Mental Capacity Law Newsletter August 2016: Issue 68

Court of Protection: Health, Welfare and Deprivation of Liberty

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: covert medication and deprivation and further findings in relation to state imputability;

(2) In the Property and Affairs Newsletter: statutory wills and charitable giving and OPG guidance on professional deputy costs;

(3) In the Practice and Procedure Newsletter: an update on Case Management, s.49 and Transparency pilots and habitual residence strikes again;

(4) In the Capacity outside the COP Newsletter: assistance wanted with questionnaires on powers of attorneys/advance decisions and mediation and relevant law reform developments around the world;

(5) In the Scotland Newsletter: the first AWI appeal determined by the Sheriff Appeal Court and Scottish observations on habitual vs ordinary residence.

With this Newsletter, we also roll out the next iteration of our capacity assessment guide, including a re-ordering of the stages of the test and summaries of (ir)relevant information for the most important decisions. You can find it on our dedicated sub-site here, along with all our past issues, our case summaries, and much more. And you can find 'one-pagers' of the key cases on the SCIE website.

We are now taking our usual summer break, but will return in early October with all the mental capacity news that is fit to print.

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Covert medication and deprivation of liberty

AG v BMBC & Anor [2016] EWCOP 37 (District Judge Bellamy)

Medical treatment – deprivation of liberty

Summary

In this case, District Judge Bellamy has given some rare, and useful, clarification as to the seriousness of the consideration that must be given to the use of covert medication, especially in the context of DOLS authorisation.

During the course of a s.21A application challenging a DOLS authorisation in place in respect of a 92 year old woman, AG, it became clear that part of AG's care plan at the home involved the covert administration of strong sedative medication in the form of promethazine and then diazepam. There were no conditions relating to this medication contained in the care plan.

Following directions made as to the provision of information as to how this medication had come to be administered, the District Judge was able to draw the following conclusions (although not making formal findings of fact):

> *"(a) Proper consideration does not appear to have been given to the initial covert use of promethazine between November 2014 and February 2015;*
>
> *(b) The use of covert medication was not subject to proper reviews or safeguards.*
>
> *(c) The decision to administer diazepam covertly in February 2015 (as prescribed by the GP) appears not to have been communicated to the supervisory body or to the RPR so that an opportunity to request a review of the standard authorisation at that time was lost;*
>
> *(d) There does not appear to have been a review or provision for review of the fundamental decision to administer medication covertly notwithstanding the covert medication policy disclosed [it would appear to be that of NICE] makes it clear that this is only to be considered in exceptional circumstances.*
>
> *(e) The best interest decision making process appears not to have involved any family member or RPR on behalf of AG nor her allocated social worker.*

Fortunately (one might think) no harm appeared to have been caused to AG by the covert use of either promethazine or diazepam.

District Judge Bellamy noted that:

> *25. Although it is not an issue for me to determine I accept that treatment without consent (covert medication in this case) is an interference with the right to respect for private life under Article 8 of the ECHR and such treatment must be administered in accordance with a law that guarantees proper safeguards against arbitrariness. Treatment without consent is also potentially a restriction contributing to the objective factors creating a DOL within the meaning of Article 5 of the Convention. Medication without consent and covert medication are aspects of continuous supervision and control that are relevant to the existence of a DOL. It must therefore attract the application of Section 1(6) of the Act and a consideration of the principle of less restriction and how that is to be achieved.*

> *'1(6) Before the act is done, or the decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.'*

Such intervention must be proportionate to the circumstances of the case and accord with the principle of minimum intervention consistent with best interests.

By way of general observation, District Judge Bellamy noted that:

> *29. All parties agreed that covert medicines should only be used in exceptional circumstances and when such a means of administration is judged to be necessary and in accordance with the Act. The guidelines published by NICE (National Institution for Healthcare and Excellence) [available here] provide that medication should not be administered covertly until after a best interest meeting has been held, unless in urgent circumstances. Care homes are to ensure that if a decision is taken to covertly administer medicine to an adult care home resident, then a management plan should also be agreed and recorded after a best interest meeting. The meeting should be between healthcare professionals and family members. The decision to covertly administer diazepam as compared to promethazine, was not communicated to the supervisory body. The care home as managing authority has a duty to keep a patient's case under review and if any of the qualifying requirements appear to be reviewable then it must request a review. The supervisory body in this case BMBC may be almost entirely dependent upon the managing authority (the care home) to notify it of any change or proposed change to care/treatment.*

District Judge Bellamy further held that:

> *37. It is clear that the managing authority has a duty to monitor for any change in a person's circumstances on an ongoing basis. This obligation exists no matter how long or short the stipulated duration of the authorisation granted. The code is clear, there must be a care plan setting out clear roles and responsibilities for monitoring and addressing the issue of when a review is necessary.*
>
> *38. Covert medication is a serious interference with a person's autonomy and right to self-determination under Article 8. It is likely to be a contributory factor giving rise to the existing DOL. Safeguards by way of review are essential.*
>
> *39. The reference to a change in the relevant person's case is broad and must sensibly apply to each of the steps in the best interests assessment on a case-by-case basis. A clear omission of information relating to additional restrictions or interference with autonomy is a relevant change in the circumstances known to the best interest assessor that should trigger an immediate review under part 8. This would also apply to new circumstances arising after the DOL is granted and that were not known about or did not exist at the time.*
>
> *40. The use of medication without consent or covertly whether for physical health or for mental health must always call for close scrutiny.*
>
> […]
>
> *43. The following may assist by way of future guidance:-*
>
> *(a) Where there is a covert medication policy in place or indeed anything similar there*

must be full consultation with healthcare professionals and family.

(b) The existence of such treatment must be clearly identified within the assessment and authorisation.

(c) If the standard authorisation is to be for a period of longer than six months there should be a clear provision for regular, possibly monthly, reviews of the care and support plan.

(d) There should at regular intervals be review involving family and healthcare professionals, all the more so if the standard authorisation is to be for the maximum twelve month period.

(e) Each case must be determined on its facts but I cannot see that it would be sensible for there to be an absolute policy that, in circumstances similar to this, standard authorisation should be limited to six months. It may be perfectly practical and proportionate provided there is a provision for reviews (or conditions attached) for the standard authorisation to be for the maximum period.

(f) Where appointed an RPR should be fully involved in those discussions and review so that if appropriate an application for part 8 review can be made.

(g) Any change of medication or treatment regime should also trigger a review where such medication is covertly administered.

(h) Such matters can be achieved by placing appropriate conditions to which the standard authorisation is subject and would of course accord with chapter 8 of the deprivation of liberty safeguard's code of practice. […].

District Judge Bellamy also endorsed the written guidance proposed by the supervisory body, which included the following:

(i) if a person lacks capacity and is unable to understand the risks to their health if they do not take their prescribed mediation and the person is refusing to take the medication then it should only be administered covertly in exceptional circumstances;

(ii) before the medication is administered covertly there must be a best interest decision which includes the relevant health professionals and the person's family members;

(iii) if it is agreed that the administration of covert medication is in their best interests then this must be recorded and placed in the person's medical records/care home records and there must be an agreed management plan including details of how it is to be reviewed; and

(iv) all of the above documentation must be easily accessible on any viewing of the person's records within the care/nursing home.

(v) If there is no agreement then there should be an immediate application to Court.

Comment

Although not a decision with binding precedent value, being a decision of a District Judge, this decision is extremely useful for highlighting (1) the very widespread use of covert sedative

medication in circumstances such as those of AG (which are not uncommon); and (2) the seriousness with which such administration should be accompanied, but is all too often not. It is undoubtedly a serious interference with Article 8 ECHR. As the European Court of Human Rights has repeatedly made clear (for instance in *Shtukaturov v Russia* [2008] ECHR 223 at paragraph 89) "*whilst Article 8 of the Convention contains no explicit procedural requirements, 'the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8.'*" The greater the interference, the more rigorous the decision-making process (see also in this regard, by analogy, *X v Finland* [2012] ECHR 1371 at paragraphs 220-221).

Given that the use of covert sedation is also, as District Judge Bellamy noted, often associated with the exercise of supervision and control giving rise to a deprivation of liberty, it is clearly important that, where the results do give rise to such a deprivation, they are monitored and controlled by reference to the provisions of DOLS.

We would, however, emphasise that the administration of any covert medication is a step which must be taken with considerable care and forethought. Indeed, a failure to comply with the principles of MCA 2005 and the steps required by s.4 would, we suggest, both mean that it would not be possible to justify the resulting interference with the Article 8 ECHR rights and (by analogy with *Winspear*) mean that those involved in the administration of the medication would have no defence under s.5 MCA 2005 to a claim brought on the basis of those rights.

State imputability, families and deputies

Re R [2016] EWCOP 33 (Senior Judge Lush)

Article 5 – deprivation of liberty – state imputability

Summary

In a judgment from a case heard prior to the decision in *Re SRK* but delivered afterwards (without referring to it) Senior Judge Lush has also weighed into the debates about state imputability in the context of Article 5.

In, *Re R* Senior Judge Lush had cause to consider the situation of Robert, a young man with intellectual disabilities, epilepsy and autism. He was non-verbal and frequently self-harmed, and required a high level of support from others to manage his activities of daily living. His mother, father and brother were his deputies (both for property and affairs and personal welfare). In January 2015, at a meeting convened by his social worker from LB Haringey, and attended by his family and members of the staff from his college, it was agreed that the best option for Robert, when he left college, would be a supported living placement. Haringey agreed to fund the family's proposed choice of supported living placement, together with day care, and transport between the two.

In December 2015, Haringey applied to the Court of Protection for a determination as to whether Robert was deprived of his liberty (and if necessary) authorisation. Haringey contended that Robert was not being deprived of his liberty and was free to leave his current placement whenever he wished; and, in the event that there

was any deprivation of his liberty, it was his family's responsibility, as his court-appointed deputies, because they chose his current placement.

Senior Judge Lush held that Robert's care arrangements satisfied the acid test for deprivation of liberty because: he was obliged to live in a particular place subject to constant monitoring and control; he had 1:1 support during the day and 1:2 support at night; all aspects of his care arrangements were controlled and supervised by the care staff; he was only allowed to leave the building with close supervision; he was not free to leave the building without permission; if he did attempt to leave without permission, he would be restrained by the care provider's staff, naturally as an act of humanity; and the fact that his living arrangements were as comfortable as they possibly can be made no difference. He held that it was irrelevant that Robert was content and acquiesced with these arrangements. He also distinguished the decisions of Bodey J in the case of Mrs L and Mostyn J in *PS* on the basis that "[Mrs L] *was living in her own home and had no supervision and control for large parts of the day. For broadly the same reasons, Robert's circumstances are also different from Ben's* [in PS]*, who had appreciable privacy and was free to leave.*"

He also found (at paragraph 58) that:

> (a) *Haringey was actively involved in every stage of the care planning process. It actually admitted that, 'Haringey provided the financial support and specialist knowledge and commissioning ability to enable Robert to access the choice of providers and services that his parents have decided jointly with professional input are in his best interests.'*
>
> (b) *Haringey convened the meeting on 23 January 2015, at which it was decided that the best option for Robert would be supported living.*
>
> (c) *It provided specialist knowledge by drawing up a list of the organisations that support people with autism to live in the community.*
>
> (d) *It supplied a copy of that list to Robert's deputies and invited them to decide which package of support they thought would be most suitable for him.*
>
> (e) *Whatever choice Robert's deputies had made would have been subject to further approval by Haringey.*
>
> (f) *Haringey carefully matched Robert with his two housemates to ensure that the three of them would be compatible with one another.*
>
> (g) *Haringey funds Robert's supported living placement and his day care and the transport costs between the two locations.*
>
> (h) *The providers of the placement and the day care service are accountable to Haringey.*
>
> (i) *The supported living placement and the day care service are subject to review by Haringey.*

Further:

> *59. For the purposes of section 4 of the Mental Capacity Act 2005 Haringey was ultimately "the person making the determination" as to*

> *what was in Robert's best interests and, because it was practicable and appropriate to consult them, pursuant to subsection 4(7), Haringey took into account the views of 'any deputy appointed for the person by the court.'*
>
> *The deputies' views, however, did not automatically determine the outcome and were merely a factor that Haringey was required to take into account as part of the overall decision-making process.*

Because he found that the state (in the form of Haringey) was directly responsible for the deprivation of liberty, Senior Judge Lush did not then go on to consider issues of indirect state responsibility.

Comment

It is hardly surprising that Senior Judge Lush had little truck with Haringey's attempt to disavow responsibility for what was clearly an objective confinement of Robert to which he could not consent. However, for our part, we would have focused solely upon the fact that, discharging public law obligations, they were commissioning and funding the arrangements under which Robert was (beneficently) confined. It seems to us that this is where Haringey's real responsibility for the deprivation of liberty lay.

Indeed, we would respectfully suggest that the reference to s.4 MCA 2005 is something of a red herring here. On its face, if (as appears clear) Haringey was in discharge of its public law obligations willing to fund a range of placements, between which Robert's deputies were able to choose on his behalf, then for purposes of the MCA (but not Article 5 ECHR), it seems to us that the decision-makers in this case were indeed the deputies. Senior Judge Lush's decision may reflect the pragmatic reality that the public authority will be seen to be in the MCA driving seat in these situations, but it does not sit easily with the fact that only deputies, attorneys and the Court of Protection are able formally to make decisions on a person's behalf, and in respect of all other – informal – decisions the MCA does not afford any particular status to one person or body (see *G v E* at paragraph 51). Alex will be exploring the issue of informal decision-making, the place of public authorities and the proper approach to s.5 MCA 2005 in an article forthcoming in the Elder Law Journal.

We would also suggest that when read together with the decision in *Re SRK* this decision reinforces the point that arguments as to direct versus indirect state responsibility are rather beside the point in these situations. Even if Haringey had been found not to be directly responsible, it seems to us inconceivable that it would not have been found to be have been on notice of the confinement and following Re SRK and *Re A and C* [2010] EWHC 978 (Fam) to have been under the obligation imposed by the positive limb of Article 5 ECHR to have investigated the circumstances and, if the confinement could not be brought to an end (as by definition here it could not have been given that Haringey were in agreement with it) sought the necessary authority from the Court of Protection. We should note that, whereas in Re SRK, it would appear that the obligation to seek the authorisation of the Court of Protection lay with the deputy administering the personal injury settlement, there could have been no doubt that it would have lain with Haringey here as it was funding the arrangements.

Deprivation of liberty, dogs and a deputy's dereliction of duty

Mrs P v Rochdale Borough Council and others [2016] EWCOP B1 (District Judge Matharu)

Article 5 ECHR – DOLS authorisations – Article 8 – contact – P's wishes – deputies – property and financial affairs

Summary

Mrs P's deprivation of liberty was authorised in a nursing home. By the time of the final hearing in the MCA section 21A proceedings, place of residence was not in dispute. The focus was upon whether the care arrangements amounting to a deprivation of her liberty were in her best interests. And these were "*inextricably linked*" with the appointment of a deputy that was managing her property and finances.

She had experienced two strokes and was a coeliac sufferer requiring gluten-free food. The only living being with whom she shared any love or devotion was her dog, Bobby. Her "*face lights up*" when she saw other dogs. But the deputy considered "*it would seem irresponsible in the extreme to suggest that a dog visits a care home for elderly and frail people*". She owned her own home and had a number of pensions and investments in bonds. The court was particularly troubled about how Mrs P, and the things that she needed, were (not) being provided for by her deputy:

> *27 … What is known is that her wishes and feelings before her second stroke were very clear. She enjoyed a good quality of life, she loved her dog, likes to be made to feel glamourous. Now she is wearing ill-fitting clothes, and financially unable to pay to have her feminine needs attended to, such as having her hair and nails done.*

The deputy failed to provide money for new clothes. Nor did he purchase the more varied food that was requested and refused a request by Mrs P's legal representative to bring Bobby to see her. These were "*all matters which are affecting the quality of her life. They are extremely important to and for her*."

District Judge Matharu decided to replace the deputy with a panel deputy because he was not acting in her best interests and appeared to be working against the litigation friend, not with them. Moreover:

> *27. It may seem to those not well rehearsed in the needs of a person who owns a pet, in this case a person who no longer has capacity to make decisions about various matters, what the importance of a pet is in their life. The deputy only has to read any single reference in reports, assessments or statements of Mrs P of how important Bobby is to her. Her Social Worker says in her witness statement to the court that:*
>
> > *I would recommend that of single most importance in her life is her dog and having some form of contact with her dog in the future if possible.*
> >
> > *By comparison, the comments of Temperley Taylor solicitors in the e mail of 13th July are "brutal" and insensitive. When enquiries were made of them, they appeared to reject such questioning or consider themselves challenged in some inappropriate way. That is not the case. The questions being put to them were a line of reasonable enquiry by the Litigation Friend as to Mrs P's best interests.*

28. I have had regard to the financial information at C67-8. In around October 2015 the money in her NatWest account was around £7000. Now there is a nil balance. That is all the court is told. "Troubling" is the term that I would use and this is an understatement.

29. When I consider the Act and Code of Practice, the authorities show I should deal with as many matters as possible. I am making this order today because the deputy having been served with the application was aware of its content and implications. I have used every endeavour to resolve matters in the least restrictive way possible to Mrs P. However, this is the only way to deal with matters. I commend counsel for bringing it to court in this way. The Deputyship cannot continue to operate in "a prism" of its own.

Comment

We mention this decision for three reasons. The first concerns human well-being. The importance of animals to those with (or, for that matter, without) dementia or other conditions cannot be underestimated. Indeed, some go so far as to describe it as "*dog therapy*" or "*animal-assisted therapy*." In this case, Bobby was given away when Mrs P moved into residential care. Experience suggests that, especially in a "gilded cage", the comfort of a pet can make people happier and reduce so-called "*behaviour that challenges*."

Secondly, it is worth noting that the deputy had failed to engage with the court on the basis that they were not a party to the welfare proceedings. District Judge Matharu corrected the error of the deputy's ways:

24. Let me make this clear. Under Rule 74 of the Court of Protection Rules, any order made binds this firm because "any person who has been served with or notified of an application form" shall be bound as if they were a party. Temperley Taylor LLP knew there was a hearing date. They were served with the application and informed of it. The Deputy has a solicitor at court today so is represented and will be bound by the order I make.

The final reason is jurisdictional. The application to remove the financial deputy was made within MCA section 21A proceedings. It is axiomatic that access to money can affect someone's liberty. And being able to consider financial deputyship within section 21A proceedings, avoiding a jurisdictional fixation, is – we suggest – eminently sensible.

Short Note: objections, RPRs and Article 5(4)

The long-awaited judgment from Baker J as to when it is necessary for RPRs to bring challenges (themselves or in the name of P) against authorisations has now been delivered orally. We will report upon the judgment and upon its consequences fully when it is published.

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Conferences at which editors/contributors are speaking

4th World Congress on Adult Guardianship

Adrian will be giving a keynote speech at this conference in Erkner, Germany, from 14 to 17 September. For more details, see here.

Autism-Europe International Conference

Alex will be taking part in a panel discussion on deprivation of liberty at Autism-Europe's 11th international congress in Edinburgh on 16-18 September. 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 third (free) seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Deprivation of Liberty in the Community

Alex will be doing a day-long seminar on deprivation of liberty in the community in central London for Edge Training on 7 October. For more details, and to book, see here.

Switalskis' Annual Review of the Mental Capacity Act

Neil and Annabel will be speaking at the Annual Review of the Mental Capacity Act in York on 13 October 2016. For more details, and to book, see here.

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester, which this year has the theme 'The five guiding principles of the Mental Health Act.' 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.

Alzheimer Europe Conference

Adrian will be speaking at the 26th Annual Conference of Alzheimer Europe which takes place in Copenhagen, Denmark from 31 October–2 November 2016, which has the theme Excellence in dementia research and care. For more details, see here.

Jordans Court of Protection Conference

Simon will be speaking on the law and practice relating to property and affairs deputies at the Jordans annual COP Practice and Procedure conference on 3 November. For more details and to book see here.

Other conferences of interest

Financially Safe and Secure?

Action on Elder Abuse (AEA) Northern Ireland is delivering its first national conference on 30 September, supported by the Commissioner for Older People for Northern Ireland (COPNI) and sponsored by Ulster Bank, to explore the nature and extent of financial abuse of older people and focus on working collaboratively to address what has been described as the 'crime of the 21st Century'. For full details and to book see here.

Chambers Details

Our next Newsletter will be out in early October. 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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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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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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

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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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