Mental Capacity Law Newsletter April 2016: Issue 64

Practice and Procedure

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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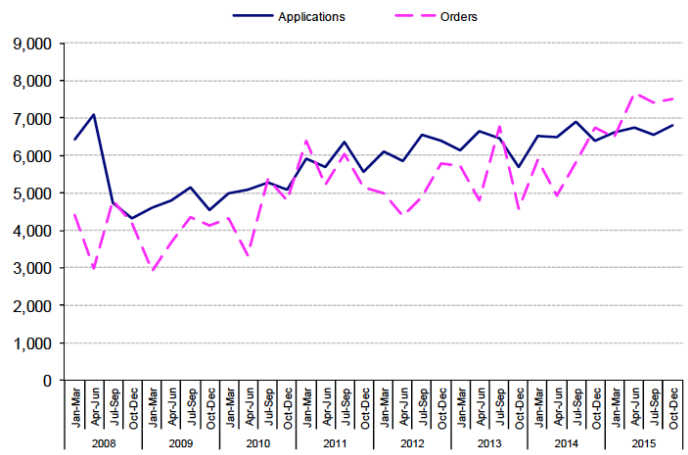
Court of Protection statistics

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.

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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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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

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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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Adrian is a practising Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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