Mental Capacity Law Newsletter April 2016: Issue 64

Essex CHAMBERS

Compendium

Introduction

Welcome to the April 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: Charles J and the DOL impasse, sex and marriage, grappling with anorexia, and wishes and feelings in different contexts;

(2) In the Property and Affairs Newsletter: revoking and suspending LPAs, Law Society guidance on fiduciary duties and the OPG on delegation;

(3) In the Practice and Procedure Newsletter: Court of Protection statistics, the appointment of the Chief Assessor for the Law Society Mental Capacity accreditation scheme, statutory charges, contempt of court, and the admissibility of expert evidence;

(4) In the Capacity outside the COP Newsletter: follow-up from the Mental Capacity Action Day, obstructive family members and safeguarding, and end of life care and capacity;

(5) In the Scotland Newsletter: capacity, facility and circumvention, the new Edinburgh Sheriff Court Practice Note, an important case on the ability to apply for appointment as a guardian, and key responses to the Scottish Government consultation on incapacity law.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

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It has been over two years since the Supreme Court handed down its decision in *Cheshire West*. In a further round of test cases, following *Re X* [2015] EWCA Civ 599 and *Re NRA* [2015] EWCOP 59, Charles J continues to grapple with the practical implications of the *Cheshire West* decision for public bodies and the Court of Protection. On this occasion, the issue was who is to be P's Rule 3A representative where there is no family member or friend?

The Secretary of State argued that the court should use its case management powers to direct the local authority to provide or to identify a person who the court could appoint as a Rule 3A representative. The court rejected that approach. In a judgment which was highly critical of the

Secretary of State's position, Charles J said at paragraph 17:

> *I am sorry to have to record that in my view the stance of the Secretary of State (through officials at the MoJ and the DoH) in these proceedings has been one in which they have failed to face up to and constructively address the availability in practice of such Rule 3A representatives and so this aspect of the issues and problems created for the COP (and others) by the conclusion in Cheshire West. Rather they have sought to avoid them by trying to pass them on to local government on an approach based on the existence of an accepted possibility rather than its implementation in practice."*

At paragraph 19, Charles J found that the Secretary of State had demonstrated *"…an avoidant approach that prioritises budgetary considerations over responsibilities to vulnerable people who the Supreme Court has held are being deprived of their liberty."*

Charles J considered the evidence of the Official Solicitor which was that, if only a small percentage of the necessary and expected applications were made in the near future, it was inevitable that the Official Solicitor would shortly reach "saturation point" and would not accept further invitations to act as the litigation friend of last resort. The resources of the Official Solicitor are funded by the Ministry of Justice and neither the Official Solicitor nor the Ministry of Justice indicated that it was likely, or even being considered whether, the Official Solicitor would be provided with more resources.

The solution adopted by Charles J was to make an order:

(1) joining both the Ministry of Justice and Department of Health as parties;

(2) inviting the parties to take steps to identify a suitable person for immediate appointment as a Rule 3A representative or identify an alternative procedure available to the COP to meet the minimum procedural requirements;

(3) staying the applications pending the identification of a practically available alternative procedure; and

(4) giving all parties liberty to apply to lift the stay.

That order could and should be made in all other cases such as the present in which there was no family member or friend who could be appointed as a Rule 3A representative.

Charles J readily acknowledged the consequences that "absent the provision of relevant resources, the likelihood, if not the inevitability, is that this approach will create a backlog comprising a very large number of stayed cases. Plainly this is unfortunate but it will identify the extent of the problem and why the COP and the applicant authorities have not been able to progress the applications for welfare orders to authorise P's deprivation of liberty."

He continued at paragraph 30: "If applicant authorities decide not to spend time and money on making applications that they know are likely to be stayed that backlog will not be as large and the extent of the problem will be less easy to quantify and less obviously placed at the door of the lack of an available court procedure that meets the minimum procedural requirements."

Charles J was at pains to emphasise that the primary responsibility to provide resources to enable the Court of Protection to meet the minimum procedural requirements falls on the Secretary of State, or on the Secretary of State together with local authorities. Charles J offered a number of suggestions to the Secretary of State at paragraph 28:

> *"…There are a number of routes that the Secretary of State could take, alone or with local authorities, to provide the necessary solution. They include:*
>
> *i) The Secretary of State could do effectively what the MoJ and the DoH assert local authorities can and would do without significant expenditure or difficulty if so directed by the COP, namely entering into contracts with providers of advocacy services to supply a pool of persons who can be appointed as Rule 3A representatives. If entered into with the Secretary of State these would be new rather than varied contracts. But effectively the Secretary of State would be doing what he asserts local authorities can and should do by agreement with providers of advocacy services.*
>
> *ii) The Secretary of State could assist local authorities to achieve this result by providing additional resources.*
>
> *iii) The Secretary of State could set up a pool of accredited legal representatives which is a possibility envisaged by Rule 3A made with the concurrence and so support of the Lord Chancellor.*
>
> *iv) The Secretary of State could provide further resources to the Official Solicitor.*
>
> *v) The Secretary of State could make changes to legal aid.*
>
> *vi) The Secretary of State could provide further resources to enable s. 49 reports to be obtained or to create a wider pool of visitors to enable the COP to instruct them to investigate P's proposed placement."*

Importantly, and further or alternatively, his Lordship said that the Secretary of State could take a case back to the Supreme Court and invite it to revisit its decision in *Cheshire West*.

As at the date of going to press, we do not know whether the Secretary of State will seek permission to appeal.

Comment

The sense of frustration in Charles J's judgment is palpable. And the risk of harm to vulnerable people is real. The deadlock between the government and the executive is resulting in those lacking capacity not being moved out of inappropriate care settings because the Court has not authorised the next deprivation of liberty. All practicably workable solutions to meet the increased workload following *Cheshire West* are likely to involve more expenditure in a time of austerity. This is not something that the court can compel the Secretary of State to provide. As the backlog of cases continues to build, we are left wondering whether we have now reached a stalemate. There is, at the moment, no foreseeable way out of this predicament. However, the clear message to public authorities is to continue making applications where an individual is being deprived of their liberty in circumstances requiring authorisation from court.

Rule 3A representatives clarified

Re VE [2016] EWCOP 16 (Charles J)

Article 5 – deprivation of liberty

Summary

In this case, a friend of VE's was appointed as her Rule 3A representative. However, it became apparent during the course of the hearing that local authorities had experience of family members and friends finding it difficult to understand what their role as a Rule 3A representative involved. Charles J took the opportunity to provide an explanation for family members or friends appointed as Rule 3A representatives. Key responsibilities for Rule 3A representatives include:

- Weighing the pros and cons of P's care and support package and comparing it with other available options;
- Considering whether any of the restrictions are unnecessary, inappropriate or should be changed;
- Informing the court about what P has said, and P's attitude towards, the care and support package;
- Checking from time to time that the care and support package is being properly implemented.

Charles J summarised the role in this way:

> *In short, the court is asking you, as someone who knows the position on the ground, to consider whether from the perspective of P's best interests you agree or do not agree that the Court should authorise P's package of care and support.*

The explanatory note also contains a step-by-step guide for dealing with court documentation and for completing a witness statement in form COP 24.

Comment

We hope that Charles J's explanatory note will help family members and friends better understand the role of a Rule 3A representative. Local authorities also have a responsibility to assist family members and friends during the course of an application and should, where appropriate, refer family members and friends to independent legal representatives.

DOL appeals update

Permission has been granted to the claimant to appeal the decision of the Divisional Court in the *Ferreira* case concerning deprivation of liberty in the ICU setting. We will update you when we know when the case will be listed.

Our friend Jonathan at Mental Health Law Online informs us that the appeals against the decisions of Charles J in the *MM* and *PJ* cases will be heard by the Court of Appeal on 8 and 9 June.

Sex and marriage – oh so simple?

LB Southwark v KA (Capacity to Marry) [2016] EWHC 661 (Fam) (Parker J)

Mental capacity – assessing capacity – marriage – sexual relations

Summary

In the *London Borough of Southwark v KA & Ors*

[2016] EWHC 661 (Fam), Parker J had to grapple – again – with the question of whether a young person had capacity to consent to sexual relations and to marry. The case concerned a 29 year old man of Bangladeshi origins with learning disabilities, whose family were seeking to arrange a marriage for him as way to secure support for him once his parents became too old. Parker J concluded that the presumption of capacity had not been displaced either in respect of consent to sexual relations or marriage.

Capacity to consent to sexual relations

Parker J was invited to undertake an attempt to reconcile the notoriously tricky authorities in the area, but declined to do so, saying she would apply the statute. The judge did agree with previous authorities (and in particular *IM v LM*) that the tests for capacity in relation to both marriage and sexual relations are not high or complex, the degree of understanding of the 'relevant information' is not sophisticated and has been described as 'rudimentary', the requirement to 'use and weigh' the information is unlikely to figure materially, and that the core relevant information, in respect of sexual relations (1) the mechanics of the act; (2) sexual relations can lead to pregnancy; and (3) that there are health risks caused by sexual relations.

The court was asked to clarify the necessary degree of understanding of the following matters:

- Health risks of sexual activity: what health risks must be perceived and to what extent.

- Whether health risks include a risk of pregnancy, or whether it is a separate risk.

- The extent of the understanding of pregnancy as a consequence and the process of pregnancy, and does there need to be an understanding of a possibility of pregnancy if P is homosexual.

- Is an understanding of any protective method against either pregnancy or disease necessary.

- What is the role of consent and does it relate to the assessment of capacity or the exercise of capacity.

Parker J addressed the issue of consent first, holding that it was not part of the relevant information but fundamental to capacity:

> *53. In my view consent is not part of the 'information' test as to the nature of the act or its foreseeable consequences. It goes to the root of capacity itself.*
>
> *54. Mr McKendrick submits that consent is the exercise of capacity, and not relevant information. I put it a different way. The ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity: in other words that P "knows that she/he has a choice and can refuse".* [a reference to A Local Authority v H]
>
> *55. I am less certain that consent of the other party is fundamental to capacity.*
>
> *56. The core cases do not specifically deal with this issue: some refer to P's consent and in some there is passing reference to the consent of a partner. None analyses why the latter consent is part of the capacity test.*
>
> *57. Since it is all too possible for sexual contact*

> *to take place, and does take place, without consent the necessity for the consent of a partner does not obviously form part of the capacity test, particularly since the issue of consent in the criminal law can give rise to complex debate as to mens rea, particularly in cases of apparent consent or lack of explicit communication of consent.*

Parker J did not, however, expressly have to make any conclusions in relation to these issues because she was satisfied that KA both understood and retained the understanding of necessity of consent of both himself and his partner/spouse.

As regards health and pregnancy, Parker J emphasised how important it was to "decouple" welfare from capacity. She then went to note that "*pregnancy is a separate type of consequence from illness and must be considered separately. It does not constitute ill-health*." She noted that *'it should suffice if a person understands that sexual relations may lead to significant ill-health and that these risks can be reduced by precautions like a condom*,'" and was satisfied that it was sufficient that KA understood that '*illness is a possible consequence of sexual activity'*. KA did not need to understand about condom use to have capacity.

Crucially, Parker J emphasised:

> *73. Even though the statutory criteria need to be looked at individually, evaluation of a particular capacity should not simply be practical but also has a holistic element. It is not an examination in which one has to attain a certain mark in all modules.*
>
> *74. The issue specific question is not whether P lacks capacity in respect of contraception, or disease control... but whether overall looking at the relevant information, capacity is proved absent.*

Capacity to marry

As regards marriage, Parker J emphasised that the test is a simple one (although it is perhaps of note that she considered that it was axiomatic that a person had to have capacity to enter into sexual relations in order to have capacity to marry). Again, she emphasised, the test is one of capacity not of welfare, so she did not

> *77.* [...] *take into account aspects of his decision making which affect the consequence of his decision making, so long as they do not affect the decision making process in itself.*
>
> *78. Nor is it a factor that in a family which facilitates arranged marriage KA is much more likely to find a bride than if he was unaided.*
>
> *79. It is not relevant to his understanding of marriage that he does not understand:*
>
> > *a) That a wife will need to obtain entry clearance.*
> >
> > *b) How financial remedy law and procedure works and the principles are applied. The fact that he might lack litigation capacity in respect of financial remedy litigation does not mean that he lacks capacity to marry.*

Parker J noted that she did "*not know whether a marriage will truly bring happiness to KA. His disabilities will provide challenges for any wife, and they will be different for a wife who has capacity from one who lacks it. A marriage might lead to distress, conflict and misery for KA and his family, as opposed to enhancement of his life and of his personal autonomy. But it is not for me to weigh up the relative chances of finding a wife who is prepared to love and cherish KA with all his*

needs against that of finding one who is unequal to the task."

She also held that she had "*no evidence that KA would necessarily lack litigation capacity to decide to end a marriage or to agree to or resist a divorce. In that unfortunate event that would need to be assessed in context. He might be regarded as a vulnerable adult where a decision in reality would be made for him by others. But all this is for the future and not relevant to his capacity now*."

Comment

On its facts, this case represents an admirable defence of the right of a young person to make their own decisions as to sexual relations and marriage, rather than to be barred in the name of protection. It also represents - on one view – an approach to capacity that, in practice, took account of the cultural circumstances of KA and the approach being adopted by his family to securing for his care in later life. There is therefore much to be applauded in this judgment.

It remains of concern, however, that so apparently "simple" a test as the capacity to consent to sexual relations continues to generate so much litigation about its very meaning, as opposed to its application. Does the fact that so many judges, doing their best to apply the plain words of a statute, come up with so many slightly different interpretations of that statute, itself suggest that we are asking them to answer an impossible question? And this is – of course – to ignore the fact that the test is completely different when it comes to the criminal sphere: being person-, not act-specific.

It is also of note that while Parker J held that KA did not need to understand how financial remedy law and procedure works, it was part of the relevant information to a decision to marry that '*there may be financial consequences*'. Those with a long-ish memory will recall that permission to appeal the decision of Hedley J in *A, B and C v X & Z* [2012] EWHC 2400 (COP) was granted, precisely to consider the extent, if any, to which an understanding of the financial implications of marriage was required, but then discontinued when the subject of the proceedings died.

Wishes, feelings and termination

An NHS Trust v CS (Termination of Pregnancy) [2016] EWCOP 10 (Baker J)

Best interests – medical treatment – P's wishes and feelings

Summary

A Hospital Trust made an application to the Court of Protection in respect of CS who was said to lack capacity, seeking an order that it would be in her best interests to undergo surgery terminating her pregnancy.

CS already had two children. She had been in a relationship with the father of the younger child until recently. It was alleged that her partner was violent towards her. In December 2015 she discovered that she was pregnant by him. Thereafter she told a number of people, including her sister, that she did not intend to keep the baby and that she wanted to have an abortion. She asked her sister to accompany her to the clinic. Some years earlier CS has also had an abortion and on that occasion that sister had also accompanied her to the clinic.

Shortly after the conversation with the sister, CS

was allegedly violently assaulted by her partner and sustained serious injuries, including serious head injuries and brain damage. Her partner was arrested and is presently remanded in custody. It is likely that there will be criminal proceedings. CS received emergency treatment and was remained in that hospital receiving care and treatment. The prognosis was unclear; she remained agitated, restless, disruptive and extremely unsettled. She wandered, had assaulted staff and had suffered falls. She was suffering from post–traumatic amnesia and had no insight into her condition. Although it was predicted that she would emerge from this, there was no indication when this would happen.

At the time of the substantive hearing the application had become urgent because the time during which a surgical termination of pregnancy could be carried out was about to expire the following week. The Official Solicitor had accepted appointment to act as the litigation friend of CS and the court had the benefit of written medical reports from her treating clinicians, including a consultant psychiatrist and consultant obstetrician, and statements from a number of relatives and friends of CS. In addition the court heard oral evidence from her mother and sister.

The court had two issues to determine, first whether CS lacked capacity to make decision whether to undergo a termination of pregnancy and secondly, if so, what order should be made in her best interests. The Trust submitted that there was sufficient evidence upon which to make a final declaration in respect of capacity and that it was unlikely that she would regain capacity within the timeframe required. The Official Solicitor agreed. Having regard to all the evidence the Court had little trouble in arriving at the conclusion that CS lacked capacity to make the decision in question.

On the issue of best interests Baker J concluded that the evidence was overwhelming and all one way that CS was consistently expressing her wish to have a termination of pregnancy prior to the injury shortly before Christmas. He had particular regard to the statements supplied by her family and friends and the oral evidence provided by her mother and sister. She had also begun to take steps towards making an appointment and had acted in a way, which was entirely compatible with that being her intention. In considering this evidence he also bore in mind that CS had previously had a termination of a pregnancy and was therefore aware of what was involved physically, emotionally and psychologically. Despite her fluctuating views since her injuries he took the view that little weight should be attached to those views because of her 'patent lack of capacity' and that the 'clear and unambiguous views that she expressed prior to the injury' were the 'crucial factors in this case'.

In the above circumstances the judge was satisfied that it was in CS's best interests to authorise the termination of pregnancy by surgery, because it accorded with her clear wishes prior to the injury and also with her overall health and welfare. He also made a declaration that it would be lawful for the Trust to use proportionate force for the purpose of restraining CS in the event that it became necessary.

Comment

In some respects, and despite the nature of the decision, this was not a difficult one for the court to take because the evidence of CS's views prior to her losing capacity was so very clear. It is however unusual in a medical treatment case for

the Court to have available such clear evidence of a person's past wishes and feelings prior to the person losing capacity. She also lacked capacity to make any decisions at the time of the hearing because of the "manifest difficulties she has in understanding, retaining and weighing up information concerning the pregnancy and therefore little weight could be attached to any views she now expressed in this regard." Having a termination of pregnancy also accorded with her overall health and welfare interests. Her prior views therefore become the determining factor in deciding her 'best interests'.

Beverley Taylor

Anorexia and the CoP – the difficult line

Betsi Cadwaladr University Local Health Board v Miss W [2016] EWCOP 13 (Peter Jackson J)

Best interests – medical treatment – Mental Health Act 1983 – interface with MCA

Summary

The potential tragedy in this case is summed up in its final paragraph:

> *54. I know that W understandably considers that she has in some way failed. I certainly do not see it that way. To be faced with such a severe illness from such a young age is not a failure but a misfortune. W and her family now face a daunting future. They know that it will be a huge task for W to live in the community and that the chances of real change are unlikely, but they will be the last to lose hope. Unlikely things happen all the time and if any family deserves some good fortune it is this one. I earnestly hope that things go as well as they can for W, who has so many good qualities if her illness will only let her be.*

W was 28, weighed less than 30kg with a BMI of 12.6. She had spent around 10 of the last 17 years as a hospital inpatient combatting anorexia nervosa: "*the process of eating had become something almost sinful*". Detained for 2½ years under section 3 of the Mental Health Act 1983, W did not want to die. She wanted to return to education, with a career path in mind, but: "*Currently I am struggling because I have no control over decisions in my life. I have no focus on things I would like in life that I am being denied…*". The most important thing for her was "*To make my own decisions and that treatment should not be enforced*". She wanted to go home and felt she could "*turn it around*", managing on her own for the first time in her life but with a collaborative plan. She lacked capacity to make decisions about the care and treatment of her severe anorexia. But retained capacity to make decisions about her physical health.

Her responsible clinician "*confirmed that she would immediately discharge W from compulsory detention because, while her condition warrants treatment, they have found no way of treating it. If W is to stay on the ward, there needs to be a treatment plan and a goal. It is not otherwise possible for an acute bed to be held open*." The original proposal to re-feed under sedation was now off the table by consent. Peter Jackson J agreed with the unanimous professional view that using coercion to get W to eat was no longer appropriate. It was beyond the power of doctors, family members, and the court to improve her circumstances or to extend her life. And, "*The possibility that the withdrawal of inpatient mental health services will bring about a change for the better may not be very great, but in my judgment it is the least worst option from W's point of view*." The ward had "*become a place for talking about eating, and not for eating. If she is capable of making any progress, it will not be as an inpatient*." The treatment "*is not beneficial and it*

is therefore not right for it to continue." His Lordship accordingly approved the Health Board's plan that W be discharged from the psychiatric unit into the community with a package of support for her and her family.

Comment

These proceedings are another example of clinicians and others exercising roles under the Mental Health Act 1983 using the Court of Protection to ratify their decisions, particularly where the patient's life is at risk (see also the *RC* case and also Ms X's case).

It is entirely understandable why ratification may be sought in some cases, and why the Court of Protection may appear to be the appropriate forum where questions of capacity are in play. However, these cases raise some potentially complex issues – and will do so for so long as there remains (in principle) two entirely separate regimes for the treatment of mental disorder and the treatment of physical disorder in respect of those who may lack the capacity to make the relevant decisions.

It is important to clarify the jurisdictional basis for the court's decision in the instant case. The decision to discharge W from detention was not one that W could make if she had capacity. That would have been a decision for her responsible clinician, hospital managers, nearest relative, or the tribunal. Furthermore, subject to certain exceptions, s.28 MCA 2005 prohibits the use of the MCA to give a patient, or to consent on their behalf to, medical treatment for mental disorder whilst they are subject to the psychiatric treatment powers contained in MHA Part 4.

In those circumstances, what, exactly, did the Court of Protection do in this case? It was prohibited from making a MCA s.16 decision on W's behalf in relation to her psychiatric treatment. But, on a strict reading, MCA s.28 does not prohibit the making of declarations under s.15 MCA either as to the person's capacity in the material domain(s) or as to the "*lawfulness or otherwise of any act done, or yet to be done, in relation to that person*."

The judgment itself refers to a treatment plan which was not appended to the judgment, and does not make clear what substantive relief was granted. We are therefore particularly grateful to Andrew Bagchi QC (who acted for the applicant Trust) for clarifying that (a) the Court had a recital whereby it approved the treatment plan "*as being in W's best interests in the current clinical circumstances*" and (b) declared under MCA s.15 that "*It is in W's current best interests for the Board to provide treatment to W for her anorexia nervosa and its physical consequences in accordance with the treatment plan annexed hereto*".

We further understand from David Lock QC, who acted for the Official Solicitor, that although W was detained under the MHA 1983 at the time that the application was being considered by the Court of Protection, W's responsible clinician had made the decision that her detention was shortly to come to an end. Accordingly, the Court of Protection was only asked to make decisions about care and treatment for W after she was discharged from section. It follows that potentially tricky interface issues did not arise on the facts. However, the case does illustrate an important role for the Court of Protection in the context of care and treatment decisions post-MHA-detention which could include, for example, s.117 aftercare issues.

Litigation friend or foe?

NHS Trusts v C [2016] EWCOP 17 (Theis J)

Best interests – medical treatment – litigation friend

Summary

C was detained under s.2 of the Mental Health Act 1983 with bipolar affective disorder. She was in the late stages of pregnancy and suffering from a severe manic episode. This caused her to be unable to weigh the pros and cons of medical interventions that may be required during the dynamic situation of childbirth. She was unable to retain the relevant information long enough as she could only concentrate or engage with any one topic for up to 15 minutes before requiring a break. This also prevented her from understanding the whole of what was being explained (paras 38-39).

It was proposed that it was in C's best interests to have an elective caesarean under general anaesthetic. Labour was likely to be a very traumatic experience for her. C's reaction could be extreme, including physical resistance, that could pose a significant risk to her, her baby, and the staff caring for her. Moreover, continuous tracing of the baby's heart beat was required, which she was unlikely to tolerate.
Shortly before the hearing, C stated that she wished to have a natural birth in accordance with an earlier birth plan. She wished for minimal intervention, unless there was an emergency, in which case she would have an emergency caesarean if she had to. If that happened, she wanted to stay awake, would like the baby given to her immediately for as much skin to skin contact as possible, and for her birth partner to be with her.

In oral evidence, the Official Solicitor as C's litigation friend explored less interventionist procedures for the birth, after which he did not oppose the orders sought. The revised care plan was also agreed between all parties and the court determined that the elective caesarean was in C's best interests for the reasons given at para 58. She subsequently gave birth.

Comment

We mention this case as another clear example of the tension between P's wishes and feelings and the position advocated on P's behalf. The current practice in the Court of Protection looks to the litigation friend not to represent P in any conventional sense but to instead identify and relay P's wishes and feelings, investigate and assess the available options, and present what the litigation friend considers to be in P's best interests. In this case, it was to agree to a treatment plan which contradicts P's position and not to oppose the application.

As a result, we would suggest, P's wishes and feelings are not being given full effect to by those representing – as opposed to those 're-presenting' – P. The history of the litigation friend is a long, tortuous and curious one and is in need of reform. For a more detailed analysis of the history and the current problems, see the article by Alex, Neil and Peter Bartlett: "Litigation friends or foes? Representation of 'P' before the Court of Protection" (2016) *Medical Law Review* (forthcoming).

DOLS in the House of Commons

In a short but pithy exchange on 22 March 2016, the Care Minister, Alastair Burt, indicated that he would look at any situation from Ann Coffey MP

(who indicated that DOLS assessments were costing Stockport Council £1.2m/year) that might ease the situation "practically" as regards DOLS pending any amendments to the law following the Law Commission's current projects.

A further exchange is of note:

> *Mr David Nuttall (Bury North) (Con)*
>
> *Will the Minister confirm that when the new legislation is finally introduced, it will be simpler to understand and result in fewer bereaved relatives facing distressing delays when a loved one dies in care?*
>
> *Alistair Burt*
>
> *My hon. Friend is absolutely right. What has caused the confusion has been a definition of loss of liberty and dying in state detention that bears no relation to anyone's common-sense understanding of the situation. Whatever new legislation is proposed by the Law Commission, it must meet the test of being much simpler, but it must also meet the legislative test of meaning what it says so that it does not get disrupted in the courts again.*

The Law Commission should be publishing an interim report in mid-May. We will bring you the details as soon as Alex is allowed to share them.

Agency Lawyer position at the Official Solicitor's office

Although we do not usually operate as a recruitment agency, we make an exception in this case to let you know that a position has arisen for an agency lawyer in the Official Solicitor's office in the healthcare and welfare team. The agency position is being advertised via Capita Business Services, Lot number 14554.

Revocation and suspension

The Public Guardian v TW, KW, HF and SC [2016] EWCOP 18 (Senior Judge Lush)

Lasting powers of attorney – revocation – suspension

Summary

In this case the Senior Judge was dealing with an application for the revocation of an LPA and the appointment of a deputy.

The evidence about P's capacity to revoke the LPA was ambivalent and the power to revoke cannot be exercised unless P lacks such capacity (s. 22(4)(b) MCA).

The Senior Judge, seemingly on his own initiative, ordered a report from a Court of Protection Visitor and, in the meantime, "suspended" the LPA pursuant to s.23(2)(a) MCA and made an interim deputyship order.

Comment

It is curious that the MCA does not provide the court with an express power to suspend an LPA, because such will on occasion clearly be necessary (the automatic suspension under s.13(4) upon the making of an interim bankruptcy or debt relief restrictions order is different).

Section 23(2)(a) does not, on its face, allow the court to suspend an LPA. Rather, it enables the court to give directions with respect to decisions which the donee of a lasting power of attorney has authority to make. In this case, the court in effect appears to have directed the attorney to make no such decisions thus leaving the way clear for the interim deputy to take over.

We are aware that this section is regularly used in this fashion but there are no reported cases of which we aware in which the basis (or width) of the power to do so has been analysed. We hope that in another case this issue might be explored in more depth.

Law Society Guidance on fiduciary roles and retirement from practice by a private client practitioner

The Law Society has published new guidance on fiduciary roles and retirement from practice by a private client practitioner. The Law Society's website gives the following brief indication of its contents.

> *This practice note provides guidance to assist firms to address the issues that arise when a solicitor, who has held fiduciary roles, retires or departs from a practice.*
>
> *It also looks at ways in which a practice can plan ahead for succession, so that when retirement or departure arises, there may be fewer problems to face, or better solutions available.*

The OPG and delegation of investment decisions

As reported by STEP, the Public Guardian is to review its new guidance concerning delegation of investment decisions to discretionary fund managers.

In Part A7 (page 28) of the guidance that the OPG gives relating to LPAs, the OPG states that unless the LPA gives express power to use discretionary management schemes, an attorney must apply to the Court of Protection to allow the use of a discretionary fund manager.

This was new and represented a change from the OPG's previous position. Practitioners were concerned and made representations. Hence the announcement of a review and the possibility of a test case.

It would be anomalous if donees of LPAs had to have court approval for using such a ubiquitous form of investment. Trustees can do so pursuant to sections 11 and 15 of the Trustee Act 2000. As regards the position of agents generally (and the donee of a LPA is no more than an agent whose agency survives the incapacity of the donor and is subject to the court's control under the MCA) *Bowstead and Reynolds on Agency 20th Edn* Article 34 states that an agent may delegate:

> *Where, from the conduct of the principal or of the principal and the agent, it may reasonably be presumed to have been intended that the agent should have power to employ a sub-agent"*

An echo of the guidance can be seen, however, in what Senior Judge Lush said in *Northamptonshire County Council v RG and others* [2015] EWCOP 66 (noted in the November 2015 newsletter) at paragraph 43:

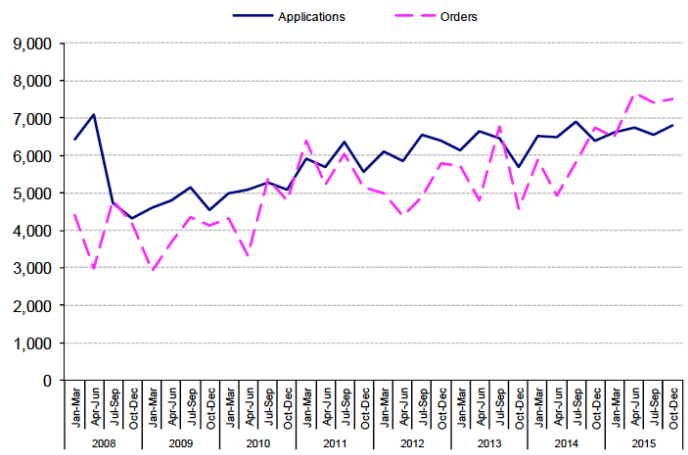
> *Attorneys cannot usually delegate their authority to someone else. They must carry out their duties personally. Of course, they may seek professional or expert advice when appropriate (for example, investment advice from a financial adviser or legal advice from a solicitor), but they cannot as a general rule allow someone else to make a decision that they have been appointed to make".*

It is to be hoped that donees of LPAs will be able to use discretionary investment schemes without the need for court sanction. Otherwise, every time an investment manager wants to make a change in a portfolio, he will have to get the attorney's consent or the Court of Protection will have to make orders in any case where, quite reasonably, an attorney wants to use a discretionary fund. Indeed the guidance seems to suggest that court approval is needed even for the attorney to continue to use such funds.

Court of Protection statistics

The Ministry of Justice has published the quarterly Family Court statistics for October to December 2015. After a dip in applications at the end of 2014, they show a gradual upward trend for most of 2015:

Figure 15: Applications and orders made under the Mental Capacity Act, January to March 2008 to October to December 2015



The main headlines are:

- 29,083 orders were made in 2015, of which 16,528 appointed a property and affairs deputy, 276 appointed a personal welfare deputy, and 49 appointed both.
- There were 134,363 LPAs in October to December 2015, the highest quarterly figure so far; the common age group for having an LPA is 81 to 90. At the end of 2015, the total number of LPAs registered in England and Wales was 1,617,252, 61% of whom were women.
- Applications relating to deprivation of liberty increased from 109 (in 2013) to 525 (in 2014) to 1,499 in 2015 (489 of which were made in that final quarter).

Of those 489 DoL applications, 65% were brought by a local authority, 30% by solicitors, and 5% from others including CCGs. The applications broke down into the following (a break down provided for the first time with these statistics):

- 119 were MCA s16 applications
- 177 were MCA s21A challenges
- 193 were made under the *Re X* streamlined process.

It need hardly be pointed out that 193 applications is rather far off the numbers required to achieve compliance with Cheshire West.

Appointment of Chief Assessor for Law Society Mental Capacity Accreditation scheme

Although the Law Society has yet formally to establish a Mental Capacity Accreditation scheme, a further step has been taken with the recent appointment of Floyd Porter of Miles & Partners as the Chief Assessor. We congratulate him on his appointment, and wish him well as he and the Law Society work towards establishing a panel, which will in due course – and amongst other things – open the way to the appointment of Accredited Legal Representatives to act for P within the intermediary of a litigation friend. As discussed in relation to the *Re JM* case in the Health, Welfare and Deprivation of Liberty Newsletter, such appointments cannot come too soon (so long, of course, as they are accompanied by appropriate amendments to the relevant legal aid regulations). Floyd will be discussing the role and the scheme at the MHLA annual COP conference in June.

Statutory charging and discretion

R (Faulkner) v Director of Legal Aid Casework [2016] EWHC 717 (Admin) (Admin Court) (Mostyn J)

Article 5 – damages

Summary

We briefly mention this case as it relates, by analogy, to a growing concern in the Court of Protection about the difficulties in securing damages for breaches of P's human rights.

The Supreme Court had previously held ([2013] UKSC 23) that where a prisoner cannot prove that, but for the delay in holding a Parole Board hearing, s/he would have been released, s/he will nevertheless generally receive a modest award of damages for feelings of frustration and anxiety where the period of delay has been for three months or more. Prisoner Sturnham was accordingly awarded £300. However, higher awards would be made where, but for the breach, the prisoner would have been released earlier. Prisoner Faulkner had shown on the balance of probabilities that he would have been released if his review had taken place 10 months earlier and was award £6,500 for breach of Article 5(4).

The issue in the present case was whether that sum of £6,500 should be subjected to the Legal Aid Statutory Charge, following the costs arising from Supreme Court's decision. If it was, he would recover nothing. For those unfamiliar, the reasons for the statutory charge are explained in its accompanying *Manual*:

> *1. The statutory charge is designed to:*
>
> *(a) put legally aided individuals as far as possible in the same position as successful non-legally aided individuals (who are responsible at the end of their cases to pay their own legal costs if their opponent in the litigation does not, or is unable, to pay them). The statutory charge converts legal aid from a grant into a loan. (See Davies v Eli Lilly & Co [1987] 3 All ER 94 at 97 to 98)*
>
> *(b) ensure that legally aided individuals contribute towards the cost of funding their cases so far as they are able; and*
>
> *(c) deter legally aided individuals from running up costs unreasonably by giving them a financial interest in how much money is being spent.*
>
> *…*
>
> *3. The law that creates the statutory charge is based on the solicitor's charge. The principle behind the solicitor's charge is that it is fair for solicitors to be able to take their costs out of any property their clients recover or preserve because of the services provided.*

The statutory charge can be waived where it is equitable to do so if (a) the proceedings have a significant wider public interest and (b) it is cost-effective to fund particular claimants. Mostyn J held that these two issues leading to the waiver decision must be determined either at the beginning or during the case. Moreover, it was not a violation of Faulkner's human rights to have his damages subject to the statutory charge:

> *37. I accept that an award of damages made under Article 5 (5) of the European Convention on Human Rights is a serious matter. Detention by the State is, on any view, a very bad business. The award of damages - although they are customarily modest - should*

reflect the fact that it is only in Article 5 (5) of the Convention that compensation is mentioned. However I do not accept that awards of damages for State detention pursuant to the Convention are a class apart from all other types of damages. I do not accept that because they are awarded to Mr Faulkner as a victim of human rights violation that they should be subjected to a process of immunisation in the way that perhaps damages for personal injury or an award of damages for, say, the loss of an eye or a leg would not. Naturally, State detention is a bad business but the consequences of many personal injuries are far more long-enduring than temporary State detention as happened in this case by virtue of delay in convening a Parole Board hearing.

38. It is for these reasons that I reject the argument that there is some kind of special status or numinous quality to be attached to these damages. These damages are to be treated under the costs regime, in my judgment, in exactly the same way as any other damages. It is therefore for these reasons that the claim for judicial review is dismissed.

Comment

What often matters most in human rights cases is a judicial declaration of a violation. However, there will be cases in the court has decided that monetary compensation is required in order to give the victim just satisfaction.

Unless there is full cost recovery, what the State awards with one hand (damages), it takes away with the other (the statutory charge). The waiver is now governed by the Civil Legal Aid (Statutory Charge) Regulations 2013 (SI 2013/503). Requiring clarity from the Legal Aid Agency as to whether the condition precedents to a waiver decision (significant wider public interest and cost-effectiveness) have been satisfied before the case is over ensures that those benefitting from legal aid know whether a waiver of 'is in the offing'.

An allied problem which is of particular difficulty for Court of Protection practitioners is what is to happen where a claim under the HRA is brought at the conclusion of proceedings in the COP. In the editors' experience, the Legal Aid Agency adopts an inconsistent approach as to whether (1) such a claim should be brought within the COP, or in the County or High Court upon the basis of declarations made in the COP; and (2) in either case, whether in the event of damages being awarded, the LAA will seek to recoup only the costs of the claim under the HRA or the entire costs on the legal aid certificate, including the costs of the underlying "substantive" COP proceedings. We are aware that there may be a judicial review in the offing in relation to a similar issue that has arisen in the context of claims being brought on behalf of children arising out of care proceedings.[1] We will bring you news of developments in this area as soon as we have it, but in the interim our strong advice (not, of course, legal advice on the facts of any individual case) is to extract from the LAA as early as possible a statement in writing as to what they will do on the facts of the particular case: experience has taught that setting out a clear proposal for how to proceed with an explanation of why such is likely to result in a speedy and proportionate of the HRA aspects of the claim together with a request for confirmation that this is agreed is likely to achieve better results than asking an open-ended question as to what the LAA would like.

Short note: penal notices and contempt of court

In *In the Matter of Gous Oddin* [2016] EWCA Civ 173, the Court of Appeal reminded practitioners

[1] Local guidance in Staffordshire, brought to our attention by Andrew Bagchi QC, has provided for a 3 month stay (from 23 February 2016) on all "free-standing" actions in such claims in that area pending clarification of the position.

(and the judiciary) of the importance of compliance with the procedural protections that must be afforded to an individual facing contempt proceedings. As Theis J usefully summarised the position:

> *78. Before any court embarks on hearing a committal application, whether for a contempt in the face of the court or for breach of an order, it should ensure that the following matters are at the forefront of its mind:*
>
> *(1) There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.*
>
> *(2) Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37* [COPR rule 186] *and which the person accused of contempt has been served with.*
>
> *(3) If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.*
>
> *(4) Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.*
>
> *(5) Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.*
>
> *(6) Whether the person accused of contempt has been advised of the right to remain silent.*
>
> *(7) If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.*
>
> *(8) The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.*
>
> *(9) Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.*
>
> *79. Counsel and solicitors are reminded of their duty to assist the court. This is particularly important when considering procedural matters where a person's liberty is at stake.*

Short note: expert evidence and admissibility

In *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, the Supreme Court had to consider a Scottish appeal arising out of a personal injury claim made by a home carer against her employer Cordia (Services) LLP following an injury to her wrist when she slipped on a snow covered footpath on the way to a home visit. An issue arose as to whether a witness who gave evidence about health and safety requirements, risk assessments and the availability of 'add-ons' (material that employers could provide to employees to add to their footwear to help prevent slips) was an expert witness.

The Supreme Court set out four general matters which fell to be addressed in the use of expert evidence in civil cases: (i) the admissibility of such evidence (ii) the responsibility of a party's legal team to make sure the expert keeps to his or her

role of giving the court useful information (iii) the court's policing of the performance of the expert's duties and (iv) economy in litigation.

The question of admissibility was held to turn on four considerations: (i) whether the proposed expert evidence would assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

Despite being a Scottish case about employers' liability, this appeal is of use more generally across the UK as a guide to expert witness evidence in civil proceedings (including, of course, COP cases and adult incapacity cases) and contains a helpful review of case law relevant to the four considerations on admissibility. One quote stands out as particularly apt when considering expert reports on capacity: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion" (Lord Prosser in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604).

Short Note: foreign teenagers, medical treatment and the inherent jurisdiction

In *Re Z* [2016] EWHC 784 (Fam), Baker J had to consider the exercise of the court's powers under the inherent jurisdiction to recognise and enforce orders concerning the medical treatment of children made by courts of another member state of the European Union.

Z was a girl in her early teens who had developed a very serious eating disorder. She received treatment at a number of hospitals in Ireland but by early 2016 it became clear that she required special treatment, incorporating nutrition, hydration and psychiatric treatment, which would include, if necessary, the use of restraint, and which could not be provided in her home country. Her doctors therefore made arrangements for her to be admitted and treated in a specialist unit in an English hospital which is able to provide the treatment required. Her parents supported this proposal although Z herself did not agree. The Irish statutory authority brought an application before Baker J for recognition and enforcement of the order made in Ireland providing for such treatment.

In short terms, Baker J held that:

1. An order of that nature fell within the scope of Brussels IIA as a decision about the exercise of parental responsibility, such that, in principle, recognition and enforcement should be undertaken under the provisions of FPR Part 31;

2. Where – as in the instant case – it was not possible for those provisions to be operated with sufficient speed, the High Court could use its inherent jurisdiction to recognise and enforce the order pending the completion of the FPR Part 31 processes;

3. An order providing for medical treatment of the nature made by the Irish court did not fall within the scope of Article 56 of Brussels IIA, such that prior consultation with the "receiving" central authority or other authority with jurisdiction was not a pre-requisite to it being made;

4. In line with the approach adopted in *Re PD*, it would not ordinarily be necessary for the child to be represented in the English proceedings if they were party to and

represented in the proceedings in the foreign court.

Usefully, the order endorsed by the court appears at the end of the judgment as a precedent for any future application of this nature.

National Mental Capacity Action Day

The newsletter editors were represented at the Action Day, at which many examples of innovative and effective methods of implementing the MCA were highlighted. In her address to the delegates (see also this *Community Care* article, the Chief Social Worker for Children noted that the MCA was valuable in children's services, in particular in relation to the involvement of people in decisions that concern them, and the need to avoid being unnecessarily risk averse. The Chief Social Worker for Adults was clear that the MCA was a core aspect of social work which every social work student needed to be fully trained in. The editors were interested to learn that at least one local authority now routinely trains all adult social workers as best interests assessors.

Updated Care Act Guidance published

The Statutory guidance to support local authorities implement the Care Act 2014 was updated on 24 March 2016. The guidance is now available online in a format that defies easy downloading, but a "hacked" composite version can be found here.

A helpful table identifying the amendments and additions can be found here, and Luke Clements has updated his invaluable briefing here. Many of the amendments are minor, but the chapters on safeguarding and ordinary residence have been more substantially revised and amended to reflect developments in caselaw and practical experience. The focus on safeguarding is perhaps unsurprising in light of the recent publication of figures from the Local Government Association showing that there has been a large increase in safeguarding referrals since the coming into force of s.42 of the Care Act (see also in this regard the recent and troubling *Times* investigation in conjunction with Action on Elder Abuse as regards the increase in financial abuse). We note with a degree of concern that "clarification" has been added to chapter 14 on safeguarding to "*to reinforce that, ordinarily, an enquiry under Section 42 of the Act is not appropriate where people are failing to care for themselves. Section 42 is primarily aimed at those suffering abuse or neglect from a third party*." We cannot help but feel that self-neglect is likely to fall back into the "too difficult" category as a result of this step.

Call for guidance on dealing with obstructive family members

In 2014 Newcastle Safeguarding Adults Board published a case review arising from the death of an elderly man whose son was subsequently convicted of wilful neglect under the MCA 2005, which has only just hit the headlines. The man himself had a history of non-engagement with medical services, and was supported in this by his son. When concerns about the man's capacity arose, the local authority made an application to the Court of Protection, but sadly the man died before any substantive progress was made with the application, which was strongly resisted by the man's son. The case review concludes that an earlier application to the Court of Protection would have made a difference, and recommends improved MCA training and awareness. While that is no doubt to be supported, the case review contains the following paragraph, which the editors respectfully suggest contains the entirely incorrect assertion that it can never be in P's best interests for an unwise decision to be taken:

> *It has been questioned whether a successful and/or quicker application to the Court of Protection would have made any difference to*

> *the safeguarding of Adult D, given his previous lack of engagement with services. In determining Adult D's best interests the Court of Protection would have been required to consider his previous behaviour and his current wishes and feelings amongst a number of other factors; however these would not have significantly influenced the outcome as the Mental Capacity Act does not allow any decision-maker, including the Court, to make an unwise decision as being in the best interests of an incapacitated person. Given the unique circumstances of this case the factor of magnetic importance for the Court would have been ensuring Health and Adult Social Care were given access to Adult D in his own home for the purposes of assessment and care provision.*

This extract from the case review highlights the tension between the MCA as a method of protection, and as a way of empowering people who lack capacity to make their own decisions but wish their preferences to be respected. The editors suggest that while written guidance as to managing obstructive family members may be useful, addressing the wider issue of the interface between the MCA and safeguarding responsibilities is something which may be more helpful.

BMA report on end of life care and physician-assisted dying

The third part of the BMA's report on end of life care and physician-assisted dying was published in March. The report contains the 'reflections and recommendations' of the BMA's enquiry. The following key points of direct relevance to MCA practitioners arose:

- Current training on mental capacity does not always address all of the complexities involved in assessing decision-specific capacity in patients.

- Training should look to emphasise specific issues associated with mental capacity which are particularly applicable to the end of life – such as fluctuating capacity, patients with cognitive impairments, and recognising that capacity must be assessed for specific decisions.

- Doctors should understand how to best maximise decision-making capabilities.

Report of the House of Lords Select Committee: The Equality Act 2010: the impact on disabled people

The Equality Act 2010 received the Royal Assent on 8 April 2010. The Act brought together a number of statutes relating to discrimination into one statute. Most of the main provisions of the Act were brought into force by 1 October 2010 while other provisions relating to the Public Sector Equality duty of care come into force on 5 April 2011. A number of provisions of the Act however have still not been brought into force 6 years later.

A Committee was appointed in June last year under the chairmanship of Baroness Deech to conduct post legislative scrutiny of the disability provisions of the Act. During the course of the enquiry the Committee hear evidence from a range of people and organisations. The report of the committee was published on 24 March 2016. It made dismal reading.

Commenting on the report, the Chair of the Commission, Baroness Deech, said:

> *Over the course of our inquiry we have been struck by how disabled people are let down across the whole spectrum of life.*
>
> *Access to public buildings remains an unnecessary challenge to disabled people. Public authorities can easily side-step their legal obligations to disabled people, and recent changes in the courts have led to disabled people finding it harder to fight discrimination.*
>
> *When it comes to the law requiring reasonable adjustments to prevent discrimination, we found that there are problems in almost every part of society, from disabled toilets in restaurants being used for storage, to schools refusing interpreters for deaf parents, to reasonable adjustments simply not being made.*
>
> *In the field of transport alone, we heard of an urgent need to meet disabled people's requirements – whether it's training for staff or implementing improvements to trains and buses - and we're calling for all new rail infrastructure to incorporate step-free access in its design from the outset.*
>
> *The Government bears the ultimate responsibility for enabling disabled people to participate in society on equal terms, and we believe it is simply not discharging that responsibility. Not only has the Government dragged its heels in bringing long-standing provisions of the Act into force, such as those requiring taxi drivers to take passengers in wheelchairs, but has in fact repealed some provisions which had protected disabled people. Intended to reduce the regulatory burden on business, the reality has been an increase in the burden on disabled people.*
>
> *The Committee would like to see changes right at the top of Government and is calling for the Minister for Disabled People to be given a place on the Cabinet's Social Justice Committee.*
>
> *It's time to reverse the attitude that disabled people are an afterthought. Many of the changes we suggest are simple and do not require legislation. We hope the Government will implement them quickly.*

The report reached a number of conclusions and made a number of detailed recommendations. Although it concluded that combining disabilities with the other protected characteristics in one act did not in practice benefit disabled people, it also found that separating them out would be impractical. The committee preferred to concentrate on improvements to the Equality Act 2010 which would increase the protection of disabled people.

Of particular interest was the discussion of the role of the UN Convention on the Rights of Persons with Disabilities. The Committee was at pains to clarify the position and status of the CRPD in light of "confusion" manifested by some who gave evidence to it, and in light of submissions that the Convention should be incorporated into English law. The Committee noted that:

> *Incorporation of the Convention is a step of a wholly different order from implementation, and would result in every provision of the Convention becoming a provision of English law, justiciable and enforceable in the courts of this country. A recommendation by the Committee that the Convention should be incorporated into United Kingdom law would certainly, as the Law Society said, "give an important signal about government commitment to equalities legislation". But the Government, in its evidence to the inquiry by the Joint Committee on Human Rights into the UN Convention on the Rights of the Child*

(UNCRC), has argued that incorporation is unnecessary.

Rather, the Committee noted that there was an alternative, namely to give an equivalent commitment to that given by the Government in relation to the UN Convention on the Rights of the Child (which, as with the UNCRPD, is ratified, but not incorporated) to "give due consideration to the UNCRC articles when making new policy and legislation. In doing so, we will always consider the UN Committee on the Rights of the Child's recommendations but recognise that, like other state signatories, the UK Government and the UN committee may at times disagree on what compliance with certain articles entails."

The Committee noted that the Government had given no equivalent commitment in relation to the CRPD, and recommended that it do so. Such would "*would be a recognition by the Government of its obligation 'to take sufficient steps, including legislative steps, to realise the rights enshrined in the Convention.' We agree with the* [Joint Committee on Human Rights] *that this would also render the debate about incorporation an irrelevance*."

The reported noted with regret the decision of the Government in 2015 to downgrade the role of the Minister for Disabled People from Minister of State to under Secretary of State, commenting that "*it seemed to suggest to the disability movement that disability issues were less important*." The report made various suggestions to make the role more effective.

The report made a number of specific recommendations, of which we pick out solely that relating to the law and enforcement. The Committee concluded that developments in recent years have made fighting discrimination more difficult for disabled people. New tribunal fees, less access to legal aid, and procedural changes have combined to create barriers to the effective enforcement of disabled people's rights. Changes are recommended to combat these developments, including the collection of data relating to disability discrimination claims and reviewing the fee structure for tribunal claims for disability discrimination. It also recommends that the government amend the mandates of those regulators, inspectorates and Ombudsmen that deal with services most often accessed by disabled people to make the securing of compliance with the Equality Act 2010 a specific statutory duty.

The government is expected to respond to the Lords report within two months of the date of the report.

Beverley Taylor

Local Government Ombudsman: disabled facilities grant problems

The Local Government Ombudsman published a report on 21 March 2016 called "*Making a house a home: local authorities and disabled adaptations*" which stated that people with disabilities were being left too long in unsuitable homes because of problems with councils' Disabled Facilities Grant (DFG) processes.

The report details that in 2015, *Leonard Cheshire Disability* found that every year almost 2,500 disabled people wait longer than they should to receive their DFG. The charity's research found that 62% of councils surveyed were not funding agreed adaptations within set timescales. It further set out research from *Foundations* which oversees the national network of Home Improvement Agencies which found that older people were able to stay in their own homes and postpone moving into a care home by an average

of four years following adaptations. The *Foundations* research suggested that the average cost of a placement in residential care is around £29,000 per year whereas the average cost of providing adaptation is less than £7,000 (although the editors note that making adaptations does not rule out the need for further in-home support).

The report sets out common issues and complaints by means of individuals complaints to the LGO: delay in making a referral, failure to complete an OT assessment and make clear recommendations; failure to consult other professionals; delay in provision of disabled adaptations etc and provides a useful summary of the DFG process in Appendix 1.

Guidance for social workers working with people with an ABI

The Brain Injury Social Work Group and the British Association of Social Workers issued "Practical Guidance for Social Workers working with people with an acquired Brain Injury" in February 2016. The guidance can be found here.

The aim of the guide is to increase awareness of ABI among social workers and to provide guidance about what an ABI is and how intervention by social workers can benefit individuals. It also contains useful information for COP practitioners who may have clients with an ABI. The guidance contains an interesting case study at appendix 1 which raises issues around a potential, previously undiagnosed ABI.

ATU Days of Action

Beginning on Monday 18 April there will be seven days of action intended "*to raise awareness of the thousands of learning disabled people currently being held against their wishes in assessment and treatment units*." See here for more details.

The site also contains statistics about young people resident in ATUs (taken from the Learning Disability Census 2015). See here.

Money and mental health: new institute and survey

A new Money and Mental Policy Institute has been set up, and is running a major survey to gather stories and information from people who've experienced mental illness or mental distress about their finances. More details can be found here.

Children and life-limiting illnesses

In *County Durham & Darlington NHS Foundation Trust v SS & Ors* [2016] EWHC 535 (Fam), the court was concerned with a profoundly disabled 7 year old girl who was in the care of the local authority, and who was thought to be on a downward trajectory in view of her many serious physical and neurological disabilities. The relevant NHS Trust sought declarations that it was lawful for their clinicians to treat SS in accordance with their clinical discretion, effectively to impose a ceiling of care such that resuscitation and admission to intensive care would be most unlikely to be offered. The child's guardian supported the Trust's application; SS's parents opposed it. Granting the declarations sought, Cobb J commented on and approved the usefulness of the Royal College of Paediatrics and Child Health guidance "Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice" (2015).

Short note: Strasbourg, deprivation of liberty and children

In *Blohkin v Russia* [2016] ECHR 300, the Grand Chamber of the ECtHR has decided that Russia breached Article 3 of the ECHR when it detained a 12 year old boy with disabilities for 30 days in a temporary detention centre for juvenile offenders. The applicant complained that he had not received adequate medical care while in the temporary detention centre for juvenile offenders and that the conditions of his detention there had been inhuman. The Grand Chamber concluded that "*there has been a violation of the applicant's rights under Article 3 on account of the lack of necessary medical treatment at the temporary detention centre for juvenile offenders, having regard to his young age and particularly vulnerable situation, suffering as he was from ADHD*".

Further, the Grand Chamber confirmed the earlier Chamber decision (which the Russian Government did not contest) that "*the applicant's placement for thirty days in the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5 § 1, noting in particular that the centre was closed and guarded, with twenty-four-hour surveillance of inmates to ensure that they did not leave the premises without authorisation, and with a disciplinary regime enforced by a duty squad*." It held that that there had been a violation of Article 5(1) of the ECHR as his placement in the centre could not be justified under Article 5(1)(d) as "*detention of a minor by lawful order for the purpose of educational supervision*", as it had not served an educational purpose. The Russian courts on deciding on his placement referred to behaviour correction and the need to prevent the boy from committing further delinquent acts, neither of which constituted 'educational supervision'.

The court held that there had been a violation of the boy's Article 6 rights. The proceedings which had led to the boy being placed in the detention centre should have been considered criminal proceedings for the purpose of Article 6 despite the fact that they were not classified as criminal under Russian law. A majority of the court held that the child's defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as the basis for his placement in the detention centre.

The UK based charity, the Mental Disability Advocacy Centre (MDAC) was granted permission to intervene in the case. The editors note that the intervention held weight with the judges of the Grand Chamber. The judgment quotes the submissions made by MDAC and adopts some key aspects of the submissions.

For a further important Strasbourg decision this month, see also the report on *Kocherov and Sergeyeva v Russia* in the Scotland Newsletter.

Capacity, facility and circumvention

In *Ritchie v Nelson* [2016] CSOH 35, decided on 4th March 2016, Lord Clarke granted decree of reduction of a Disposition in favour of the defender by an aunt of the pursuer (now deceased – "the deceased") of a house belonging to the deceased, on the grounds that the deceased "did not have the necessary capacity to grant the Disposition" [paragraph 88 of Lord Clarke's decision]. The pursuer, who was executrix-dative to the deceased, also pled facility and circumvention though "that case was, in the event, perhaps, less well developed" [2] and not accepted by Lord Clarke.

The case is of general interest as to the question which medical witnesses should address when giving an opinion as to capacity in such a case; the use of an affidavit where there was no apparent reason why the evidence of the person in question could not have been taken on commission; and Lord Clark's comments on the case based upon facility and circumvention. Also worthy of comment are two aspects not addressed, namely aspects relating to a power of attorney granted by the deceased, and circumstances surrounding the granting of the Disposition which might have warranted at least the possibility of a case based on undue influence.

For the purposes of this article, relevant persons were, in addition to the pursuer, the defender and the deceased; two medical witnesses called by the pursuer and one medical witness called by the defender; the family solicitor, now deceased, who prepared the Disposition ("the family solicitor"); and the witness who purportedly witnessed the Disposition ("the witness"). "the Disposition" is the Disposition which the pursuer sought to have reduced, and "the subjects" are the subjects purportedly conveyed by the Disposition.

Lord Clarke held that: "The primary issue for the court to determine in this action is whether or not, on the balance of probabilities the deceased, as at the date of the disposition, 2 July 2007, had the necessary legal capacity to grant that deed, the effect of which was to dispone, *inter* vivos, the only asset of hers of any significant value namely her home." [74]. It was accepted that as at October 2007 the deceased was suffering from advanced dementia, therefore: "The question therefore becomes more refined and it is whether, notwithstanding the accepted fact that the deceased was suffering from advanced dementia in October 2007, she, nevertheless, had the mental capacity, sufficient on 2 July 2007, for her to be considered as having been capable of fully comprehending the nature and effect of the granting by her of the disposition in question." [74].

Relevant dates include that in 1966 the subjects were acquired by the deceased and two siblings with special destination to the survivors and the survivor; those siblings died in 1992 and 1999 respectively; the deceased granted a power of attorney in favour of the defender on 30th September 2004; the Disposition was granted on 2nd July 2007; the deceased died aged 96 on 31st March 2011; and the pursuer was confirmed as executrix-dative to the deceased conform to an interlocutor dated 20th March 2012.

The medical evidence

Both of the pursuer's medical witnesses, whom Lord Clarke found to be credible and reliable, had submitted written reports providing opinions, "in no material respect … displaced in cross-examination", that on the balance of probabilities, the deceased would not have had

sufficient capacity on 2nd July 2007.

Lord Clarke quoted, with evident approval, the conclusion in the report by one of the pursuer's medical witnesses, which was in the following terms: "In summary following my review of the available evidence I believe it to be, on the balance of probability, highly unlikely that in July 2007 [the deceased] possessed the capacity to understand and/or recall complex financial decisions such as would be required to sign a deed transferring ownership of her house to her nephew." [28].

Lord Clarke was however critical of the approach of the defender's medical witness. He said: "It was apparent from the witness's report [i.e. the report of the defender's medical witness] and his evidence that he approached the request for an opinion from a standpoint he adopted when, for example, advising on guardianship cases. His starting point was, he said, always, in such situations, that there was a presumption that the individual who was being considered for guardianship had capacity, the task then being to identify whether or not there were any contra-indications. I observe at this stage that the court, however, in a contested litigation like the present has to decide the issue of capacity on the balance of probabilities. [The defender's medical witness] did not, it seems to me, address the issue in that way. His position was simply to say that he could not say what mental capacity, if any, the deceased had before she entered hospital." [57].

Lord Clarke also commented, after indicating that he found the evidence of the pursuer's medical witnesses persuasive, that he had "some difficulty" with the evidence of the defender's medical witness who "was, no doubt, doing his best to assist the court but, as has been noted, he approached matters on the basis that the pursuer had to overcome some presumption and was, as a consequence, desiderating a level and kind of evidence which he considered was necessary to rebut that presumption." [75].

The affidavit evidence

As already indicated, Lord Clarke was critical that the defender had submitted an affidavit by the family solicitor when it appears that the family solicitor's evidence could and should have been taken on commission. Lord Clarke was "unable to place any weight on the material contained in the affidavit for ultimately deciding the key issues in [dispute in] this case. The affidavit raises many questions which the court would have wished to have answered by [the family solicitor]. Fairness also would have required the opportunity to be given to the pursuer to have [the family solicitor] cross examined in relation to what was said in the affidavit as it clearly was highly germane to the issue in the case. No explanation, at all, has been given as to why his evidence was not taken on commission when it appears that he was alive for some time after the proceedings were raised."

Facility and circumvention

Lord Clarke considered that the pursuer's case on grounds of facility and circumvention was lacking in specification. On the evidence, facility at the material time was made out, but the pursuer had not "set out averments sufficiently specific in the circumstances to support the existence of circumvention, or that, in the event she has placed before the court sufficient evidence to support circumvention on the part of the defender or anyone else in this case." He was "not satisfied that they amount to establishing circumvention which is said to be a 'deceit or fraud'. There must be clear averment by which person or persons the deed is alleged to have been impetrated." He referred to *Baird v Harvey's Trustees* (1869) 20 D 1220, which in turn

referred to *Clunie v* Stirling (1854) 17 D pages 17 and 18. He also noted that: "There is a question as to whether the deceased could be said to have at least, strictly speaking, suffered lesion. In *McKay v* Campbell 1966 SCT 37 at 249 it was held that it must be averred that the party suffered lesion by granting the deed complained of. In my judgment the pursuer failed adequately to address this aspect of such a case." [89].

The power of attorney

Lord Clarke narrated that one of the pursuer's medical witnesses had, in her report, noted that there are "obviously concerns as to when this Power of Attorney was granted, as I think it is likely that [the deceased] would have been unable to give consent in the last year or so." [22]. Later in his Judgment he narrated and commented that: "On 30 September 2004 the deceased granted a power of attorney, 6/6 of process, which was registered with the Office of the Public Guardian. That might suggest, it was submitted, that at that time there was at least some concern as to the deceased's wellbeing and capacity to look after her own affairs." [64].

The family solicitor "stated that he had acted on behalf of the deceased in drawing up a continuing power of attorney in terms of which she appointed the defender and his brother Francis as her continuing attorneys in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000. He had acted as a witness to the power of attorney which was executed on 30 September 2004." [15].

It is surprising that apparently no evidence was given to the court, and no submissions made to the court, as to the certification of the power of attorney, including as to who certified, whether indeed capacity and absence of undue influence or other vitiating factors was certified, and whether (and if so whom) the certifier had consulted for the purposes of certifying capacity.

Undue influence?

Towards the end of his Judgment, Lord Clarke commented that: "The whole circumstances surrounding its instruction and signing were driven, it seems, by the defender." [86]. The evidence indicated that there was no record in the family solicitor's file of any meeting between the family solicitor and the deceased regarding the Disposition. There were no file notes of instructions being taken from the deceased herself. No Terms of Business letter was issued to the deceased. There was no indication in the relevant papers of the client's identification. A copy of the duly registered Disposition was sent by the family solicitor to the defender, in which the family solicitor wrote: "I enclose copy of duly registered Disposition of the above property and I have placed this with the remaining Titles and enclose herewith my own Business Account in the matter for your attention". [16] There was no record of the Disposition, or any copy of it, being sent to the deceased herself.

The defender said in evidence that it took a matter of weeks for the Disposition to be prepared, and that there was further delay by the deceased after it had been delivered to her for signature. The business account was not addressed to anyone and was in fact paid by the defender with (he said) cash given to him by the deceased. The witness did not see the deceased on the day that he signed the Disposition as a witness. He stated that he did so in the defender's home. He understood that he was being asked to confirm that he had seen the document. The defender had in fact admitted in his pleadings that: "The witness was asked to witness the Disposition outwith the presence of the deceased. Admitted the witness did not see

the deceased sign the Disposition nor did she acknowledge her signature to him. Admitted the witness did not have the mandate of the deceased to sign." [67].

If these events had taken place after issue by the Law Society of Scotland of its vulnerable clients guidance, the circumstances narrated above might have attracted criticism by reference to that guidance. It is not clear from the Judgment why the pursuer did not seek to have the Disposition declared void on grounds of undue influence. Particularly in view of Lord Clarke's comments about the case on facility and circumvention, the pursuer might well have had stronger prospects of establishing undue influence than of establishing facility and circumvention. Compare the recent *Smyth* case (reported in our November 2014 Newsletter) in which incapacity, undue influence and facility and circumvention were all pled (albeit unsuccessfully).

Adrian D Ward

New Edinburgh Sheriff Court Practice Note

Sheriff Principal Mhairi M Stephen, who is Sheriff Principal of Lothian and Borders (and also President of the Sheriff Appeal Court), has issued Practice Note No 1, 2016, entitled "Applications under the Adults with Incapacity (Scotland) Act 2000". The Practice Note is dated 11th March 2016 and will apply to all applications lodged on or after 25th April 2016. This new Practice Note is available here. An electronic version may be obtained by email from the AWI mailbox at Edinburgh Sheriff Court at edinburghawi@scotcourts.gov.uk.

In the October 2015 Newsletter we reported on the issue by the Sheriff Principal of Glasgow and Strathkelvin of a Practice Note for applications under the 2000 Act. In that article we stated various criticisms of the Glasgow Practice Note. We are pleased to report that the new Edinburgh Practice Note is not open to similar criticisms.

The Edinburgh Practice Note is organised so as to cover separately applications and minutes under the 2000 Act (paragraph 2) and appeals to the sheriff under that Act (paragraph 3). The first of these seems to be focused principally upon applications under Part 6 of the Act, and does not explicitly address applications under section 3(3) or the two types of variation covered by section 74. However, it does carefully address the principal omissions in the Glasgow Practice Note. For example, paragraphs 2(k) and 3(g) both require averments as to the present and past wishes and feelings of the adult insofar as they can be ascertained. Alternatively, if it has not been possible to ascertain them, the writ must explain why and set out the steps taken, if any, to ascertain, including setting out any assistance or support which has been provided.

There have at times been difficulties where courts have criticised averments along the lines that "the applicant states that", on the basis that the solicitor preparing the application should be in a position to offer to prove the averments. The Practice Note helpfully obviates some of these difficulties by requiring that a proposed guardian, substitute guardian or intervener should provide a letter specifying whether he or she has at any time been formally barred from working with vulnerable adults, or convicted of a criminal offence in Scotland or elsewhere.

The other requirements of the Practice Note largely follow the requirements of the 2000 Act itself and relevant court rules, and practitioners in other sheriffdoms may find it helpful to refer to it as a checklist. As ever, any such checklist can only be a starting-point: the particular

circumstances of an individual application, or the precise nature of any orders sought, may well generate their own further requirements, or adjustments to requirements in the Practice Note.

The Edinburgh court would no doubt regard it as good practice that where for good reason there are any significant departures from the requirements of the Practice Note, the sheriff clerk's attention should be drawn to these when an application or appeal is submitted, and the solicitor who has submitted it should be ready to address the sheriff on such points.

Adrian D Ward

Application by J, solicitor, in respect of the adult F

The Edinburgh Sheriff Court issued a judgment on 22nd March 2016 in this case ((2016) SC Edin 24)). It involved an application under the Adults with Incapacity (Scotland) Act 2000 by a solicitor seeking the appointment of a financial guardian for F, an 87 year old adult. The pursuer claimed that she had an interest in the property and financial affairs of F by virtue of the fact that she had acted as F's solicitor for approximately a year before F lost capacity thus entitling her to apply for the guardianship (under section 57(1) of the 2000 Act).

Section 57(1) of the 2000 Act permits an application for guardianship to be made by "…by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult…"

It appears from the judgment that this was interpreted by the sheriff as the pursuer "claiming to have an interest" which in his view meant that the pursuer would have to successfully assert that she had both title and interest to be granted guardianship[2] and to do so would mean she would have had to demonstrate a patrimonial interest[3]. On this basis, the sheriff determined that the pursuer did not have a sufficient interest entitling her to bring the application, and that the pursuer was not therefore a person claiming an interest.

The sheriff's interpretation is interesting given that the 2000 Act makes a distinction between 'claiming an interest' and 'having an interest'. The 2000 Act requires only that "the pursuer claims an interest" and was designed to allow solicitors in certain situations to go beyond their duty to advise and suggest in the event of an adult's incapacity and actually apply for guardianship[4] as a protective measure for the adult[5].

Clearly this judgment raises some important legal and practice related issues and accompanying confusion. It is understood that the decision is to be appealed and the outcome will be eagerly awaited for any authoritative guidance it provides.

Jill Stavert

[2] On the basis of Macphail, *Sheriff Court Practice (3rd edition)* at paras 4.29 and 4.33, quoted at para 7 of this judgment.
[3] At paras 12-13.
[4] See A W Ward, *Adult Incapacity*, W Green, 2003, pp23-24 and para 14.59 (quoted at para 6 of this judgment although no mention is made of discussion in para 14.59 of *Adult Incapacity* about the distinction between 'claiming an interest' and 'having an interest').
[5] See again, Ward, p 14.59 and also Scottish Law Commission, *Report on Incapable Adults*, Scot Law Com No 151), 1995, para 2.37-2.38 and the 2000 Act's *Code of Practice for persons authorised under intervention orders and guardians*, 2011, para 4.3.

Major Change Ahead – Scottish Government Consultation Closes

As we reminded readers last month, the period for responses to the Scottish Government Consultation on the Adults with Incapacity (Scotland) Act 2000 ended on 31st March 2016. Scottish Government has not yet published the responses to consultation, but three are already in the public domain: from the Mental Welfare Commission for Scotland, the Public Guardian (Scotland) and The Law Society of Scotland. Each of these is a major document, responding carefully to the proposals in the Scottish Law Commission report on Adults with Incapacity but also containing a wide review of the whole relevant area of law, and tabling proposals for wide ranging reform.

At this stage it would be premature to attempt to assess in any detail the changes to be expected as a result of this consultation process. This will in any event be a matter upon the agenda of the Scottish Government which will be in power following next month's elections.

On the particular issues regarding compliance with article 5 of the European Convention on Human Rights in relation to people deemed to be deprived of their liberty, the general flavour of the responses received so far indicates that further work will be required upon the proposals, on the one hand to ensure compliance with the requirement for regular judicial review, and on the other to integrate any such procedures more efficiently with the wider range or procedures which already exist. On topics for wider review, a few selective quotations will give a picture of the general thrust of the responses so far made public.

From the Mental Welfare Commission for Scotland:

> *Particularly in the light of the UN Convention on the Rights of Persons with Disabilities, we believe the starting point should not be to try to protect services from any possible legal challenge. It should be to devise a system which empowers people in care settings, and protects them where necessary. It should focus not simply on capacity as a legal concept, but powerlessness as a lived experience.*
>
> […]
>
> *We propose a system of graded welfare guardianship, the general features of which we outline below. The Public Guardian has previously proposed a similar graded approach to financial guardianship, and we believe these approaches can be combined…*
>
> […]
>
> *Level 1: Registered supporter . . . This would be a mechanism to recognise formally a person who supports the adult in decision-making. It would give effect to the concept of supported decision making, as called for by the UN Convention on the Rights of Disabled Persons. It also reflects the fact that many carers and family members still feel excluded and disempowered in dealings with services. Health and care services and other bodies such as banks may refuse to share information with or seek input from those who, in practice, support the adult in day to day living. The lack of formal status raises problems in relation to obligations of confidentiality. In our experience, it is this fear of lack of involvement which drives many families to seek guardianship, rather than a wish to control every decision of the adult.*

From the Public Guardian:

The Public Guardian submitted a report to the Scottish Government in November 2011, entitled 'Early Deliberation of Graded Guardianship'; this Report expressed serious concerns about the viability of the current guardianship regime as a result, inter alia, from increasing demands on mental health officers. The position has become ever more critical with reducing numbers of practitioners and increasing numbers of applications (as well as increasing demands on these same practitioners from other business). The suggestion that these same professionals will have a formal role in respect of significant restriction statements / applications will further pressure an already strained service. The process of applying for guardianship has become progressively more protracted, for a number of reasons but amongst these is the increasing difficulty and thus time taken to obtain the necessary mental health officer report; any new process which places even more demands on mental health officers risks the viability of the overall guardianship process and has to be of major concern and given very serious consideration.

15 years of experience with the 2000 Act has demonstrated that fundamentally it is fit for purpose but there are serious concerns about the ongoing ability to meet this purpose unless there is some modification and modernisation. We must take this opportunity to review the 2000 Act, re-engineer those sections that need updating and so ensure we have as robust and as enviable a statute to support our incapable citizens over the next decades of the 21st century.

From the Law Society of Scotland:

The Society … welcomes the encouragement which it has received… to suggest ways in which the combined jurisdictions in relation to adults with incapacity, adults in need of compulsory mental health care and treatment, and adults who are vulnerable and at risk, are addressed in terms of the commendable and pioneering body of legislation introduced by the Scottish Parliament in 2000, 2003 and 2007 (and in amending legislation); and how what are at present separate jurisdictions are being operated in practice. … As a matter of urgency Scotland must improve the efficiency and effectiveness of the operation of the combined jurisdictions. In particular, the current position under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") is inefficient and ineffective. The fragmented operation of the three jurisdictions is inefficient because of the waste of public resources in terms of the current operation, in particular of the AWI jurisdiction by the courts and the drain on Legal Aid funds. The operation of the AWI jurisdiction is also expensive for litigants meeting their own costs, and time consuming and stressful for many of those involved in its procedures. This situation does not use the available resources of the Office of the Public Guardian and others with statutory roles to best effect. Most seriously of all, from the perspective of the Society in relation to its responsibility for the public interest, the current fragmented operation of the three jurisdictions and the current operation of the AWI jurisdiction in particular, frequently and seriously lets down vulnerable people, their families and carers. … In consequence of these concerns, we urge that early steps be taken to move to implementation of the "one door" approach unanimously favoured by all stakeholders and interest-groups in the 1990s during the processes of consultation and discussion which led to the 2000 Act.

The 51-page response from the Law Society of Scotland draws upon the range of specialist expertise available within the Society's Mental Health and Disability Sub-Committee to provide separate sections identifying areas for review of

the Mental Health (Care and Treatment)(Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007, as well as a full section by section review of the Adults with Incapacity (Scotland) Act 2000. The Society's response develops specific proposals, with reasons, for achieving the "one door jurisdiction" referred to in the quotation above. It addresses as separate topics the under-provision of Mental Health Officers, the requirements for compliance with the United Nations Convention on the Rights of Persons with Disabilities, matters originally proposed by the Scottish Law Commission in 1995 but omitted from the 2000 Act, and matters requiring coordinated action by both the UK and Scottish Parliaments.

Adrian D Ward

Experts in the courts

In addition to the comment upon the *Ritchie* case above, interested readers are also directed to the comment on *Kennedy v Cordia (Services) LLP* in the Practice and Procedure Newsletter, a Supreme Court case concerning Scotland which has general application for the role of experts.

Learning Disability and Parenting

At the end of March 2016 the European Court of Human Rights issued an important ruling in *Kocherov and Sergeyeva v Russia* (Application no. 16899/13 judgment of 29 March 2016) firmly rejecting blanket assumptions that a person with a diagnosis of learning disability is incapable of caring for their children. Indeed, to make such an assumption may well result in a violation of that person's Article 8 ECHR right (the right to respect for private and family life).

A reading of the full judgment is highly recommended – and the author intends to return in more detail to this ruling in the future – but a summary of the judgment follows.

The applicants were a father (first applicant) and daughter (second applicant). The father has a mild learning disability and lived in a care home between 1983 and 2012. In 2007 he married Ms NS, who was resident in the same care home, and who had been deprived of her legal capacity because of her mental disability. In the same year, she gave birth to their daughter who was placed in a children's home. The first applicant subsequently consented to their daughter remaining there until it became possible for him to take care of her. Meanwhile he maintained regular contact with her, visiting her at the children's home, spending time with her and buying her books, toys and clothes.

In 2008 the marriage between the first applicant and Ms NS was declared void at the request of a public prosecutor because of Ms N.S.'s legal incapacity. However, her legal capacity was subsequently restored and they have since remarried.

In 2012 the first applicant moved out of the home into social housing and wanted his daughter to live with him there. It appears that he had set up an environment conducive to caring for his daughter and had proactively made enquiries about schooling for her. Ms NS also had regular contact with her daughter and visited the first applicant's flat. However, the authorities resisted, and this was upheld by the courts, until May 2013 when the second applicant was at last permitted to join her father.

The first applicant argued that the refusal to allow his daughter to live with him was a violation of his right under Article 8(1) ECHR. The state

argued that their actions were justified under Article 8(2) ECHR as lawful and in pursuit of a legitimate aim (protecting the child from harm). International Disability Alliance, the European Disability Forum, Inclusion International and Inclusion Europe intervened in the proceedings as third parties and submitted that the first applicant's right under Article 8 in conjunction with Article 14 (non-discrimination) ECHR had been violated. The Court, by a majority, agreed that there had been a violation of Article 8 ECHR and as such felt that there was no need to also consider Article 14.

The authorities essentially asserted that the first applicant's diagnosis of learning disability meant that he was unable to care for his daughter. Much turned on the conflicting evidence provided by the state and by the first applicant. Whilst there is no suggestion in the judgment that the first applicant lacked capacity at the material times the national courts also appear to have been much influenced by the fact that Ms NS, who was not a party to the proceedings, had been deprived of her legal capacity and concerns about her involvement with her daughter and the risk this posed. Restoration of her legal capacity seemed to be a pivotal factor in them finally relenting and allowing the daughter to live with her father.

The Court[6], whilst it acknowledged the paramountcy of the child's best interests[7] and need to have regard to any actual and potential risks involved, found that the evidence produced suggested that the first applicant was capable of adequately and appropriately caring for his daughter[8]. Significantly, it also made it clear that to align the refusal to allow the child to live with her father primarily on the basis of his diagnosis was not a "sufficient" reason to justify a restriction of his parental authority[9]. Nor was it convinced that the national courts' reference to Ms NS's legal status was a sufficient ground for restricting the first applicant's parental authority[10].

What is, however, interesting about the ruling is that whilst Articles 5 (equality and non-discrimination) and 23 (respect for home and family) of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) are referred to as relevant international law there is no mention of Article 12 (equal recognition before the law). This is surprising given the apparent relevance of this particular right to this case and its interpretation by the UN Committee on the Rights of Persons with Disabilities in its General Comment No 1[11] and now considerable literature surrounding it. It is difficult to know whether this illustrates a lack of appreciation of the requirements of the UNCRPD, especially the foundational right identified in Article 12, or whether it simply did not want to address the complicated issues raised in the general comment.

Jill Stavert

[6] Judge Keller dissenting.
[7] Indeed, Articles 3 and 9 of the UN Convention on the Rights of the Child were cited as relevant international law.
[8] Paras 101-108 and 118-119.
[9] Paras 109-112.
[10] Paras 113-117.
[11] Committee on the Rights of Persons with Disabilities, General Comment No. 1(2014): *Article 12: Equal recognition before the Law,* adopted 11 April 2014.

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Conferences at which editors/contributors are speaking

CoPPA London seminar

Alex will be speaking at the CoPPA London seminar on 20 April on the recent (and prospective) changes to the COP rules. The seminar will also cover the transparency pilot. To book a place or to join COPPA, or the COPPA London mailing list, please email jackie.vanhinsbergh@nqpltd.com.

Scottish Paralegal Association

Adrian will be speaking at the SPA Conference on Adults with Incapacity on 21 April in Glasgow. For more details, see here.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The second and third seminars in the series will be on "New" categories of abuse and neglect' (20 May) and 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Adults with Incapacity

Adrian will be speaking on Adults with Incapacity at the Royal Faculty of Procurators in Glasgow private client half day conference on 18 May 2016. For more details, and to book, see here.

CoPPA South West launch event

CoPPA South West is holding a launch event on 19 May at Bevan Brittan in Bristol, at which HHJ Marston will be the keynote speaker, and Alex will also be speaking. For more details, see here.

Mental Health Lawyers Association 3rd Annual COP Conference

Charles J will be the keynote speaker, and Alex will be speaking at, the MHLA annual CoP conference on 24 June, in Manchester. For more details, and to book, see here.

Advertising conferences and training events

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

Chambers Details

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

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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

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