking the right questions

Re D (A Child) [2014] EWHC 121 (Fam) (Mostyn J)

Practice and procedure - Fact finding

Summary

This decision in a fact-finding hearing relating to children merits note here because of the helpful summary of the relevant legal principles, which are – we suggest – directly applicable to fact-finding hearings in proceedings in the CoP where it is alleged that a third party has caused harm to P.

The question that Mostyn J had to decide (as the first stage in care proceedings brought by a local authority) was whether the mother of a young child who had spent her entire life in hospital had deliberately switched off her oxygen supply. It was common ground that there was a closed class of possible scenarios: (1) the oxygen supply was not in fact turned off, and the nurse who asserted that it was was mistaken in believing that it was; or (2) the oxygen supply was accidentally turned off by a student nurse, J; or (3) the oxygen supply was deliberately turned off by the mother.

At paragraph 31, Mostyn J set out the applicable legal principles thus:

> "*i) The local authority must prove its allegations on the balance of probabilities, no more, no less: Re B (Care Proceedings: Standard of Proof), [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, at paras [2] and [70].*
>
> *ii) The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the court is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened: Re B (Care Proceedings: Standard of Proof), at para [2] per Lord Hoffmann.*
>
> *iii) The more serious or improbable the allegation the greater the need for evidential 'cogency': Re Dellow's Will Trusts; Lloyd's Bank v Institute of Cancer Research [1964] 1 WLR 451 at 455; Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, [1996] 2 WLR 8, [1996] 1 FLR 80; Re S-B (Children) (Care Proceedings: Standard of Proof), [2010] 1 AC 678, [2010] 2 WLR 238, [2010] 1 FLR 1161 at para [13]. Evidential cogency is obviously needed where the harmful event is itself disputed. However, where there is no dispute that it happened the improbability of the event is irrelevant: Re B (Care Proceedings: Standard of Proof), at paras [72] and [73].*
>
> *iv) Sometimes the burden of proof will come to the judge's rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge ought to be able to make up his mind where the truth lies without needing to rely upon the burden of proof: Re B (Care Proceedings: Standard of Proof) at paras [2] and [32]; Rhesa Shipping Co SA v Edmond and Another: The Popi M [1985] 1 WLR 948.*
>
> *v) It is impermissible for a judge to conclude in the case of a series of improbable causes that the least improbable or least unlikely is nonetheless the cause of the event: Rhesa Shipping Co SA v Edmond and Another: The Popi M; Ide v ATB Sales Ltd; Lexus Financial Services t/a Toyota Financial Services (UK) plc v Russell [2008] EWCA Civ 424 at para [4].*
>
> *vi) There is no pseudo-burden or obligation cast on the respondents to come up with alternative explanations: Lancashire County Council v D and E [2010] 2 FLR 196 at paras [36] and [37]; Re C and D (Photographs of Injuries) [2011] 1 FLR 990, at para [203].*
>
> *vii) The assessment of credibility generally involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited. Therefore, contemporary documents are always of the utmost importance: Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, per Lord Pearce; A County Council v M and F [2011] EWHC 1804 (Fam) [2012] 2 FLR 939 at paras [29] and [30]*."

This case was not one of the "pool of possible perpetrators" class of case governed by the principles in *Re S-B (Children) (Care Proceedings: Standard of Proof)*. In such a case the harmful act is a certainty and there is a pool of at least two guilty perpetrators. Rather, Mostyn J found that

the most that could be said against the student nurse was that she was negligent.

In an exercise of particular interest to those who care about the proper application of statistics to legal proceedings, Mostyn J then went on to analyse the three possible scenarios. He found that he was satisfied – just – that the oxygen supply was turned off, but he resisted the submission made on behalf of the local authority that it was appropriate to proceed in stages and then to consider whether it was either (1) the student nurse; or (2) the mother who had turned it off. A staged approach, in essence, turned something that was only just established on the balance of probabilities at the first stage into a certainty and then led to a false choice between the mother and the nurse as responsible. For reasons the interested reader can read in more detail in his judgment, this led to the mathematically impossible situation where the relevant probabilities of the competing scenarios added up to more than 1. Or, "[p]*ut another way, a way which is less numeric and more linguistic, if there is an alleged primary harmful act and a whodunit between two possible perpetrators then in deciding the whodunit the possibility that the primary act was not in fact harmful has to be taken into account*" (paragraph 39).

Mostyn J therefore was able to conclude that, on the balance of probabilities, if the supply was turned off the mother did not do it. But it did not flow from that – he emphasised – that he was concluding that the student nurse, J, turned off the supply by accident. Rather, a correct application of the laws of probability led him to conclude that he was not satisfied on the balance of probability that she turned off the supply either.

Comment

The application of the laws of probability by Mostyn J is the subject of an extremely interesting discussion by Ian Hunt, an independent statistician, in a paper here.

Whilst we are very alive to the fact that there are clear distinctions in principle between proceedings in the CoP and those relating to children, we have had cause in the past to note the forensic similarities between certain of the exercises that are required in both sets of proceedings (see, for a recent example, the discussion in relation to disclosure in the case of *RC* and the comments of McFarlane J as he then was in *Re SA* [2010] EWHC 196 (Admin), [2009] COPLR Con Vol 362). We therefore have no hesitation in suggesting that the principles distilled by Mostyn J are equally applicable to 'safeguarding' cases before the CoP. They also – by the same token – stand as a reminder of the need for real forensic clarity on the part of all those involved in fact-finding.

OTHER DEVELOPMENTS OF RELEVANCE

IMCAs under the spotlight

On 14 February 2014 the Department of Health published a detailed report on "The sixth year of the Independent Mental Capacity Advocacy (IMCA) Service: 2012/2013". There has been a year-on-year increase in the number of instructions to the IMCA service since it began in 2007 (when there were 5,266 referrals). There were a total of 12,381 eligible instructions for the IMCA service in England in 2012-2013, which represented a 4% increase on the total number of eligible referrals in the previous year. The subject matter of the instructions in 2012/2013 (and the increase or decrease since 2011/2012) was as follows:

- Accommodation decisions: 5,353 (an increase of 9%);
- Serious medical treatment decisions: 1,907 (an increase of 9%);
- Care reviews: 1,203 (an increase of 16%);
- Adult protection/Safeguarding: 1,482 (a decrease of 3%);

- Deprivation of Liberty Safeguards: 1,907 (a decrease of 3%)

The report found it is likely that the duties under the MCA are still not well embedded in some local authority areas as there continues to be wide disparities in the rate of IMCA instructions across different local areas which cannot wholly be explained by population differences. The report contains detailed tables showing the number of instructions by local authority between 1 April 2012 and 31 March 2013.

The key recommendations from the report may be summarised as follows:

1. Commissioners should recognise that the number of people statutorily eligible for the IMCA service continues to increase on a year-by-year basis;

2. Local authorities and IMCA organisations should carry out self-audits of recent accommodation moves, and ensure that people's wishes and feelings have been considered and the issue of 'less restriction' has been fully reflected in all decisions;

3. IMCA organisations, local authorities and the NHS should continue to be alert to possible Deprivations of Liberty (DoLs). IMCA organisations should alert local authorities and the NHS for the need either to prevent a DoL by changing the care plan, or applying the DoL safeguards, in a care home or hospital. If the possible DoL is the result of a care package in the community, a referral to the Court of Protection is required;

4. Local authorities should carry out a small audit of recent reviews, to establish whether all those who would benefit from IMCAs in their reviews did in fact receive one;

5. Mental Capacity Act leads in clinical commissioning groups should monitor compliance with the requirement for referrals to IMCAs for each of their providers, as part of their MCA responsibilities;

6. Local authority safeguarding coordinators should consider the statistics in this report and report to their Safeguarding Adults Boards on whether sufficient number of IMCA referrals are being made in their areas;

7. Supported decision making should be adopted more widely within safeguarding practice, to assist more people to make their own decisions about their safeguarding plans. Consideration should be given to whether there is any alternative, less restrictive safeguarding action available before a care plan or a protection plan is made;

8. IMCAs and commissioners should audit a sample of IMCA reports;

9. IMCAs should follow Court of Protection advice in published judgments on identifying a possible DoL and on applying the MCA principles in relation to all care planning.

Review to be undertaken into the application and effectiveness of DOLS safeguards in Wales

In February 2014 the Care and Social Services Inspectorate Wales ("CSSIW") and Healthcare Inspectorate Wales ("HIW") published its fourth annual monitoring report on "Deprivation of Liberty Safeguards: Health and Social Care" in Wales. The report analyses the key findings for the year 2012-13 and sets out the observed trends as well as areas of concern and achievements.

There were 526 applications made to supervisory bodies in Wales in 2012/2013 (compared to 545 in 2011/12). These applications were concerned with 417 individuals (compared to 428 in 2011/12). Overall the figures have been very similar in the four years that the reviews have been carried out. A total of 254 standard authorisations were granted, 182 (72%) of which were granted by local authority supervisory bodies, and 182 (28%) of which were granted by health board supervisory bodies. In care homes, 55% of the authorisations sought were granted,

whereas in hospitals 43% of the authorisations sought were granted. The number of cases where the relevant person and relevant persons' representatives received help from IMCAs fell to 70 in 2012/13 (from 75 in 2011/12).

Echoing the theme of regional variation in the Department of Health's report on the IMCA Service 2012/2013 (summarised above), the CSSIW and HIW report expressed concern over significant variation in the proportion of DOLS applications made and the proportion of applications that were authorised in different local areas. Some local authority areas were identified as receiving five times as many DOLS applications as others, per 100,000 population, and while some local authorities authorised most of the applications they received, others did not approve any. As these variations cannot be fully explained by demography and the geographical distribution of care services, the CSSIW and HIW have announced their intention to undertake a national review to examine the application and effectiveness of the DOLS safeguards in Wales. This will include inspections of a sample of local authorities and health boards and further interrogation of performance information. Routine inspections of care homes will also follow up previously reported notifications of applications to use the DOLS safeguards and will look at the experience of people who have been, or should have been, subject to the safeguards. The national overview report following the review is due to be published in summer 2014.

Guidance on DOLS in children's homes and residential special schools

In an unusual step, Sir James Munby P and OFSTED have recently issued joint guidance as to deprivation of liberty in children's homes and residential special schools. We understand that this has been issued in response to generalised concerns about the application of the deprivation of liberty provisions of the MCA 2005 in such places, as opposed to being a response to a specific case that has been before the courts.

The guidance is of some considerable importance for spelling out in crystal clear terms that:

(1) No application should be made to the Court of Protection in relation to the deprivation of liberty (or indeed welfare more generally) of any child under the age of 16 years old;

(2) Standard and urgent authorisations under Schedule A1 MCA 2005 have no application to children's homes as they only apply to hospitals and care homes and only apply to those over the age of 18 years old;

(3) Orders of the Court of Protection authorising a deprivation of liberty by non-secure children's homes or residential special schools should not be sought or made and they should not be advanced or relied on to permit such homes and schools to act in breach of the Regulations that apply to them;

(4) The MHA 1983 Code of Practice (referred to approvingly by analogy in *R (C) v A Local Authority* [2011] EWHC 1539 (Admin) the 'blue room' case) and other Guidance may be relevant but do not override the Regulations and Guidance directed towards children's homes and schools.

The guidance is also of interest for an entirely separate reason. It is, as far as we aware, the first statement in which (even if which extra-judicially) confirmation has been given of the status of an order made under s.16 MCA 2005 authorising a deprivation of liberty. As the Guidance notes at paragraph (2), such an order "*may authorise (not require) the detention of that person. Any such order is a decision on behalf of the person who lacks capacity - it is not like an injunction aimed at requiring third parties to take steps to facilitate the detention of that young person*." This is perhaps a rather obvious point, but it does also give rise to an interesting logical conundrum that we are aware has been floated – but not decided – in cases in which we have appeared: if the court is taking the decision on P's behalf, then why is such a decision not 'substituted consent' to the arrangements that – objectively – amount to a deprivation of liberty. If so, does that not negate the very existence of a deprivation of liberty? Such a proposition has a

distinctly Alice in Wonderland quality about it, and it is one that we would find deeply troubling, but we note that the Scottish Law Commission in their 2012 discussion paper as to how Scotland should close the Bournewood Gap appear at least to have flirted with this idea upon the basis of the decision of the ECtHR in *Stanev v Bulgaria* [2012] ECHR 46 (Application no. 36760/06):

> "*6.73 The relevance of consent to whether there is a deprivation of liberty at all has not featured to a great extent in any decision of the European Court. But the Court* [in Stanev] *has commented on the possible role of a substitute decision-maker in this context:*
>
> *'The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned'.[239]*
>
> *It would appear that 'valid replacement' of the wishes of the person with incapacity would prevent the regime under which he or she is living from being a deprivation of liberty at all. It may therefore be that Scots law could make specific provision for the giving of consent by substitute decision-makers to care of a person with incapacity in conditions which, absent such consent, would amount to deprivation of liberty*."

We await with interest further news from north of the border in this regard…

Recommendations to secure the rights of older persons

The Council of Europe has very recently (19 February) adopted the first European instrument on the human rights of older persons, in the form of Recommendation CM/Rec(2014)2. The recommendation stresses, inter alia, the importance of autonomy and participation, noting that:

> *"9. Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, inter alia, the taking of independent decisions with regard to all issues which concern them, including those regarding their property, income, finances, place of residence, health, medical treatment or care, as well as funeral arrangements. Any limitations should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination."*

It also stresses the importance of securing older persons against violence and abuse:

> *"16. Member States should protect older persons from violence, abuse and intentional or unintentional neglect. Such protection should be granted irrespective of whether this occurs at home, within an institution or elsewhere.*
>
> *17. Member States should provide for appropriate awareness-raising and other measures to protect older persons from financial abuse, including deception or fraud.*
>
> *18. Member States should implement sufficient measures aimed at raising awareness among medical staff, care workers, informal carers or other persons who provide services to older persons to detect violence or abuse in all settings, to advise them on which measures to take if they suspect that abuse has taken place and in particular to encourage them to report abuses to competent authorities. Member States should take measures to protect persons reporting abuses from any form of retaliation.*

19. Member States shall carry out an effective investigation into credible claims that violence or abuse against an older person has occurred, or when the authorities have reasonable grounds to suspect that such ill-treatment has occurred.

20. Older persons who have suffered from abuse should receive appropriate help and support. Should member States fail to meet their positive obligation to protect them, older persons are entitled to an effective remedy before a national authority and, where appropriate, to receive adequate redress for the harm suffered in reasonable time."

With specific reference to consent to medical care, the Recommendation notes:

"*36. Older persons should receive medical care only upon their free and informed consent, and may freely withdraw consent at any time.*

37. In case an older person is unable, in the particular circumstances, to give consent, the wishes expressed by that person relating to a medical intervention, including life-prolonging measures, should, in accordance with national law, be taken into account.

38. When an older person does not have, according to national law, the capacity to consent to an intervention, in particular because of a mental disability or a disease, the intervention may only be carried out with the authorisation of his or her representative, an authority or a person or body provided for by law. The older person concerned should, as far as possible, take part in the authorisation procedure. Appropriate and effective safeguards should be provided to prevent abuse.

39. When the appropriate consent cannot be obtained because of an emergency situation, any medically necessary intervention may be carried out immediately for the benefit of the health of the older person concerned. Appropriate and effective safeguards should be provided to prevent abuse."

The recommendation also, interestingly, contains specific examples of good practice drawn from member States of the Council of Europe in relation to each of its themes.

Such recommendations are non-binding, but have frequently proven in the past to be important in setting the agenda. It is perhaps, timely, that this particular recommendation has been made just as the Care Bill completes its passage through Parliament.

USEFUL RESOURCES

GMC Learning Disability Resource

An extremely useful resource which has recently been brought to our attention is the learning disability section on the GMC website. It is designed for doctors but is equally useful for anyone else seeking to improve their ability to communicate with and advise those with learning disabilities.

The website is divided into 5 main sections:

- Interactive learning - this includes four interactive sessions that provide doctors with the opportunity to test their knowledge by exploring a play commissioned by the GMC and available to view on the website, entitled *Wood for the Trees*;
- The issues – this gives examples of problems and challenges that face doctors and also includes excerpts from GMC guidance and videos with experts and advocates;

- Patient perspectives – this gives the thoughts and feelings of people with learning disabilities and their carers in their own words (using text and video), so that doctors and other health professionals can see what people want and how they wish to be involved in their own healthcare;

- Into practice – this contains solutions to issues raised in other areas as well as excerpts from guidance, best practice and videos featuring experts and advocates;

- Resources – this provides links to guidance, best practice, reviews, reports, tools and various websites.

SCOTLAND

CASE-LAW

The Scottish Bournewood?

On 12 February 2014 a petition for judicial review was submitted on behalf of DC to the Court of Session in *DC v Mericourt Limited and Others.* The court immediately made interim orders for the liberation of the petitioner from the nursing home where he then resided and for suspension of the "welfare elements" of a Power of Attorney which he had granted in 2011. DC featured in litigation last year when the Public Guardian, having received representations from the relevant social work authority, sought directions from a Sheriff as to whether she should register a notice of revocation by DC of the Power of Attorney. The Sheriff directed that she should not register it. An appeal by DC to the Sheriff Principal was unsuccessful. Further appeal to the Court of Session was competent but not taken, but the present petition seeks reduction of the decisions of the Sheriff and Sheriff Principal on the ground that they were *ultra vires*. The petition, if it proceeds, will thus test the balance between the wide powers to give directions under section 3(3) of the Adults with Incapacity (Scotland) Act 2000 and the mandatory registration provisions of that Act. If it proceeds, the petition will also test whether any Power of Attorney can authorise deprivation of liberty. The petition seeks declarator that DC was unlawfully detained in the nursing home, that he had been unlawfully deprived of his liberty contrary to article 5 of the European Convention on Human Rights, and that the local authority had breached his article 8 rights by not involving him sufficiently in decisions in relation to his care, and damages from the care home proprietors and from the local authority. The first hearing of the petition has been fixed for 30th April 2014.

OTHER DEVELOPMENTS

Paving the way for specialist Sheriffs to consider adult incapacity cases

The Courts Reform (Scotland) Bill was introduced in the Scottish Parliament on 6 February 2014. It has been allocated to the Justice Committee, whose first evidence session will take place on 18th March 2014. The Bill is wide ranging. Provisions include creation of a new judicial office of "Summary Sheriff" and creation of a new Sheriff Appeal Court. The Bill also provides for merging of the Tribunal Service with the Scottish Courts Service – previously a matter for separate consultation from Courts Reform.

One aspect is of particular interest in relation to the adult incapacity regime. The Scottish Government's consultation document prior to introduction of the Bill contained proposals for a specialist Scotland-wide personal injury court. The Mental Health and Disability Sub-committee of the Law Society of Scotland made representatives that there should be similar provision for a Scotland-wide adult incapacity jurisdiction, or alternatively generalised provision for all-Scotland jurisdictions. The alternative has been adopted by Scottish Government. Section 41 of the Bill provides that the Scottish Ministers may by order provide that the jurisdiction of a Sheriff of a specified Sheriffdom sitting at a specified Sheriff Court extends territorially throughout Scotland for the purpose of dealing with specified types of civil proceedings. In addition, sections 34 – 37 provide for judicial specialisation by empowering the Lord President (not Scottish Ministers) to determine categories of Sheriff Court case that the Lord President considers to be suited to being dealt with by specialist judges. Wherever the Lord President has done that, the Sheriff Principal of a Sheriffdom may designate sheriffs as specialists.

This provision opens the way to achieving

recommendations first made by the Mental Health and Disability Committee 22 years ago, as part of the law reform process which lead to the Adults with Incapacity (Scotland) Act 2000.

Scottish Law Commission Discussion Paper No 94 (September 1991) Question 84 read: "*Should all applications relating to the personal welfare and financial affairs of mentally disabled people….be heard by the courts, new Mental Health Tribunals or new Mental Health Hearings?*"

The Committee proceeded to analyse all of the requirements for the jurisdiction and came to the conclusion, set out in some detail in the Law Society of Scotland's response to consultation of March 1992, that the appropriate forum should be the Sheriff Court, but that there should be designated sheriffs. After setting out the analysis, the submission concluded: "…*Of all options available, such a system of designated sheriffs would best meet all of the requirements identified above*."

That proposal gained substantial, if not unanimous, support and provision for designated sheriffs was included in the draft Incapable Adults Bill annexed to the Scottish Law Commission report number 151 on Incapable Adults (September 1995). That provision, however, quietly disappeared from the Bill as introduced, and despite representations, was not included in the legislation. Experience since then has demonstrated that his omission was an error, but fortunately one capable of rectification. If the Courts Reform Bill is enacted, in this respect, substantially as introduced, that will at long last open the way to implementing such rectification.

Consultations

Forthcoming deadlines for responses to current consultations include:

1. On the Mental Health Bill: **25th March 2014**;
2. On Extending the Rights of Children with Capacity under the Education (Additional Support for Learning) (Scotland) Act 2004 (as Amended) and Repealing Section 70 of the Education (Scotland) Act 1980: **28th March 2014**; and
3. On Proposals for Carers Legislation: **16th April 2014**.

People

Dr Joe Morrow was installed as Lord Lyon King of Arms on 24th February 2014. He continues as President of the Mental Health Tribunal for Scotland but has stepped down as President of the Additional Support Needs Tribunals for Scotland. May Dunsmuir has been appointed acting President of the Additional Support Needs Tribunals. She continues as an in-house convenor of the Mental Health Tribunal. She is also Vice Convenor of the Law Society of Scotland's Mental Health and Disability Sub-Committee.

Michael Gallen, Alison Hempsey and Emma Horne (all solicitors) and Pradeep Pasupuleti (Psychiatrist) have all been appointed additional members of the Mental Health and Disability Sub-Committee – and have become the four youngest members of that Committee!

CONFERENCES

Conferences at which editors/contributors are speaking

- Alex and Tor will be speaking at the Community Care Conference "Implementing The Mental Capacity Act and Deprivation of Liberties Safeguards," on 19 March 2014. Full details are available here.

- Alex and Adrian will be speaking at (and Jill will be acting as a session facilitator at) the Law Society of Scotland's Mental Health and Incapacity Law Conference being held on 21-21 March 2014 at the Fairmont Hotel in St Andrew's. This conference, held in conjunction with the Mental Welfare Commission for Scotland and the EHRC, is the first of its kind to be held since the introduction of the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003. Full details are available here.

- Neil is speaking on *Cheshire West* and developments in the DOLS field at the Best Interest Assessor's Conference 2014 on 31 March 2014 at Lincoln's Inn. Full details are available here.

- Adrian is speaking at a medico-legal seminar at the Mason Institute of the University of Edinburgh Law School on the subject of assisted dying on 24 April 2014 at the Royal College of Physicians in Edinburgh. Details can be found here and initial details can be found here.

- Adrian will be speaking on hot topics in the incapacity field at the Solicitors' Group Wills, Trust & Tax conference in Edinburgh on 7 May 2014. Full details are available here.

- Adrian will be speaking at the annual private law conference convened by the Royal Faculty of Procurators in Glasgow on 29 May 2014. Full details are available here.

Other conferences of interest

BABICM Summer Conference

The British Association of Brain Injury Care Managers is holding its summer conference on 25 and 26 June 2014 at the Hilton Birmingham Metropole. Entitled "Nobody Does It Better! Current Practical Issues in Brain Injury," the conference will examine issues facing brain injury case managers: (1) sex, capacity and the law; (2) what constitutes privileged documentation; and (3) the implications of the judgment in *Loughlin v Singh*. For more details and to register, please click here.

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.

CHAMBERS DETAILS

Our next Newsletter 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 Newsletter in the future please contact marketing@39essex.com.

Use this QR code to take you directly to the CoP Cases Online section of our website

David Barnes Chief Executive and Director of Clerking
david.barnes@39essex.com

Sheraton Doyle Practice Manager
sheraton.doyle@39essex.com

Alastair Davidson Senior Clerk
alastair.davidson@39essex.com

Peter Campbell Practice Manager
peter.campbell@39essex.com

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For further details on Chambers please visit our website: **www.39essex.com**

London	39 Essex Street, London WC2R 3AT	Tel: +44 (0)20 7832 1111	Fax: +44 (0)20 7353 3978
Manchester	82 King Street, Manchester M2 4WQ	Tel: +44 (0)161 870 0333	Fax: +44 (0)20 7353 3978
Singapore	Maxwell Chambers, 32 Maxwell Road, #02-16, Singapore 069115	Tel: +(65) 6634 1336	

Alex Ruck Keene

alex.ruckkeene@39essex.com

Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities, in matters across the spectrum of the Court's jurisdiction. His extensive writing commitments include co-editing the Court of Protection Law Reports, and contributing to the 'Court of Protection Practice' (Jordans). He also contributed chapters to the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). **To view full CV click here.**

Victoria Butler-Cole

vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical casses. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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.**

Neil Allen

neil.allen@39essex.com

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.**

Michelle Pratley

michelle.pratley@39essex.com

Michelle's broad range of experience in the Court of Protection encompasses deprivation of liberty, residence and contact, forced marriage, serious medical treatment, capacity to consent to marriage and capacity to consent to sexual relations as well as applications for financial deputyship. She is recommended as "responsive and approachable" and a "formidable presence" in the Court of Protection in Chambers and Partners 2013. **To view full CV click here.**

Adrian Ward
adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a partner of 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.**

Jill Stavert
J.Stavert@napier.ac.uk

Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**