MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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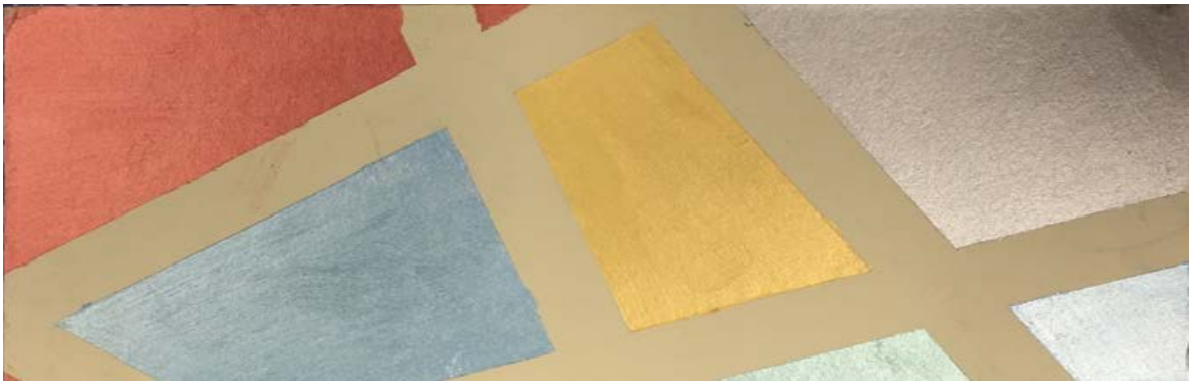

Welcome to the June 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the JCHR has questions for the Government about the delay to the LPS; anorexia and capacity, and Caesarean sections and P-centricity;

(2) In the Property and Affairs Report: Hegel and testamentary capacity, and cross-border management of personal injury settlements;

(3) In the Practice and Procedure Report: a freeze on freezing injunctions, and ss.48 and 49 MCA under the spotlight;

(4) In the Wider Context Report: Mental Health Act reform potential and pitfalls, an update to the Mental Health and Justice Capacity Guide, and food refusal in prison;

(5) In the Scotland Report: Issues with powers of attorney – an unprecedented tangle, the Powers of Attorney Bill and Implementation of the Scott Report.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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

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EG & Anor v AP & Ors [2023] EWCOP 15 (Senior Judge Hilder)

CoP jurisdiction and powers – injunctions

Summary

Senior Judge Hilder has further refined our understanding of the scope of the Court of Protection's power to make injunctions. This issue has been the subject of recent appellate level consideration in *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312, in which the Court of Appeal confirmed that the Court of Protection (1) has the power to make orders, including injunctions, to give effect to, or otherwise in connection with an order under s.16(2)(a) (i.e. a decision made on behalf of P); and (2), given that its power to make injunctions is founded upon s.47, which cloaks the Court of Protection with the same powers as the High Court 'in connection' with its jurisdiction, the Court of Protection is required to apply the test of whether an injunction is "just and convenient." Baker LJ gave two examples where an injunction might be found to be "just and convenient":

> *72.* […] *suppose that the Court decided under s16(2) that a fund held by A should be transferred to be held by B for P instead. If there is no reason to suppose that A will be obstructive, it may well be enough for the Court to decide that it is in P's best interests that the funds be transferred from A to B and make an order to that effect in the expectation that A would duly co-operate. If however there is a risk that A will seek to frustrate the order, the Court can undoubtedly add an injunction ordering A to transfer the fund. That would be an example of an ancillary order intended to make the s16(2) order effective.* ('the transfer example')

> *73.* […] *a useful analogy can be found in Broad Idea itself. There Lord Leggatt identified the rationale for the grant of freezing injunctions as the so-called "enforcement principle", namely the principle that the essential purpose of a freezing order is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment. Then, having identified the relevant interest as the claimant's (usually prospective) right to enforce through the court's process a judgment or order for the payment of a sum of money, he continued at [89]:*

> > *"A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondent's right to use its assets for ordinary business purposes. The purpose of the*

> *injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced."* ('the enforcement example')

Before SJ Hilder, the question – on appeal – was whether the Court of Protection could grant an injunction prohibiting capacitous persons from disposing of assets in which others alleged that P had an interest, but where that interest had not been determined. SJ Hilder concluded that it could not.

The factual matrix and procedural history was somewhat complicated, and SJ Hilder had a number of somewhat pointed observations to make about the procedural history. For present purposes, however, of immediate relevance was that, against the backdrop of a dispute about the proceeds of sale of a house which had previously been owned by the donor of a power of attorney, an application was before the Deputy District Judge for an order under s.22 MCA. In the context of that application, the Deputy District Judge granted a proceeds of sale injunction (a 'freezing injunction'). Before Senior Judge Hilder, it was common ground that the Court of Protection had no jurisdiction to determine the extent of the donor's interest in the proceeds of sale.

Senior Judge's Hilder's first conclusion as to the Court of Protection's ability to grant a freezing injunction was linked to the fact that the application had been founded on s.22 MCA:

> *68. On the application formally before the Court, orders were sought pursuant to section 22 of the Mental Capacity Act, not section 16. That section has no direct equivalent of section 16(5). Instead s22(4) specifies the court's powers. In my judgment it would stretch the s47 concept of 'connection with' the s22 jurisdiction beyond what it can bear to suggest that a freezing injunction is so linked to a determination of validity of lawful authority as to be ancillary to preventing frustration of the validity decision. Both of the powers of s22(4) can be fully implemented irrespective of what happens to disputed assets.*

However, Senior Judge Hilder continued, even if the matter could be framed by reference s.16(2), the freezing injunction was a step too far:

> *69. I accept that the Deputy District Judge was considering - despite no such application having been made and apparently not immediately - granting someone authority to conduct proceedings on behalf of MMP in respect of the property dispute, then at least there is potential for a section 16 order (as provided by section 18(1)(k) of the Act) so section 16(5) would apply. Can it be said that a freezing injunction is 'necessary or expedient' for giving effect to, or otherwise 'in connection with' the granting of authority to conduct proceedings? Again, in my judgment the answer to that question must be negative. Litigation can be properly conducted irrespective of what happens to disputed assets. A freezing injunction goes materially beyond the conduct of litigation, into its determination. It is not within the realms of effectively conducting litigation to freeze disputed assets, even when the conduct of litigation has reached the point of enforcement; so such an order cannot be ancillary to preventing frustration of such authority. In substance and intent, a freezing injunction is ancillary to a power to determine the dispute, which the Court of Protection does not have.*

Senior Judge Hilder cross-checked her two conclusions against the examples given by Baker LJ in *Re G*:

> *70*
>
> a. *The transfer example: the clear assumption of the example is that the funds in question are held "for P" ie there is no dispute about P's beneficial entitlement; it is merely a question of who holds them for P. So the example tells us nothing directly about whether the Court of Protection can grant freezing injunctions against assets in which P may have an interest.*
>
> *The s16 decision contemplated is that B should hold P's funds. The ancillary order contemplated is an injunction to compel the current holder, A, to transfer the funds to the intended holder, B. Clearly the transfer is necessary to the decision, and clearly if A will not make it voluntarily, an order compelling him to make the transfer is ancillary to preventing frustration of the decision. The very clarity of connection between the decision and the injunction in this example reinforces my conclusion that a freezing injunction cannot be considered ancillary to either a determination of validity of LPAs or a decision to authorise conduct of litigation.*
>
> b. *The enforcement example: to Baker LJ the usefulness of this example was by analogy. He offered it as an illustration of meeting the 'just and convenient' test. The principle is that the purpose of a freezing injunction is to facilitate enforcement of an order. The decision to which that principle applies must therefore be that assets in the control of X are payable to Y. So far, this confirms my conclusions because, as all parties agree, the Court of Protection cannot decide the property dispute.*
>
> *However, Baker LJ went on to note that the principle applied "even though the order (i) may not yet exist but may only be a potential order and (ii) may not be an order of the relevant court at all but may be that of a foreign court."*
>
> *Deputy District Judge Chahal clearly had enforcement issues in mind, as evident for example from paragraph 48 of her judgment. So does the enforcement example, and particularly Baker LJ's note of the extent of it, suggest that she can make an injunction to prevent frustration of an order which the civil court may make?*
>
> *After anxious reflection I am satisfied that the enforcement example does not import such suggestion. In my judgment, the reason for that lies in section 47 of the Act. The Court of Protection's recourse to High Court powers is, pursuant to section 47, limited to use "in connection with its [own] jurisdiction." Baker LJ's analogy to the enforcement example is useful as an illustration of the principle of preventing frustration of an order but it is not – and on my understanding of the Re G judgment, was never intended to be - an illustration of when the Court of Protection is acting "in connection with its jurisdiction."*
>
> *The Court of Protection does not have jurisdiction to determine the property dispute so an injunctive order to prevent frustration of that determination elsewhere cannot reasonably be understood as made*

"in connection with" Court of Protection jurisdiction.

Senior Judge Hilder noted, further, that she had:

*71. […] cross-checked **Conclusions 1** and **2** against Baker LJ's stated intention (at paragraph78) that the judgment in Re G does not "cast doubt on or lead to any significant change in practice" in respect of discretionary injunctions. Throughout my 12+ years sitting in the Court of Protection, the general approach has always been that third party disputes require a different forum, including for interim measures. I am not aware of any instances where freezing injunctions against third parties have been considered or even requested from the Court of Protection, and neither counsel referred me to any such instances. Contrariwise, I am aware that freezing injunctions were obtained against the former deputies in Matrix via parallel proceedings in the High Court. So, it seems to me that my conclusions are in accordance with existing practice, and in accordance with Baker LJ's stated intentions for the Re G judgment.*

Entirely separately, Senior Judge Hilder also had some important points to make about dispute resolution hearings ('DRHs'), a significant feature of cases on the property and affairs pathway:

59. The purpose of a dispute resolution hearing, as spelled out in paragraph 3.4(3) of Practice Direction 3B, is "to enable the court to determine whether the case can be resolved and avoid unnecessary litigation." It should be a singular opportunity for the court to "gives its view on the likely outcome of the proceedings" so that the parties can take a realistic view at an early stage of the merits of further litigation.

60. In order to achieve that purpose, the judge conducting the dispute resolution hearing needs to focus on what is in issue before the court, and to ensure that the parties do too. Often, this exercise leads to sensible compromise and proceedings can be brought to an end with a final order made by consent. However, at least at the central registry it is about as often the case that one party or another does not accept judicial insight and no agreement is reached.

61. A dispute resolution hearing may be considered successful if parties reach a position where proceedings can be concluded. It may nonetheless be effective as a dispute resolution hearing even if no concluding agreement is reached, in that the judge will have expressed a view about the likely outcome and the parties had an opportunity to consider their next steps in the light of such insight. It is only generally considered ineffective as a dispute resolution hearing if in fact no such opportunity for judicial explanation arises because, for example, one of the parties or one of the representatives for some reason fails to attend.

62. Once a judge has engaged in dispute resolution, whether successfully or not, that judge cannot properly engage in substantive decision-making in the case beyond what the parties agree. It would be procedurally unfair to do so because the judge has expressed views without any party having had the opportunity to give their evidence. Accordingly, paragraph 3.4(6) of Practice Direction 3B explicitly provides that if the parties do not reach agreement, the court will give directions for the management of the case and for a final hearing; and paragraph (7) specifies that the final hearing must be before a different judge.

63.In passing, I note that a question has previously arisen as to what the court may do where a dispute resolution hearing has been ineffective as defined

> *above. It is indeed frustrating if an objecting party fails to attend a dispute hearing. An applicant may reasonably ask why the court cannot infer from non-attendance that the objection is abandoned, and go on to make final orders rather than give directions for further hearing. For practical reasons, it may be unsafe to infer abandonment of objection from non-attendance (not least because explanation of a good reason for non-attendance may reach the court only after the hearing). However, there is formal reason too in the wording of Practice Direction 3B. The preliminary words of paragraph 5 ("If the parties reach agreement to settle the case…") not being made out, the second half of the sentence ("the court will make a final order if it considers it in P's best interests") does not apply. In the absence of agreement, paragraph 6 applies. Any change to this approach would require amendment of the Practice Direction, which is not presently under active consideration by the Rules Committee. Meanwhile, any frustration about non-attendance is better dealt with as a costs consideration.*

On the facts of the case before her, Senior Judge Hilder noted that:

> *64. In the matter currently before me, there is nothing in the order made on 21st July 2021 to explain why the dispute resolution hearing was considered "ineffective" as opposed to unsuccessful. It is expressly recorded that the applicant and both the respondents (jointly) were represented by counsel, SB and DG only being joined as parties by order made at conclusion of the hearing. Moreover, the identification of matters which were agreed and not agreed clearly indicates some judicial engagement. In accordance with Practice Direction 3B, the directions should therefore have been simply for case management and final hearing before another judge. Regrettably, in my judgment the Deputy District Judge went procedurally astray in providing for "a further dispute resolution appointment" before herself. There is no provision in the Rules or Practice Direction for multiple dispute resolution hearings, and adopting such a practice would not serve the purposes for which such a hearing was devised, namely early conclusion of unnecessary litigation. The court is not a mediation service. If a dispute resolution hearing is unsuccessful, normal procedure should thereafter apply.*

Comment

Given how few cases are reported in relation to property and affairs cases, it is not surprising that DRHs do not feature heavily in reported cases. The observations about their purpose – and their 'one-shot' nature – are therefore particularly helpful.

As regards the question of the Court of Protection's jurisdiction to grant freezing injunctions, it is perhaps important to distinguish carefully between two situations.

The first is that under consideration by Senior Judge Hilder, where (1) it is not yet clear what the nature of the underlying interest to be protected is; and (2) resolution of that question is not for the Court of Protection. At that point, it must be right that the Court of Protection cannot grant a freezing injunction, not least because it would put the court which is actually charged with determining the dispute in a very difficult position because it would effectively had had its jurisdiction usurped. In this regard, Senior Judge Hilder's observations prompts consideration of the recent decision of Hayden J in *D v S* [2023] EWCOP 8, and the need for care (discussed here) to navigate the division of labour between the Court of Protection and the Family Court in relation to the question of the pursuit of divorce

proceedings on behalf of a person with impaired decision-making capacity.

The second situation is where the nature of P's interests are clear, and it is a question of protecting them. This might be the 'transfer example' given by Baker LJ in *Re G* (in which the various enforcement mechanisms provided for in Part 70 of the Civil Procedure Rules, imported via COPR r.24.2 may also be in play). We would also suggest that it could be applicable in a situation where there is no dispute as P's interests in assets, but steps are being taken by a third party to disperse those assets. At that point, the underlying s.16 decision would be a decision on P's behalf not to agree to those steps, and the freezing injunction would be in support of that decision.

For completeness, and in relation to the observation of Senior Judge Hilder at paragraph 71 in relation to whether freezing injunctions have been sought before the court, we note, finally, that we are aware of at least one (unreported) case where a freezing injunction was granted by the Court of Protection against the assets belonging to a third party so as to seek to compel them to return P to the jurisdiction. A reported example of such a case, decided (because of a historical quirk) under the inherent jurisdiction, is that of Munby LJ in *PM v KH & Anor* [2010] EWHC 870 (Fam). It may in due course be the case that the question of how the interaction between ss.16 and 47 MCA 205 plays out in such a situation requires further consideration, ideally in a reported case.

Section 48 MCA 2005 (again)

A Local Authority v LD and RD [2023] EWHC 1258 (Fam) (Mostyn J)

CoP jurisdiction and powers – interface with inherent jurisdiction - mental capacity – assessing capacity

Summary

LD[1] lived with his mother, RD. He was in his 40s with Downs Syndrome, a severe learning disability, autistic traits and could only communicate through body language. He also had a heart defect. Neither were believed to have had the Covid vaccination and, throughout and since the pandemic, both continued to isolate at home. His mother would not let others in for fear of the risk they posed to her son who had scarcely been seen by anyone in the last three years. He was being confined upstairs to his bedroom and bathroom.

Following a safeguarding review an appointment was made for LD to attend a cardiac clinic. His mother said he would not be coming as they were confined at home due to the risk of Covid and she was not prepared to put him at risk. Further attempts to see LD at home were refused and only a 'doorstep assessment' could be done. She would only allow carers to meet with her on the doorstep and collect a shopping list, do the shopping and then return to drop off the supplies they had bought for her.

The local authority had great fears that LD was suffering emotional and physical harm, and his health and welfare were being seriously impacted. The application to the court was to authorise LD's removal to a place of safety where his capacity and health, welfare and caring needs could all be assessed. The local authority of course struggled to assess his capacity to make

[1] It is not entirely obvious why Mostyn J was content to allow this decision to be promulgated with initials alone given his known concern at their depersonalising effect.

decisions as to residence and care. But from speaking to previous support workers and from reviewing LD's records, they thought it was highly likely that LD lacked capacity to make those decisions. The issues in this case were (a) the exact meaning and scope of MCA 2005 s.48 and (b) if s.48 did not apply, the extent of the power under the High Court's inherent jurisdiction to make an order which had the effect of depriving LD of his liberty.

Many decisions of the Court of Protection are taken on an interim basis under s.48 of the MCA 2005 which provides:

> *Interim orders and directions*
>
> *The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if:*
> *(a) there is reason to believe that P lacks capacity in relation to the matter,*
> *(b) the matter is one to which its powers under this Act extend, and*
> *(c) it is in P's best interests to make the order, or give the directions, without delay."*

At paragraph 15, his Lordship noted that if s.48 applied, "*there is no doubt that the Court of Protection has power to make an injunction requiring RD to permit the applicant to enter the dwelling, by forcing the front door if necessary, and to permit the removal of LD to the place of safety*." The Official Solicitor accepted that the existing evidence was just sufficient to satisfy s.48 that there was "reason to believe that P lacks capacity in relation to the matter" which Mostyn J went on to analyse:

> *19. The natural construction of these terms, without referring to any case-law or principles of statutory construction, suggests the following meanings.*
>
> *(i) The provision is not confined to emergency situations. It applies where the court considers it necessary to regulate the arrangements for P in relation to any matter pending the final hearing of the substantive application. It does so by making an interim order or direction.*
>
> *(ii) But to be able to make such an interim order or direction all three of the specified conditions must be met.*
>
> *(iii) Logically the first one to be considered is (b): the court must be satisfied that the matter that needs regulating is something that the court has substantive power to determine. As the court has power to make decisions about an incapacitated person's welfare and property and affairs, it is hard to think of something that falls outside the court's powers. A religious decision? Possibly.*
>
> *(iv) Second, the court has to be satisfied that there is reason to believe that P lacks capacity in relation to the matter. As a matter of plain English these words suggest that there has to be some evidence that goes beyond mere suspicion that P lacks capacity to make his own decision about the matter in question. On the other hand, the words suggest that the evidence does not have to be so strong that the court is certain P lacks capacity, or even that it is more likely than not.*
>
> *(v) Third, the Court has to be satisfied it would be best for P to make the order "without delay" i.e. here and*

now. If the court is not satisfied that it would be best to make the order now, but that it would be better to wait, then it cannot make such an order to take effect in the future.

(vi) Where all three conditions are met the Court still has a discretion whether or not to make an interim order, although the decision under the third condition will almost always answer that question.

His Lordship largely agreed with the analysis of MCA s.48 in *DP (By His Accredited Legal Representative) v London Borough of Hillingdon* [2020] COPLR 769 at paragraph 62, where Hayden J observed:

(i) The words of ... s.48 require no gloss;

(ii) The question for the Court remains throughout: is there reason to believe P lacks capacity?;

(iii) That question stimulates an evidential enquiry in which the entire canvas of the available evidence requires to be scrutinised;

(iv) Section 48 is a permissive provision in the context of an emergency jurisdiction which can only result in an order being made where it is identifiably in P's best interests;

(v) The presumption of capacity applies with equal force when considering an interim order pursuant to s.48 as in a declaration pursuant to s.15;

(vi) The exercise required by s.48 is different from that set out in s.15. The former requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter requires an evaluation as to whether P, in fact, lacks capacity;

...

(viii) The objective of s.48 is neither restrictive, in the sense that it requires a high level of proof, nor facilitative, in the sense that it is to be regarded as a perfunctory gateway to a protective regime, and

(ix) There is a balancing exercise in which the Court is required to confront the tension between supporting autonomous adult decision making and to avoid imperilling the safety and well-being of those persons whom the Act and the judges are charged with protecting.

However, Mostyn J quibbled with (iv) as there was nothing in s.48 to suggest that it is reserved for emergency situations; "*nor does the court have to be satisfied that it is "identifiably" (which I take to mean "strongly") in P's best interests for the interim order to be made*." He also quibbled with (vi) because the question was whether P "lacks capacity" rather than "may lack capacity". His Lordship went on to note:

The key question is what is meant by "there is reason to believe that P lacks capacity in relation to the matter". Obviously, as Hayden V-P explains, it requires the court to alight on a degree of likelihood which falls short of the civil standard of proof. For if it meant that "it is more probable than not that P lacks capacity in relation to the matter" then the provision would be otiose because the Court would already have reached the required degree of probability or likelihood to find that incapacity is proved and could go straight to making a substantive declaration under s.15.

Mostyn J considered other legal contexts, one of which was the phrase 'reason to believe' used in

the CPR 25.13(2)(c) in relation to an order for security for costs. He went on to decide:

> *29. In my judgment, the requisite degree of likelihood that will satisfy the criterion "has reason to believe" is not high and will be approximately the same as that for obtaining an interim (non-freezing) injunction or permission to appeal i.e. "a real prospect of success". I would say that the level is not less than 25%, or odds of 3/1 (see AO v LA at [26] – [42]).*
>
> *30. In this case the future event is whether the applicant will show at the final hearing that LD lacks capacity. That question will be answered by a formal capacity assessment. So, in order to satisfy the s.48(a) condition the applicant has to satisfy me, at this stage, that the present evidence demonstrates there is at least a 25% chance that such an assessment will find LD to be incapacitous. That degree of proof would be met even if the evidence were to suggest that it is more likely than not that LD is not incapacitated; it would be met even if it were as much as three times more likely (that is, of course, the effect of a 75% chance of LD not being incapacitated, which is the other side of the coin of a 25% chance that LD is incapacitated).*
>
> […]
>
> *32. Here, the witness statement of SG has an evidential minimum critical mass and satisfies me that there is a real prospect of a capacity assessment demonstrating that LD is incapacitated in relation to decisions about his health and welfare. I would put the likelihood rather higher than 25% or at odds rather shorter than 3/1 (but not odds-on). The mental impairments suffered by LD are irreversible and so the fact that SG has not got much contemporaneous material on which to base her opinion is not as damaging to its validity as it would otherwise be. SG is qualified to give expert evidence as to mental capacity and so her opinion, that it is highly likely that LD is incapacitated in these domains, is admissible under s3(1) of the Civil Evidence Act 1972.*

Having come to the view that MCA s.48 was applicable, whether it was in LD's best interests to be removed was to be the subject of a separate judgment (para 35). Moreover, whether the inherent jurisdiction could be used to deprive a capacitous person of liberty was now irrelevant. But, obiter, Mostyn J observed that a capacitous person without a mental disorder could not be of "unsound mind" for Article 5 ECHR purposes:

> *41* […] *Put another way, where the evidence is clear, I cannot see that there could ever be room for a class or type of unsoundness of mind for the purposes of Article 5 which does not amount to mental incapacity under the Mental Capacity Act 2005 or a mental disorder under the Mental Health Act 1983.*
>
> *42. I accept that this may leave a gap in the law in that there may be out there fully capacitous, yet extremely vulnerable, adults being ruthlessly victimised and exploited by members of their family, or their carers, who the state cannot protect by forcibly removing them from their homes. That is a gap which, in my opinion, should be filled not by judicial legislation but by parliamentary legislation."*

Comment

The jurisdiction of the Court of Protection to intervene where capacity evidence is (to use a technical term) sketchy is a particularly

important issue. As Hayden J observed in *DP*, *"At the core of Section 48 lies a balancing exercise in which the State's obligation to promote and support autonomous adult decision taking must be weighed, on the particular facts of the individual case, against the State's equally important duty to protect some of society's most vulnerable individuals in circumstances of crisis."* Other than in clear-cut cases where MCA s.15 declarations can readily be made on the evidence, how that balance is struck on an interim basis affects every other P coming before the court. We await with interest to see whether LD was in fact removed from the family home in this case on the basis of MCA s.48.

We note that in Mostyn J's detailed examination of the situation no reference was made in the judgment to MCA s.2(4), which provides: "*In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities*". The question for MCA s.48 is precisely whether there is "*reason to believe that P lacks capacity in relation to the matter*". On the face of it, it might be said (and Neil certainly would say this) that s.2 therefore requires that this is decided on the balance of probabilities. It is of course being decided at an interim stage, where the focus of the evidential enquiry is on "reason to believe that P lacks capacity", rather than "whether a person has or lacks capacity" (MCA s.15). That must mean that the evidence required to satisfy the civil standard of proof may at that stage be less than for a s.15 declaration. But the balance of probabilities remains the benchmark. In this regard, we note the decision of Keehan J in *A Local Authority v AA* [2020] EWCOP 66,[2] which proceeded on the basis that s.2(4) applied, such that the question was whether, on the balance of probabilities, there was reason to believe that the individual did not have capacity to make the relevant decisions.

It might, conversely, be said (and Alex would say this[3]) that s.48 sets out its own, specific, test, because the court is not determining that P lacks capacity to make a decision, but simply that there is reason to believe that P lacks capacity to make the decision. If this is the case, then it might be said that s.2(4) does not apply, in the same way that s.2(4) does not on its face[4] apply for purposes of relying on the defence under s.5 (at which point, the question is whether the person has a reasonable belief that the individual in question lacks the requisite capacity). However, in any event, it is unfortunate that Mostyn J did not grapple with the implications of s.2(4), if only to dismiss them.

Moreover, we suggest the statutory principles in s.1 MCA 2005 apply with equal rigour to MCA s.48 as they do to MCA ss.15 and 16. The assumption of capacity, inter alia, therefore must feature when analysing the current (lack of?) evidence. For these are not necessarily future events: the court is often asked to make best interests decisions, including authorisations to deprive liberty, on this interim basis now.

Mostyn J's observations in relation to the inherent jurisdiction were obiter but do reflect the growing consensus that it cannot be used to deprive the liberty of the capacitous. Where the person is believed to be suffering from mental disorder, s.135 of the MHA 1983 may be available if the criteria are satisfied. That could potentially have been used in this case, although

[2] In which Neil was involved.
[3] But is not in so saying advocating a position where the court can simply weigh in on the basis of suspicion.
[4] Limited as it is to proceedings before a court – the entire point of s.5 being that it means many matters do not have to come before a court, as emphasised by Lady Hale in *N v ACCG* [2017] UKSC 22 at paragraph 38.

it is more for short-term emergencies. For the longer term, we live in hope that the Law Commission may still be in a position to undertake work to codify the inherent jurisdiction in relation to vulnerable adults (not the least of the task being to work out precisely what language to use here).

Section 49 (again)

Cheshire and Wirral Partnership NHS Foundation Trust v JMC & Anor Ors [2023] EWCOP 14 (Hayden J)

Practice and procedure (Court of Protection) – other

Summary

Hayden J has returned to the vexed question of s.49 reports. As Hayden J noted:

> *8. In December 2022, I met with the NHS Mental Health Directors. Concern had been expressed about the burden experienced by the medical profession in reports requested pursuant to Section 49. There was a clear and strong feeling that some of the Section 49 requests were becoming disproportionate, overly burdensome, and wrongly authorised. Having been convinced of the legitimacy of this sensitively expressed complaint, I issued guidance to the profession to highlight the problem. As I noted in that guidance, there are obvious reasons (i.e., costs) why a Section 49 report might be preferred where what is truly required is an independent expert report. I also made the following observation:*
>
> > *"Section 49 reports are, paradigmatically, appropriate where the NHS body (typically a Mental Health Trust) has a patient within their care, who is known to them. This ought to enable the clinician to draw quickly on his knowledge of the patient and respond concisely to the identified questions, which will be directed to the issues clearly set out in the Practice Direction. Importantly, it avoids the patient having to meet with a further professional with whom, he or she, has no existing relationship.*
> >
> > *Instructions under Section 49 should be clearly focused with tight identification of the issues. It should be expected that the reports will be concise and will not require extensive analysis across a wider range of questions than those contemplated in the Practice Direction. Reports requiring that kind of response should be addressed to an independent expert."*

In the instant case, a District Judge had granted an application for a direction for an NHS Trust to file a s.49 report, outlining her reasons for doing so thus:

> *18. I do have a very wide discretion pursuant to section 49 to call for information from, amongst other people, a local authority or an NHS body dealing with such matters relating to P as the court may direct. I must operate that section firstly, in accordance with the overriding objective of the rules of the Court of Protection … and with regard to PD 14E. The PD lists common factors that I may consider. Many are plainly not relevant to this case but my view is that factors (d), (e) and (g) are ones that I must consider.*
>
> *19. Very plainly if I do make a direction for section 49 report from an NHS Trust, I am always calling upon their resources in order to prepare that report. In this*

> *respect, resources are not just financial. Clinicians will be called upon to spend their time preparing and writing the report. The reality is that, if it is a report about a party with whom they are very familiar with and are engaged in treating, it may reasonably be said that the preparation of the report is less resource intensive that if they have a lesser degree of familiarity. It also seems to be self-evident that an NHS body can only provide a report relating to information which is within their remit. If any information that is required is properly within the remit of the local authority, then fairly self-evidently it is the local authority who should provide that information.*

The Trust sought permission to appeal the decision. Although it acknowledged that it had the most recent knowledge of P, he had disengaged as a patient and their involvement discontinued on 1st April 2020. The Trust further argued that the District Judge ought to have, at least, considered directing the Local Authority to provide a comprehensive care assessment and support plan, identifying their duties and proposals to support JMC to identify an alternative accommodation with a support package, pursuant to section 35 of the Social Services and Well-being (Wales) Act 2014; applying the Care and Support (Eligibility)(Wales) Regulations 2015. Regulation 3(a) provides that the criteria is satisfied if the needs arise from the adult's *"physical or mental ill-health, age, disability, dependence on alcohol or drugs or other similar circumstances"*. The Trust further contended that responsibility for providing the information sought by the District Judge had migrated to the GP, not the Trust; and that the wider panoply of P's needs become eclipsed by the local authority's own prevailing duties. Therefore, whilst the Trust had originally accepted a referral to assess and provide reports (under s.49) in relation to P:

> *However, on 1 April 2020 it decided to discharge him from their service on clinical grounds. That was a proper decision that was not challenged and could not be challenged other than on public law grounds. Thereafter, JMC has been referred on at least two subsequent occasions but on each occasion the Trust has decided not offer services to him based on proper clinical grounds.*

Accordingly, the Trust argued that the Court of Protection was directing the Trust to provide services that it has decided are not appropriate. As Hayden J identified: "[i]*f that were in fact the case, then manifestly, it would be wrong in law, see: N v A CCG [2017] UKSC 22*."

Hayden J had little hesitation in refusing permission. In so doing, he outlined some "clear general principles."

> *18. Firstly, section 49 of the MCA manifestly conveys upon the Court a broad discretion, when deciding to request a report and in respect of the scope of it. Inevitably, however, such a discretion is not to be regarded as unfettered. Thus, the Court is confined to considering questions directly relating to P. Here, the proceedings concern a determination of best interests under section 21(A) of the MCA, as a facet of the standard authorisation. It is well established that proceedings brought pursuant to section 21(A) are the mechanism by which the State must achieve compliance with Article 5 ECHR concerning P's deprivation of liberty at a relevant care facility. Article 5(4) ECHR requires that review, in the sense of keeping in scope the continued lawfulness of any detention, should always take place speedily. As Mr Patel has emphasised, the character of the Court of Protection jurisdiction is non-adversarial, inquisitorial, sui generis.*

> *Such a jurisdiction will always require a broad margin of discretion in eliciting information it considers* ***necessary*** *to illuminate the question in focus.* (emphasis in original)
>
> *19. Secondly, as I have already foreshadowed, the Court must have regard to the Practice Direction 14E. In particular, paragraph 3 identifies a list of "common factors" which the Court may consider. Proceedings in the Court of Protection are invariably highly fact specific. It is for this reason that the common factors identified in the Practice Direction are permissive and not mandatory.*
>
> […]
>
> *22. In my December 2022 Guidance (see para. 8 above), I identified the circumstances in which a section 49 request would 'paradigmatically' be made. It would be a misreading of that guidance to interpret a paradigm as if it were a rigid and unchanging template. That is not what is contemplated by the wording of section 49 nor, of course, is it what the word means (i.e., a pattern or a model). The circumstances DJ Hennessy was considering were different from those contemplated in my document, though there are some similar features. What, in my assessment of her judgment, the District Judge was seeking to achieve, was the most effective route to the most reliable evidence she could identify as likely to assist her in determining how JMC's best interests could effectively be met.*

On the facts, Hayden J considered:

> *23. The District Judge came to the conclusion that the Trust had sufficiently recent knowledge of JMC to make them the focus of the enquiry. In my judgment, she was entitled, on the available evidence, to reach that conclusion and having done so, her selection of section 49 as the appropriate route is unimpeachable. The other factors discussed by Mr Fullwood such as the availability of legal aid etc., gain no traction against this factual backdrop. Indeed, logically, the availability or otherwise of legal aid should have no bearing on the selected framework for ordering a report.*

He also had little truck with the argument based on *N v ACCG*:

> *Mr Fullwood had also contended that an order under section 49, effectively triggered a direction to the Trust to provide services. A prototype of this argument was advanced before the District Judge and remodelled before me. With respect, I can see no mileage in the argument at all. Section 49 is a route by which information is acquired, it has nothing at all to do with the provision of NHS services. That would be to distort the plain words of the statute.*

It is also worth noting the endorsement by Hayden J of the reasons advanced on behalf of the ALR for P as to why a s.49 report would be preferable to an expert report in the instant case:

> *In this case, not only can the relevant information be provided by the relevant NHS Trust under section 49, but there are a number of reasons why such a report is more appropriate than an expert instruction, namely:*
>
> *(i) The Trust has pre-existing knowledge of JMC and has already provided two detailed reports to the court in respect of JMC and the appropriate care and treatment for him, having regard to his ARBD. The clinical guidelines in relation to the treatment of ARBD cut across both health and care*

and require a holistic and multi-disciplinary approach;

(ii) The Trust promised to provide a further report to the court developing its analysis as to whether JMC's current placement was clinically suitable, having regard to his ARBD, which was the basis on which the previous proceedings finalised. The further report never materialised and the analysis in respect of whether the placement can meet JMC's particular needs, arising out of his ARBD, is not complete.

(iii) The Trust is able to make recommendations in relation to local provision and interventions which it is aware of within the region;

(iv) The Trust is able to offer a longitudinal and multi-disciplinary view regarding JMC's needs, as opposed to an 'snapshot' expert assessment being taken by an individual from out of area.

Comment

As this is a decision refusing permission to appeal, it has no precedent value. However, it did give Hayden J the chance to read into the record the material parts of his December 2022 guidance, to clarify the limits of that guidance, and to reinforce the place of s.49 reports as part of court's armoury of tools.

The argument based upon *N v ACCG* was a novel one, at least in the reported cases. It is perhaps not surprising that it failed for the reasons identified by Hayden J. However, it is worth noting that it is not beyond the bounds of possibility that a direction to file a s.49 report could serve as a trigger for either a health body or a local authority to consider whether it is required to provide services to a person about whom they have been previously unaware. That the direction may have been for one purpose would not mean that the public body was not put on notice of its need to consider the person's needs for another reason (in the same fashion – albeit not often enough recognised – that a request for a DoLS authorisation in respect of a self-funder should alert a local authority to the potential need to carrying out a needs assessment under s.9 Care Act / s.19 Social Services and Well-Being Act (Wales) 2014).

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see here.

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book (with an early bird price available until 31 July 2023), see here.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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