Mental Capacity Law Newsletter July 2014: Issue 48

Practice and Procedure

Introduction

Welcome to the July issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult case on the line between the MHA/the MCA, safeguarding gone wrong, and updates on post-*Cheshire West* developments;

(2) In the Property and Affairs Newsletter: cases on deputies, undue influence and the COP and the duty of attorneys in continuing healthcare disputes;

(3) In the Practice and Procedure Newsletter: a focus on different aspects of access by the media to the court;

(4) In the Capacity outside the COP newsletter: an update on DNACPR notices, a case on charging in relation to monies managed by a Deputy, and updates on the Government's response to the House of Lords Select Committee's post-legislative scrutiny of the MCA 2005;

(5) In the Scotland Newsletter: an update on the legal consequences of delaying reporting by MHOs in welfare guardianship applications, a case on the proper duration of guardianship and an update on the Mental Health Bill.

In this issue, we also introduce two changes. The first is that we are delighted to introduce Simon Edwards as our Property and Affairs editor. The second is that, to reflect that many more decisions are now being reported pursuant to the President's Transparency Practice Guidance, we are introducing 'Short Notes' on cases which do not merit reporting in full here but where one or more short points of wider interest appear. As ever, we welcome feedback to the editors.

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Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors
Adrian Ward
Jill Stavert

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CoP jurisdiction and powers – costs

Summary

We have covered the previous episodes in this rather depressing story in earlier issues of our newsletter. In very summary form, the London Borough of Redbridge sought to take steps to investigate and obtain relief to protect an elderly lady, G. The web in which G described herself as being caught in then extended from her carer and her carer's husband to include the press, Associated Newspapers Limited ('ANL') the publisher of the *Daily Mail*) seeking to be joined to the proceedings. That application was dismissed by the President on 1 May 2014 [2014] EWCOP 1361, the President describing the application (para 47) as "*misconceived*" and that in relation to one suggested basis of participation saying that ANL would be (para 54) "*a mere interloper, an officious busybody seeking to intrude in matters that are of no proper concern to it, seemingly on the basis that it can argue someone else's case better or more effectively than they can themselves*."

Both the local authority and the Official Solicitor, as G's litigation friend, sought an order that ANL pay their costs of the application. Inclusive of VAT, the local authority claimed costs in the sum of £13,242. The Official Solicitor did not quantify his costs. ANL resisted both applications and said that there should be no order as to costs. The applications were made and determined on the papers.

A preliminary question for determination was whether the application was governed by the ordinary costs rules in the COP which – in the case of welfare applications – is COPR r. 157 (i.e. the general rule being no as to costs) or whether it was regulated, pursuant to COPR r. 9 by CPR r. 44.3(2), (4) and (5) – i.e. that the unsuccessful party will be ordered to pay the costs of the successful party. As the President noted at para 5, "i*n each case (see CoPR 2007 rule 159 and CPR 1998 rule 44.3(2)(b) respectively) the court 'may' make a different order, having regard to all the circumstances, including in the one case those referred to in rule 159 and in the other those referred to in the very similarly expressed rules 44.3(4) and (5). So the essential difference is in the 'starting point' or 'default position'*.

The Official Solicitor submitted that rule 157 applies only to "*that part of the proceedings*" that concerned G's personal welfare; that ANL's application for joinder was not one to which sections 1(5) and 4 of the Mental Capacity Act 2005 applied (see by way of analogy *Re AB* [2013] EWCOP B39, para 63, and, to the same effect, *Re PO, JO v GO and others* [2013] EWCOP 3932, para 34) and therefore did not concern G's welfare; and that accordingly the question of costs is regulated not by CoPR 2007 but by CPR 1998.

ANL submitted that the purpose of ANL's application was to enable it to engage in the process of determining issues concerning G's personal welfare – relating to her contacts with ANL journalists – and that the "proceedings", as that word is used in rule 157, plainly *did* concern G's personal welfare.

The President agreed with ANL, holding that:

> "*9. The overall scheme of rules 156-157 is, first, the drawing of a distinction between proceedings which "concern P's property and affairs" and those which "concern P's personal welfare" and, secondly, the principle that, where the proceedings concern both, the costs*

> *should be apportioned between "that part of the proceedings that concerns" the one and "that part of the proceedings that concerns" the other. It is for this reason, and not as suggested by Mr Patel, that rule 157 contains the words upon which he relies. The key word in each of rules 156, 157 and 158 is "proceedings" and not, it may be noted, some other word, for example, "application". The use of the word "proceedings" invites two questions: What are the proceedings? Do they concern property and affairs or personal welfare? In the present case there can only be one answer: the "proceedings" concern G's personal welfare. The fact that G's best interests are not determinative of this particular application does not bear on the fact that the application was, as Mr Wolanski correctly submits, an application made in personal welfare proceedings and made for the purpose of enabling ANL to participate in personal welfare proceedings."*

The President therefore held that the application fell to be determined in accordance with COPR r 157 and 159.

Turning to the determination of the application itself, Sir James Munby P endorsed the approach adopted in *AH and others v Hertfordshire Partnership NHS Foundation Trust and others* [2011] EWCOP 3524, paras 11-12, where Peter Jackson J said:

> "*Where there is a general rule from which the court can depart where the circumstances justify, it adds nothing to say that a case must be exceptional or atypical for costs to be ordered … Each application for costs must be considered on its own merit or lack of merit with the clear appreciation that there must be a good reason before the court will contemplate departure from the general rule.*"

The President was:

> "*18.* […] *troubled by the suggestion that ANL's conduct during the proceedings should be visited in an adverse costs order, as also by the contention (even if factually accurate) that ANL's application was self-serving and mounted for its own gain. This might be thought to reflect a mindset, also exemplified by the letters referred to above, which fails to recognise the vitally important role of the media and the valuable service the media provides, however uncomfortable this may sometimes feel to those steeped in the traditional cultures of the Family Court and the Court of Protection, in shining much-needed light on the workings of these necessarily powerful tribunals. Let it be assumed for the sake of argument – I make no findings on the point – that ANL's reporting of the proceedings merited every word of Cobb J's criticisms. What has that got to do with the question of costs with which I am alone concerned? With all respect to those who may think otherwise, nothing at all. Orders for costs are not to be made as a back-door method of punishing inaccurate or even tendentious reporting. The very suggestion is deeply unprincipled. Were the idea to gain acceptance it would inevitably have a chilling effect. At present, and for reasons which require no elaboration here, the Family Court and the Court of Protection need more transparency, more scrutiny by the media, more reporting – all vital if there is to be more public awareness and understanding – not less.*"

However,

> "*19. Stripped of all rhetoric, the essential point here is very simple: it is that ANL made an application, to be joined in proceedings in which it had no legally recognised interest, which was seemingly unprecedented (para 52 of my previous judgment), which was, as I said, misconceived and which failed completely. The question at the end of the day is whether in all the circumstances, and having regard in particular to the matters referred to in CoPR*

2007 rule 159, it is right to depart from the general rule in rule 157. In my judgment it is, given the way in which I have characterised ANL's application and the reasons why it failed. But that does not mean that ANL should necessarily have to pay all the costs, and I have concluded that that would be to go too far. There are, in my judgment, three factors which, taken in combination, justify this conclusion: first, the public importance of the issues; secondly, the stance adopted beforehand in particular by the Official Solicitor; and, thirdly, the fact that I do not see why ANL should be required to pay two sets of costs. Doing the best I can, and readily acknowledging that any figure is to an extent arbitrary, my conclusion is that ANL should be ordered to pay 30% of the costs of the local authority and 30% of the costs of the Official Solicitor (including his costs of instructing two counsel). The costs, if they cannot be agreed, will have to be the subject of detailed assessment.

20. In concluding I wish to make one thing absolutely clear. The essential factor driving the order for costs I have made in this case was, in addition to the fact it failed, the nature of the application, namely an application to be joined as a party. It should not be assumed that the same approach would have been appropriate if the dispute had been, as it usually is in cases involving the media, a dispute as to the need for or the ambit of a reporting restriction order. Very different considerations arise in such cases. Conventionally, there is often no order for costs, whatever the outcome. Nothing I have said here is intended to have any application in such cases."

Comment

The decision on the preliminary point is of particular interest for confirming the wide definition to be given to the definition of "*personal welfare proceedings*" for purposes of COPR r 157 (the same will apply by analogy to COPR r 156 in relation to property and affairs proceedings). An interesting question that will fall for resolution in an appropriate case is whether the provisions of the CPR can and should be imported in a case where an HRA damages claim has been brought within the scope of COP proceedings. It is not obvious that the ratio of the decision in this case would also apply to prevent – in a proper case – that CPR r.44 should be applied (by COPR r9) so as to provide that the costs of that claim should follow the event.

It is unsurprising, perhaps, that the President should place such emphasis upon the specific reasons that he gave for making a partial departure from the normal costs rules so that his judgment cannot be elevated into one of more general significance in terms of media applications.

The CoP and post-mortem confidentiality

Press Association v Newcastle Upon Tyne Hospitals Foundation Trust [2014] EWCOP 6

Media – anonymity

Summary

This is the follow up to a decision of Peter Jackson J [2014] EWCOP 454 relating to the question of whether it was lawful to withhold blood transfusions from a gravely ill Jehovah's Witness. For reasons discussed in our previous case note, he decided at an urgent hearing that it was; the woman, then identified solely as LM, died before he handed down his judgment.

The hearing had taken place – in part – by videolink to open court in London where it was attended by a member of the Press Association.

LM's treating NHS Trust had applied for a Reporting Restriction Order ('RRO'); the RRO was made at the hearing but the final version was not approved and sealed until shortly after LM died.

In his judgment in the substantive hearing, Peter Jackson J noted that "interesting questions" were raised *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). He had invited legal submissions upon the question, Peter Jackson J took at that stage the 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 RRO on materially identical terms (it would appear) to that which he would have granted had LM still been alive.

The Press Association then applied for a variation of the RRO. The PA did not challenge the order in relation to the medical and care staff, but sought the removal of the embargo on naming LM. The PA also wished to approach the two Jehovah's Witnesses to ask if they would wish to comment about the case. Peter Jackson J noted that, in fact, the order did not contain a 'doorstepping provision' preventing such a request being made to the Witnesses, but they had made clear through the Trust that they did not want to be named or approached.

Written submissions were exchanged with the Trust and Peter Jackson J determined the application on the papers.

The law

Peter Jackson J noted that the power to restrict the publication of identifying information may arise in two ways: (i)following an application under the Human Rights Act to secure the protection of Article 8 rights; (ii) In Court of Protection proceedings, by an order under Part 13 of the Court of Protection Rules 2007. Whatever the basis for the application, the court would take a consistent approach.

Where issues arise during the lifetime of the protected person, the existence of the jurisdiction and the basis on which it is exercised are well understood. Decisions must be made for good reason, applying the discipline of the Human Rights Act in balancing rights arising under Articles 8 and 10, as described by Lord Steyn in *Re S (A child) (Identification: Restrictions on Publication)* [2005] 1 AC 593.

> "*First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.*"

Peter Jackson J set out the relevant provisions of Part 13 of the COPR, and noted that the accompanying Practice Direction (PD13A) implied (at paragraph 15) that a RRO would not extend beyond the death of the protected party unless the interests of others require it, but that the PD was not addressing the issue now under consideration.

Peter Jackson J considered two previous authorities:

1. *Re C (Adult Patient: Restriction of Publicity After Death)* [1996] 1 FCR 605, where a non-

time limited order under s.11 Contempt of Court Act 1981 had been made alongside an order authorising withdrawal of treatment from a young man in PVS. Soon after the young man's death, the parties sought confirmation that the order remained effective so that the identity of his family and his doctors and carers could not be published. Sir Stephen Brown P held that the order remained in force, the factors underpinning his decision being (i) the position of the doctors and carers, (ii) the position of the family, (iii) the issue of medical confidentiality, and (iv) the interests of justice in similar cases. Sir Stephen Brown expressly noted that the application was unopposed by the press and said that the outcome might be different had he been asked to carry out a balancing exercise;

2. *Re Meek* [2014] EWCOP 1. In that case, the subject of COP proceedings that had taken place in private concerning her property and affairs died between the date of the hearing and publication of the judgment. It had been intended that her anonymity should endure during her lifetime; the issue was whether the judgment should remain anonymised after her death. In deciding that it should not, Judge Hodge QC had said at paragraph 104:

> "*I accept that the death of the protected person (P) will not automatically render it appropriate to authorise the publication of any relevant Court of Protection judgment in unanonymised form; but it is clearly a relevant consideration. P's death means that P no longer has any need for the special protection afforded by anonymity. However, as Sir Stephen Brown recognised in Re C (cited above), the court must consider the potential effect on P's relatives and other family members, on clinicians treating P, and on persons caring for P, if they knew that on P's death, their anonymity might be lost.*" (emphasis added)

As Peter Jackson J noted (at paragraph 22): "[o]*n one reading, the emphasised sentence begs the question with which I am faced, namely whether the protected person herself has any claim to anonymity after death.*"

It was common ground between the parties that the Court of Protection had the power to make an order preventing the reporting of the deceased's name in order to uphold the rights of others, such as medical or care staff or family members. Peter Jackson J held in this regard (at paragraph 33) that "[t]*his principle was upheld by Sir Stephen Brown in Re C and in my opinion his analysis remains convincing following the implementation of the Human Rights Act, which changed the analytical approach to these cases, rather than transforming the court's response to them: see Re S at 605G-606A.*"

What was in dispute was the existence of any independent right to protection for the deceased person herself. As Peter Jackson J noted at paragraph 34 "[t]*his comes into sharp focus in LM's case, because she had no known family or friends. In consequence, she cannot be kept anonymous for the sake of others, as was, at least in part, the case in Re C.*"

That was, though, not the end of the matter. The balance between the competing interests of maintaining the confidentiality of personal information admitted to the Court and the public need to understand and have confidence in the way in which decisions, both generally and in individual cases, have been reached were (he held at paragraph 35) "*normally reconciled by the publication of an anonymised judgment, a*

convention most recently reflected in the Practice Guidance: "Transparency in the Court of Protection", issued by the President on 16 January 2014" [Nb, guidance which – rather ironically – seems to have disappeared in the transfer across to the new Judiciary website, a matter that we have raised with those responsible; it is in any event available on Bailii].

Peter Jackson J compared the approaches taken where hearings had been held in public (as would usually be the case in applications relating to serious medical treatment) and in private. Whilst he noted that the making of an RRO is a step beyond the issuing of an anonymised judgment, the same principles are in play: "*If the court has sought to protect private information in an anonymised judgment, the case for protecting it by a RRO may be a strong one*" (paragraph 38). He therefore held that he would:

> "[39] *… approach the rights of those whose cases have been heard in private and those whose cases have been heard in public on an equal footing. Once one reaches the balancing exercise, the right to report may weigh particularly heavily in cases heard in public. But that does not mean that the existence of the power to limit reporting should depend upon whether the case is heard in public or in private or that, following the death of the subject of the proceedings, a balancing exercise is to be performed in one case but not in the other.*"

Whilst, as he noted, in very many circumstances, legal rights will end with death, the situation that Peter Jackson J was confronted with was different to – say – libel proceedings, because it was "self-evident" that "*the information that is said to deserve protection was gathered during the lifetime of the protected person in the course of proceedings that existed in order to protect her welfare. In my judgment there is no good reason to conclude that the person's death should lead automatically to all protection being lost. On the contrary, there are very good reasons why the court should retain the power to restrict where necessary the information that can be published, particularly where the information may only have come to wider attention as a result of its own proceedings*" (paragraph 41).

Peter Jackson J therefore held that

> "*[42]… where a court has restricted the publication of information during proceedings that were in existence during a person's lifetime, it has not only the right but the duty to consider, when requested to do so, whether that information should continue to be protected following the person's death, and to balance the factors that arise in the particular case.*"

Peter Jackson J agreed with the observation of HHJ Hodge QC in *Re Meek* (at paragraph 104) that "*P's death means that P no longer has any need for the special protection afforded by anonymity*" to the extent that it conveys that, at least in the eyes of the law, a dead person cannot be affected by what is said about them. However:

> "[43] *I do not take this to mean that protection required in life is automatically lost upon death, and I therefore disagree with Mr Dodd's submission that 'Once an individual is dead the rules must cease to apply in relation to that person, because they are no longer necessary, the dead having no interests or rights which can be protected or affected by the action of any human agency' There are a number of considerations that may make it necessary and proportionate to continue to uphold after death the privacy that existed in lifetime. Two of these are referred to in Re C: (i) medical confidentiality, where the death of the patient does not entitle the doctor to publish her medical records: on the contrary, the doctor may only do that in prescribed circumstances;*

(ii) the interests of justice, which require that people should not be deterred from approaching the court out of fear that any privacy will automatically lapse on death. To these considerations, I would add the need, referred to above, to treat the rights of those who are subject to public and private hearings with consistency. The COP Rules must be read conformably with the court's obligations under the Human Rights Act and any other approach would not do this.

44. Lastly, I do not consider that the fact [relied upon on behalf of the PA] that the automatic anonymity of rape victims [granted by the provisions of Sexual Offences (Amendment) Acts 1976 and 1992] ends on death takes the matter further.. That is a specific statutory provision in a different context and it is even possible to envisage a situation where the court, acting independently of statute, could preserve the anonymity of a rape victim after death."

The balancing exercise in LM's case

In light of his conclusion that he was obliged as a matter of law to consider whether the RRO should be continued so as to continue to protect LM's identity, Peter Jackson J went on to conduct the requisite balancing exercise required by *Re S*. On the specific facts of her case, he concluded that the balance in this case fell in favour of discharging that part of the order that conferred anonymity on LM. He emphasised, however, that "*there is a balance to be struck, and in other cases the conclusion might be different*" (paragraph 48).

The order was not disturbed insofar as it related to the doctors/carers and the Jehovah's Witnesses, Peter Jackson J noting in respect of the latter that "*the Witnesses acted to assist the court in an emergency and should not be exposed to unwanted publicity as a result*" (paragraph 49).

[LM's name is now – properly – available on the internet. In light of Peter Jackson J's observation that LM was a private person who would not have wanted her private information to be made public, we have chosen not to give it here].

Comment

This case is of significant interest for two particular reasons. First, it is the first contested case of which we are aware in the question of the survival of confidentiality after death has been considered (the pre-HRA case of *Re C* was not contested, as Peter Jackson J noted). We would suggest that the conclusion reached was the only correct one, allowing as it does for – and indeed requiring that – a balancing exercise to be carried out on the facts of the individual case.

Second, the case is of interest for the way in which Peter Jackson J sought to downplay the differences between cases heard in public and cases heard in private as regards rights that might arise as to the confidentiality of personal information relating to P. It is undoubtedly correct that, in light of the Transparency Guidance, the information that makes its way into the public domain as to (for instance) the names of the public authorities in question is now – in general – likely to similar in relation to both types of case (the Guidance providing that "public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named (paragraph 20(i))." However, there is one very significant difference: a hearing that has taken place in public will, by definition, be one members of the media will have been able to attend, whereas they will not be able to attend a hearing that has taken place in private. Members of the media will therefore be able to hear (often contextual) details of the case that do not make their way into the judgment; by contrast (and in

the immortal words of Donald Rumsfeld) information that does not appear in an anonymised judgment will be an unknown unknown to the media. The principles that apply in relation to decisions as to anonymisation and the granting of a RRO may therefore be the same, but they take place against a very different backdrop.

In light of this last observation, it will be of particular interest to see whether there is a drive (whether through the mechanism of the newly constituted ad hoc Rules Committee, or otherwise) to pick up on the President's oft-repeated desire to align practice in the Court of Protection to that in the family courts where, since the reforms introduced in April 2009, is that accredited journalists have a right to attend most family court hearings (including hearings of cases dealing with what in the Court of Protection would be called personal welfare) unless proper grounds for excluding them can be established on narrowly defined grounds.

Miscreants beware – protecting the identity of a wrong-doer

Re DP; The Public Guardian v JM [2014] EWCOP 7

Media – anonymity

Summary

In this appeal from one aspect of the decision of Senior Judge Lush in *Re DP* [2014] EWCOP B4 (the first decision reported under the new Practice Guidance on Transparency), Sir James Munby P has provided important clarification as to the approach he intends should prevail as regards the identification of P.

In his decision to revoke the power of attorney granted by DP to JM, Senior Judge Lush had drawn specific attention to the facts (i) that JM had sold DP's house for £165,000 and placed the net proceeds of sale in an account in his name (subsequently arranging to put the account in DP's name when he became aware that the OPG was investigating), (ii) that JM had attempted (unsuccessfully) to persuade Aviva to transfer DP's investment bond into an account in his own name, (iii) that JM had made a gift to himself of £38,000 from DP's monies (this being a breach of section 12 of the Act), (iv) that JM was unable to account for drawings from DP's monies totalling £10,020, and (v) that JM had paid himself a 'salary' totalling £8,340 (a claim that the Senior Judge described as an "*inherent artificiality*" and in any event a breach of the terms of the lasting power of attorney). As the Senior Judge recorded in his judgment, JM had asked why he was still being investigated by the OPG when the police, following an investigation, had concluded that he had no case to answer. As the Senior Judge commented drily (para 44): "*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*."

The Senior Judge did not name JM in his judgment. He did not explain why (nor, indeed, was there anything in his judgment to show that this was a matter to which he expressly directed his mind). As the President noted "[p]*ossibly bearing on the point are certain matters to which he did refer: the fact that JM lives in the Dartford postcode area, that he had known DP since 2006 and been her gardener when she lived in Orpington, and that DP is now living in a residential care home in the London Borough of Bromley*."

The *Daily Mail* then ran two stories reporting upon the case and criticising in strong terms both the facts that JM had not been named or charged.

ANL (the publishers of the *Daily Mail*) applied to the court for an order permitting the identification of JM in reports of the case.

The application was listed before the President on 18 June 2014 (at which, inter alia, JM was present in person); he granted the application and reserved his reasons.

In his judgment, Sir James Munby was at pains to emphasise that he was – and could not – be concerned with the tenor of JM's complaint that ANL was using him as a scapegoat by using the case to make a political point to get the law changed. However, Sir James Munby P held, it was clear that

> *"17. If JM is being defamed or treated unfairly by a newspaper he has remedies elsewhere. But they are not matters for this court. I venture to repeat what I said in Re P (Enforced Caesarean: Reporting Restrictions) [2013] EWHC 4048 (Fam), [2014] FLR forthcoming, para 26:*
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> > *'So far as concerns the relationship between the media and the court I … merely repeat … , so as to emphasise, three key principles (Re J (Reporting Restriction: Internet: Video) [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, paras 37-39). First, that 'It is not the role of the judge to seek to exercise any kind of editorial control over the manner in which the media reports information which it is entitled to publish'. Second, that 'Comment and criticism may be ill-informed and based, it may be, on misunderstanding or misrepresentation of the facts [but the] fear of such criticism, however justified that fear may be, and however unjustified the criticism, is … not of itself a justification for prior restraint by injunction of the kind being sought here, even if the criticism is expressed in vigorous, trenchant or outspoken terms … or even in language which is crude, insulting and vulgar'. Third, that 'It is no part of the function of the court exercising the jurisdiction I am being asked to apply to prevent the dissemination of material because it is defamatory … If what is published is defamatory, the remedy is an action for defamation, not an application in the Family Division for an injunction.'*
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> *Exactly the same goes, in my judgment, for the Court of Protection."*

Rather, all the President could be concerned with was whether JM should be identified, a matter to be determined in accordance with well-established principles equally applicable in the Court of Protection as in the Family Court (in cases including *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, *Re Webster; Norfolk County Council v Webster and Others* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, sub nom *Re Webster (A Child)* [2007] EMLR 7, and *Independent News and Media Ltd and others v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262).

Sir James Munby P placed particular attention to paragraphs 63-64 of the judgment Lord Rodger of Earlsferry JSC, giving the judgment of the Supreme Court, in *In re Guardian News and Media Ltd and others* [2010] UKSC 1, [2010] 2 AC 697. Whilst he noted that the passage is well-known, at least in some quarters, he noted that it merited quotation

in full for the benefit of those practising or sitting in the Court of Protection:

> *"63 What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed … This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.*
>
> *64 Lord Steyn put the point succinctly in In re S [2005] 1 AC 593, 608, para 34, when he stressed the importance of bearing in mind that*
>
> > *'from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.'*
>
> *Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer."*

In the balancing exercise in the instant case, the rights in play were identified as being:

1. The rights under Article 10 enjoyed by both ANL and its readers;
2. JM's Article 8 rights;
3. DP's Article 8 rights.

Sir James Munby P considered that the impact on DP if JM were to be identified was likely to be minimal. *"Quite apart from DP's current state of health,"* he held at paragraph 22, *"the reality is that few if any additional people will be able to link JM to DP if he is now identified. Almost all, in my assessment, are already 'in the know', either because they were already aware of what was happening or because, having read the Daily Mail articles, they have been able to make the link."*

As to JM's Article 8 rights, the issue was ultimately very simple:

> *"27. Why should JM be protected from the normal consequence of a judicial finding of misconduct, namely the identification of the wrongdoer in a published judgment? Nothing JM has said, or which could sensibly be put forward on his behalf, provides any reason why, looked at from his perspective, he should be spared the consequences of his misbehaviour.*

> *If publication of his identity and re-publication of the Senior Judge's findings, lowers JM in the estimation of right-thinking readers of the Daily Mail or other organs of the media, then so be it. He has only himself to blame. Why should JM be any more entitled to anonymity, just because the only judicial finding thus far has been made by the Court of Protection, than he would be if his self-same conduct was being considered in the Chancery Division or the Crown Court?*
>
> *28. The only possible argument to the contrary is dependent upon the impact, if any, on DP. But the reality, as I have already concluded, is that any impact on DP is likely to be minimal."*

The President therefore held that "*the balance comes down heavily and decisively in favour of the public being told who JM is; in favour of the Daily Mail and others being free to identify him as the person referred to by the Senior Judge in his judgment*." ANL were therefore granted the order they sought.

Comment

What the President took away from ANL with one hand in the *Re G* case he gave to ANL in this case. Indeed, the reasons for his very different conclusions indicate precisely the balancing exercises that need to be struck in this jurisdiction. In *Re G*, ANL were robustly refused permission to become a party for purposes of joining in the instruction of a psychiatrist to report upon G's capacity to communicate with the press; in *Re DP*, the President had little hesitation in finding that JM could be named and not thereby be protected from the consequences of his misconduct by the mere fact that the proceedings had taken place in the Court of Protection. There are very delicate exercises to be conducted in the (entirely laudable) pursuit of opening up the workings of the Court as far as possible to reporting, and these judgments (combined with the judgment in the *Press Association v Newcastle upon Tyne Hospitals Foundation Trust*) indicate some of the ways in which they will be struck in future.

Short Note: Restricting rights to apply to the CoP

A Local Authority v B, F and G [2014] EWCOP B21 HHJ Cardinal

Practice and Procedure – Other

Short Note

This is the second reported judgment in these proceedings. The first involved the imposition of a Hadkinson Order on B's father. The judge made final determinations in the case. The case is of note because the judge was asked in the context of injunctions imposing stringent restrictions on contact between B and her father and grandmother to impose a 5 year period where there could be no application to the court (for example seeking direct contact and varying the injunction on contact) save with the leave of a Judge of the Court of Protection. This was intended to provide a '5 year carapace of peace for B'.

The father and grandmother did not attend the hearing (the father would have been likely to be arrested if he attended and the grandmother was the subject of a future contempt application – see the Short Note.

Short Note: Contempt again

Derbyshire County Council v Kathleen Danby [2014] EWCOP B22 (Fam) (HHJ Cardinal)

Practice and Procedure – Other

Short Note

This is the third reported case in these proceedings. The first involved the imposition of a Hadkinson Order on B's father and the second the imposition of a 4 year period where an application could not be made to discharge injunctions on contact without permission (see immediately above).

This was an application by the local authority that B's grandmother had breached several elements of an injunction against her having contact with her granddaughter.

The judge first satisfied himself that the technical requirements for a committal application had been complied with and then reviewed the evidence that the grandmother had breached the injunction order (including CCTV which showed that she had arranged to meet and had met her granddaughter in breach of the injunction). He held that he was satisfied to the criminal standard of proof that the breaches of the injunction complained of by the local authority were all made out.

The judge sentenced the grandmother to three months' imprisonment concurrently. He issued a warrant for her arrest and listed the matter for review in two months' time. At the review hearing, the grandmother was invited to attend court, mitigate and try to persuade the judge to take a different view.

It is notable (and unsurprising following the furore which attached to the same judge due to the Wanda Maddocks case) that HHJ Cardinal expressly addressed the issue of whether the Practice Guidance issued by the President and the then Lord Chief Justice of 3 May 2013 had been complied with. He considered that it had: it was a public hearing with proper notice being placed outside the court and downstairs in the court's reception area in compliance with the Practice Direction of 4 June 2013. Reference to the guidance having been complied with did not deter the Daily Mail (http://www.dailymail.co.uk/news/article-2653442/Secret-court-jails-gran-hugged-granddaughter-Pensioner-sentenced-three-months-disobeying-order-not-teenager.html). The Mail made cryptic reference to "lawyers […] debating whether, by failing to give any information about why Mrs Danby is banned from seeing her granddaughter, Judge Cardinal had met the full requirements brought in after the Maddocks case". Given that the first part of the judgment deals with the reasons for the injunction and the precise terms of the injunction (imposed by Her Honour Judge Thomas in the Court of Protection) the debate is likely to have been short.

Wishes, feelings and the pregnant child

In the matter of X (A Child) [2014] EWHC 1871 (Fam) (Munby J)

Practice and Procedure – Other

Summary

This was an urgent application relating to a 13 year old girl who was subject to ongoing care proceedings. At the time of the hearing she was approximately 14 weeks pregnant. The issue before the court was whether or not the pregnancy should be terminated.

The President first highlighted the tension between the need for the judgment to be given in public and the requirement that X's identity should not be revealed. In this case the judge held that there was a compelling need to ensure that nothing was published that might lead, even if only

on a 'jigsaw' basis, to the identification of X. Consequently, only the advocates were named.

The judge began by setting out the function of the court in such a case. He adopted the approach of Holman J in *Re SB; A Patient; Capacity to Consent to Termination [2013] EWCOP 1417* (which related to an adult who lacked capacity, the same general principles applying)*:*

> "*there is no question in this case, or indeed in any case, of a court, by order, requiring any doctor to perform an abortion or termination. An abortion will only happen in this case if, as s 1 of the Abortion Act 1967 requires, two registered medical practitioners are of the opinion, formed in good faith, that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman. Further, it will only happen if a doctor or doctors, in the exercise of their own professional judgment, voluntarily decide to perform the abortion.*"

In such a case, the first question was for the doctors: are the conditions in section 1 of the 1967 Act met. If they are not, then that is the end of the matter. The court cannot authorise (and certainly could not direct) the doctors to act unlawfully. If the conditions of section 1 of the 1967 Act are satisfied then the role of the court is to supply, on behalf of the mother, the consent which is a prerequisite to the lawful performance of the procedure. The 'ultimate determinant' in cases concerned with a child or an incapacitated adult is the mother's best interests.

In addressing the question of the mother's best interests, the court is entitled to proceed on the basis that if there is to be a termination, the conditions in s.1 of the 1967 Act are satisfied. This allows the court to proceed on the basis firstly that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, to the life of the pregnant woman or of injury to her physical or mental health or that the termination is necessary to prevent grave permanent injury to her physical or mental health. Secondly, if any of the conditions are satisfied the court was already in a position where on the face of it, the interests of the mother may well best be served by the court authorising the termination.

Another vitally important factor and one which may well end up being determinative (and which in this case was determinative) is the wishes and feelings of the mother:

> "*A child or incapacitated adult may, in strict law, lack autonomy. But the court must surely attach very considerable weight indeed to the albeit qualified autonomy of a mother who in relation to a matter as personal, intimate and sensitive as pregnancy is expressing clear wishes and feelings, whichever way, as to whether or not she wants a termination.*"

The evidence was clear that X lacked *Gillick* capacity. X was initially against having an abortion. Save for X's initial wishes and feelings, the preponderance of evidence was that it would be in her best interests to have a termination. One factor which was important to take into account was the likelihood of X being able to keep her baby if there was no termination. The judge expressed the view that there was 'very little chance' that X would be able to keep her baby if it was born. Having given that view, the judge considered that he should not be further involved in the care proceedings and he recused himself.

By the end of the hearing, X's views had changed and she was in favour of a termination. Given that

X's expressed wishes accorded with the judge's assessment of her best interests it was appropriate to supply the necessary consent to enable the termination to proceed.

Comment

This case is a useful reminder of just how determinative the child or incapacitated adult's wishes and feelings are in cases where the court is providing consent for the termination of a pregnancy. Only the most powerful and compelling factors could displace expressed wishes and feelings on such a personal and intimate matter.

Less central to the case (but interesting for parallels in the COP) is the application of the *Practice Guidance on Transparency in the Family Courts*. The need to protect X's privacy in this case provided a compelling reason why only the advocates names were published as it may otherwise have been possible to piece various elements together to identify X.

Short Note: Good practice in habitual residence cases

Re F (A Child) [2014] EWCA Civ 789 (Court of Appeal (Sir James Munby P, Ryder LJ and Bodey J))

Practice and Procedure – Other

Sir James Munby P, sitting in the Court of Appeal, has set out some basic propositions that apply in relation to the determination of habitual residence in cases involving children. Whilst they were stated in the context of the application of Council Regulation 2201/2203 (known as Brussels II revised (BIIR)), they are of wider application and it suggested that (with one exception highlighted below) the core procedural aspects apply equally to the determination of habitual residence by the Court of Protection:

> "11.
> […]
> *i)* *Where BIIR applies, the courts of England and Wales do not have jurisdiction merely because the child is present within England and Wales. The basic principle, set out in Article 8(1), is that jurisdiction under BIIR is dependent upon habitual residence. It is well established by both European and domestic case-law that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to make a care order merely because the child is present within England and Wales. The starting point in every such case where there is a foreign dimension is, therefore, an inquiry as to where the child is habitually resident.*
>
> ii) […]
>
> *iii)* *Jurisdiction under Article 8(1) depends upon where the child is habitually resident 'at the time the court is seised.'* [note, in cases under Schedule 3 to the MCA 2005, jurisdiction under the MCA 2005 depends upon where the individual is habitually resident at the point when the court determines the question of habitual residence: Re PO; JO v GO [2013] EWHC 3932 (COP) at paragraph 21]
>
> *iv)* *Since the point goes to jurisdiction it is imperative that the issue is addressed at the outset. In every care case with a foreign dimension jurisdiction must be considered at the earliest opportunity, that is, when the proceedings are issued and at the Case Management Hearing: see Nottingham City Council v LM and*

others [2014] EWCA Civ 152, paras 47, 58.

v) Good practice requires that in every care case with a foreign dimension the court sets out explicitly, both in its judgment and in its order, the basis upon which, in accordance with the relevant provisions of BIIR, it has either accepted or rejected jurisdiction. This is necessary to demonstrate that the court has actually addressed the issue and to identify, so there is no room for argument, the precise basis upon which the court has proceeded: see Re E, paras 35, 36.

vi) Judges must be astute to raise the issue of jurisdiction even if it has been overlooked by the parties: Re E, para 36.

There is a further point to which it is convenient to draw attention. If it is, as it is, imperative that the issue of jurisdiction is addressed at the outset of the proceedings, it is also imperative that it is dealt with in a procedurally appropriate manner:

i) The form of the order is important. While it is now possible to make an interim declaration, a declaration made on a 'without notice' application is valueless, potentially misleading and should accordingly never be granted: see St George's Healthcare NHS Trust v S, R v Collins and Others ex p S [1999] Fam 26. If it is necessary to address the issue before there has been time for proper investigation and determination, the order should contain a recital along the lines of 'Upon it provisionally appearing that the child is habitually resident …' Once the matter has been finally determined the order can contain either a declaration ('It is declared that …') or a recital ('Upon the court being satisfied that …') as to the child's habitual residence.

ii) The court cannot come to any final determination as to habitual residence until a proper opportunity has been given to all relevant parties to adduce evidence and make submissions. If they choose not to avail themselves of the opportunity then that, of course, is a matter for them, though it is important to bear in mind that a declaration cannot be made by default, concession or agreement, but only if the court is satisfied by evidence: see Wallersteiner v Moir [1974] 1 WLR 991."

Short Note: Challenge to Exceptional Case Funding succeeds

Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin) (Collins J)

Practice and Procedure – Other

In this judicial review, Collins J scrutinised the approach adopted by the Director of Legal Aid Casework to applications for Exceptional Case Funding (in which only 1% of non-inquest applications have succeeded since 1 April 2013). Collins J held that the guidance issued by the Lord Chancellor on ECF set too high a threshold when stating that the test was whether the withholding of legal aid would make assertion of the claim practically impossible or lead to obvious unfairness. Importantly, he considered matters both by reference to Article 6 ECHR and by reference to the procedural requirements in Article 8 ECHR which may apply even where Article 6 ECHR is not strictly in play:

"28. It seems to me to be clear that the key considerations are that there must be effective access to a court and that there must be overall fairness in order that the

requirements of Article 6 are met. One aspect of effective access must be the ability of a party to present all necessary evidence to make his case and to understand and be able to engage with the process. So much is apparent from AK & L v Croatia [n.b. it appears that this is actually X v Croatia Application No 11223/04 concerning the procedural aspects of Article 8 ECHR]. It must be borne in mind that both before a tribunal and a court the process is adversarial. Thus the tribunal cannot obtain evidence where there are gaps in what an applicant has been able to produce. Equally, it may have difficulties if there is defective written material put before it in appreciating whether there is any substance to a claim or even if any particular human rights claim is properly raised. I think the words 'practically impossible' do set the standard at too high a level, but, as Chadwick LJ indicated [in Perotti v Collyer-Bristow [2003] EWCA Civ 1521], the threshold is relatively high. No doubt it would generally be better if an appellant were represented, but that is not the test. Nevertheless, the Director should not be too ready to assume that the tribunal's experience in having to deal with litigants in person and, where, as will often be the case, the party's knowledge of English is non-existent or poor, the provision of an interpreter will enable justice to be done."

Whilst these dicta are from the immigration context, they have a wider significance including in the Court of Protection.

Short Note: Varying substantive decisions

TF v PJ [2014] EWHC 1840 (Admin) (Mostyn J)

Practice and Procedure – Other

On an application to revoke an order made under the 1980 Hague Child Abduction Convention, Mostyn J has held that the reference in the Family Procedure Rules 2010 r.4.1(6) to the court having a power to vary or revoke an order made under the rules was not confined to procedural or case management orders. Rather, it could apply equally to final orders such that (for instance) a High Court judge may vary or revoke a substantive final order made by another High Court judge. Applying dicta from the Court of Appeal in civil cases (*Tibbles v SIG Plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591 and *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, [2014] 1 WLR 795, Mostyn J held that the only circumstances where the rule could be invoked were where there had been non-disclosure or a significant change of circumstances.

It is suggested that this approach holds equally true under the provisions of rule 25(6) of COPR 2007 which provides – in identical terms to FPR 2010 r 4.1(6) that "*A power of the court under these Rules to make an order includes a power to vary or revoke the order*."

Short Note: The pressures on the Official Solicitor

Re DE (A Child) [2014] EWFC 6 (Baker J)

Practice and Procedure – Other

On an appeal as to how the court should determine an application by parents for an injunction under the Human Rights Act 1998 to prevent a local authority removing their child who is living at home under a care order, Baker J made concluding observations of wider relevance about participation in proceedings:

"51. Finally, this case has highlighted a further major problem. These parents face the

prospect of losing their son permanently. If this prospect had arisen in the context of care proceedings, they would be entitled as of right to non-means tested legal aid. It is difficult to see why similar automatic public funding should not be available where the local authority proposes the removal of a child living at home under a care order and the parents apply to discharge that order and for an interim injunction under s.8 HRA. The justification for automatic public funding in care proceedings is the draconian nature of the order being claimed by the local authority. Where a local authority seeks to remove a child placed at home under a care order, the outcome of the discharge application may be equally draconian. Because this father is working, and earns a very low wage from which he has contributed to the support of his family, he, and possibly the mother, are disqualified from legal aid. Miss Fottrell and Miss Sprinz and their solicitors are at present acting pro bono. It is unfair that legal representation in these vital cases is only available if the lawyers agree to work for nothing.

52. This problem is compounded in this case because of the learning difficulties of the parties and in particular the father. I have made observations in other cases about the obligation on all professionals in the family justice system to address the particular difficulties experienced by parents suffering from learning difficulties – see Kent CC v A Mother and others [2011] EWHC 402 (Fam) and Wiltshire Council v N [2013] EWHC 3502 (Fam). A parent with learning difficulties who is not entitled to legal aid is at a very great disadvantage when seeking to stop a local authority removing his child.

53. On the basis of evidence at present available, it seems plain that the father lacks capacity to conduct litigation and therefore needs to be represented by a litigation friend. Such are the demands on the Official Solicitor's time and resources that there is inevitably a delay in his deciding whether or not to accept instructions, and the fact that the father is not entitled to public funding adds to the complications. In this case, I hope that the Official Solicitor will give urgent consideration to accepting the invitation to act as litigation friend. The current system in which so much of the responsibility for representing parents who lack capacity falls on the shoulders and inadequate resources of the Official Solicitor is nearing breaking point.

54. I have drawn these concerns to the attention of the President of the Family Division. It may be that he considers that they are of sufficient importance to bring to the attention of the Family Justice Board and others responsible for the family justice system."

A new Ad Hoc Rules Committee

One of the few concrete commitments given in the Government's response to the Select Committee's post-legislative scrutiny report, available here, related to amending the Court of Protection Rules:

> *"9.2 The Government has committed to taking forward the revision of the Court of Protection Rules and had previously agreed with the President of the Court of Protection that we would await the outcomes from the House of Lords Report prior to commencing the work. Following the publication of the Report, the President has written to the Lord Chancellor regarding the formation of the Rules Committee. It is our intention to have the new Rules in place by April 2015."*

That Committee is now in the process of formation and beginning its work; we will keep you abreast of developments as and when we can.

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Conferences at which editors/contributors are speaking

The duty of patient involvement in DNACPR decisions

Tor is speaking at a seminar at 39 Essex Street at the Hall in Gray's Inn at 6pm on 3 July on the implications of the decision in *Tracey*. The seminar is chaired by Fenella Morris QC, and the other speakers are Vikram Sachdeva Professor Penney Lewis of King's College London, and Dr Jerry Nolan, Royal United Hospital, Bath. For more details and to reserve a place, please email beth.williams@39essex.com.

'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available here.

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

Advertising conferences and training events

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

Chambers Details

Our next Newsletter will be out in early August. 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.

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

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

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

Peter Campbell
Practice Manager
peter.campbell@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

For all our services: visit www.39essex.com

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Contributors: England and Wales

Alex Ruck Keene
alex.ruckkeene@39essex.com

Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (forthcoming, 2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicylaw.org.uk. 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 cases. 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.

Anna Bicarregui
anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

Simon Edwards
simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Contributors: Scotland

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.