Mental Capacity Law Newsletter December 2016: Issue 71

Compendium

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: DOLS and objections, the scope of s.21A appeals and best interests in treatment withdrawal;

(2) In the Property and Affairs Newsletter: capacity to revoke an LPA, capacity and IVAs, and litigation friends, influence and trusts;

(3) In the Practice and Procedure Newsletter: the Court of Appeal looks at committal, dismissing vs withdrawing proceedings, and the acceptable limits in criticising witnesses;

(4) In the Capacity outside the COP Newsletter: news from the National Mental Capacity Forum, new consent guidelines for anaesthetists, an important Serious Case Review regarding self-neglect, an update on the international protection of vulnerable adults and a Christmas book corner;

(5) In the Scotland Newsletter: delegation by attorneys and getting it backwards as regards capability to stand trial.

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.

We will be back in early February, and wish you all a very happy holidays in the interim.

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For all our mental capacity resources, click here.

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Law Commission Deprivation of Liberty project delay

On 1 December, the Law Commission sent the following email to stakeholders:

> *I am writing to inform you that unfortunately the publication of our final report and draft bill will be delayed. We had planned to publish by the end of 2016, but we now expect to publish in March 2017.*
>
> *The reason for the delay is the complexity of the task of drafting legislation on such an important issue. It is vitally important to get the law right here. Badly drafted, over-complicated law is a big part of the problem with the current DoLS, and we do not want to fall into the same trap again.*
>
> *We are very aware that the project deadline was brought forward at the request of the Department of Health and for a good reason: there is an urgent need for the system to be improved. We know too that many stakeholders are waiting for our report and draft Bill and will be disappointed with any delay. For this we apologise.*
>
> *But we are convinced that it is far more important to deliver a fully completed draft Bill that can deliver effective safeguards to those being deprived of liberty. We are also confident that our new publication date will not delay the introduction of legislation into Parliament, should the Government wish to do so. It will be for Government to decide how to take forward the recommendations and draft Bill.*

DOLS, objections and s.21A applications

Re RD & Ors (Duties and powers of RPRS and s.39D IMCAs) [2016] EWCOP 49 (Baker J)

Article 5 – DOLS RPR

Summary

Five test cases involving elderly people (RD, JB, JP, EP and JW) who suffered from a form of dementia were identified to enable the court to consider the question of when an application should be made under section 21A MCA. A brief description of the five cases is as follows:

1. RD had a lifelong presentation of mental and physical disabilities with a historic diagnosis of chronic schizophrenia although her symptoms were more closely akin to learning disabilities and autism. During the initial stages of her stay, she frequently expressed an objection to being at the care home and a desire to leave. Recently, she became inconsistent about her wishes and expressed a fear of moving from the care home;

2. JB had Alzheimer's disease. After moving to the care home, she was frequently agitated, attempted to leave the building and became verbally aggressive when prevented from doing so. At other times she requested to leave and thought she had to pick up her children (all of whom were grown up) from school. In more recent months the episodes of agitation had decreased and she was no longer attempting to leave the property. She was engaged more in activities and enjoyed walking around the grounds;

3. JP had a history of physical medical problems and suffered from moderate to severe dementia. On arrival at the nursing home, she repeatedly asked to be allowed to return home. She was regularly distressed and agitated, calling out loudly with repetitive sounds. JP moved to a quieter wing in the nursing home but once again became very agitated. When her RPR discussed with her the option of bringing an application to court JP emphatically stated that she would like this to happen;

4. EP had vascular dementia. After an admission to hospital following a fall, EP was discharged to a care home. She clearly objected to being at the care home, saying that it was like a prison, and that she wanted to return to her own home. The RPR concluded that there was a fluctuation in EP's compliance with the care arrangements and her acceptance of the situation;

5. JW suffered a series of strokes. He consistently expressed objections to his placement at a nursing home. He became more settled and willing to engage with staff and activities but whenever questioned about his placement he reiterated his wish to return home. Over time, JW increasingly appeared settled but always maintained his position of wanting to return home.

In the earlier case of *AJ* [2015] EWCOP 5 (which was reported in our February 2015 newsletter), Baker J considered the selection and appointment of RPRs and IMCAs, and the duty on the local authority to ensure that the person who lacks capacity is able to challenge the deprivation of their liberty. In this case, Baker J concentrated on the question of how the relevant person's representatives (RPRs) and s.39D MCA 2005 independent mental capacity advocates (IMCAs) should decide whether to bring an application to

the Court of Protection under s.21A MCA 2005. In the end, the local authorities accepted that the section 21A applications had been properly brought in the cases of EP and JW, and the other three cases (RD, JB and JP) were referred back to the RPRs for a decision in light of the court's general guidance.

When to bring proceedings under section 21A MCA

Competing submissions were made on behalf of the Official Solicitor, the RPRs/s39D IMCA, the local authorities and CCG.

The Official Solicitor argued that the court should adopt a broad approach to the general question as summarised by the court at paragraph 46:

> *(a) Given the importance of the availability of a court review in circumstances where a person is detained by administrative action, any evidence of P's wishes to bring the application is sufficient to trigger the duty of the RPR or IMCA to assist P in their application to the court.*
>
> *(b) Evidence of P's wishes may be direct, (arising from conversations between P and the RPR, or IMCA, or comments made by P to others, in which he or she has expressed a wish to challenge the standard authorisation or leave the care home), or indirect, (for example inferences drawn from P's behavior such as attempts to leave the home).*
>
> *(c) In certain circumstances, (for example, if P's wishes appear to fluctuate) it may not be possible for the RPR or IMCA to be satisfied that P does not wish to exercise the right to apply to the court. P's compliance with arrangements and/or a lack of clarify about whether he/she objects and/or any fluctuation in his or her wishes is not necessarily evidence that he is she does not wish to exercise the right of access to the court. It is the Official Solicitor's submission that in those circumstances it is appropriate for the RPR or IMCA to apply under s. 21A"*

The Official Solicitor characterised the RPR's decision as a best interests' decision which required the RPR to take into account all the relevant circumstances, including P's wishes and feelings, as well as the likely benefit to P of independent judicial scrutiny, and the impact of the proceedings on P, whether positive or negative (para 54).

The RPRs and s.39D IMCA argued that in cases other than those in which P expressed a clear and consistent objection to the arrangements for his/her care and treatment, proceedings under s. 21A should be issued where it appears, having regard to all the circumstances, that P wishes, or would wish, to exercise a right of appeal. This required evidence capable of founding a reasonable belief that P would wish to appeal, having regard to P's express wishes, his or her behaviour, and the wider circumstances of his or her deprivation of liberty (para 56).

The local authorities expressed real concern at the practical consequences of the approach advanced on behalf of the applicants which would be significant, particularly in the context of the increased level of DOLS applications following *Cheshire West* in an economic environment where a local authority might be subject to significant cuts.

They argued that proceedings under section 21A should be issued where it appears that P or the RPR wishes to exercise a right of appeal (para 62). There was no need to add the words "would wish" but accepted that in reality there may be

little difference (para 65).

The CCG made common cause with the local authorities and argued that what is required is a reasonable belief, considering the totality of the evidence, that it appears that P wishes to apply to court (para 70).

Baker J gave some helpful general guidance as to the approach that should be adopted by RPRs and IMCAs in deciding whether to issue proceedings under s.21A at para 86:

(1) The RPR must consider whether P wishes, or would wish, to apply to the Court of Protection. This involves the following steps:

(a) Consider whether P has capacity to ask to issue proceedings. This simply requires P to understand that he/she should not be subject to his/her current care arrangements. It is a lower threshold than the capacity to conduct proceedings.

(b) If P does not have such capacity, consider whether P is objecting to the arrangements for his/her care, either verbally or by behaviour, or both, in a way that indicates that he would wish to apply to the Court of Protection if he had the capacity to ask.

(2) In considering P's stated preferences, regard should be had to:

(a) any statements made by P about his/her wishes and feelings in relation to issuing proceedings,

(b) any statements made by P about his/her residence in care,

(c) P's expressions of his/her emotional state,

(d) the frequency with which he/she objects to the placement or asks to leave,

(e) the consistency of his/her express wishes or emotional state; and

(f) the potential alternative reasons for his/her express wishes for emotional state.

(3) In considering whether P's behaviour constitutes an objection, regard should be had to:

(a) the possible reasons for P's behaviour,

(b) whether P is being medicated for depression or being sedated,

(c) whether P actively tries to leave the care home,

(d) whether P takes preparatory steps to leave, e.g. packing bags,

(e) P's demeanour and relationship with staff,

(f) any records of challenging behaviour and the triggers for such behaviour.

(g) whether P's behaviour is a response to particular aspects of the care arrangements or to the entirety of those arrangements.

(4) In carrying out this assessment, it should be recognised that there could be reason to think that P would wish to make an application even if P says that he/she does not wish to do so or, conversely, reason to think that P would not wish to make an application even though he/she says that she does wish to, since his/her understanding of the purpose of an application may be very poor.

(5) When P does not express a wish to start proceedings, the RPR, in carrying out his duty to represent and support P in matters relating

to or connected with the Schedule, may apply to the Court of Protection to determine any of the four questions identified in s.21A(2) i.e. on the grounds that P does not meet one or more of the qualifying requirements for an authorisation under Schedule A1 ; or that the period of the standard authorisation or the conditions subject to which the standard authorisation is given are contrary to P's best interests; or that the purpose of the standard authorisation could be as effectively achieved in a way that is less restrictive of P's rights and freedom of action.

(6) Consideration of P's circumstances must be holistic and usually based on more than one meeting with P, together with discussions with care staff familiar with P and his/her family and friends. It is likely to be appropriate to visit P on more than one occasion in order to form a view about whether proceedings should be started.

(7) By way of an alternative to proceedings, it may be appropriate to instigate a Part 8 review, or to seek to work collaboratively with the family and the commissioning authority to see whether alternate arrangements can be put in place. Such measures should not, however, prevent an application to the court being made where it appears that P would wish to exercise a right of appeal.

(8) The role of the IMCA appointed under s.39D is to take such steps as are practicable to help P and the RPR understand matters relating to the authorisation set out in s.39D(7)(a) to (e), and the rights to apply the Court of Protection and for a Part 8 review, and how to exercise those rights. Where it appears to the IMCA that P or the RPR wishes to exercise the right, the IMCA must take all practical steps to assist them to do so. In considering P's apparent wishes, the IMCA should follow the guidance set out above so far as relevant."

In his judgment, Baker J emphasised that there is an important distinction between the roles of the RPR and the s.39D IMCA. The RPR has a wide role to represent and support P in matters relating to or connected with Schedule A1. The s.39D IMCA's role is more narrow and confined to the specific duties in s. 39(7), (8) and (9) (para 72).

The role of the RPR

The supervisory body must appoint a relevant person's representative (RPR) for every person to whom they give a standard authorisation for deprivation of liberty. Baker J described the RPR as *"a crucial role in the deprivation of liberty process, providing the relevant person with representation and support that is independent of the commissioners and providers of the services they are receiving"* (para 32)

Under paragraph 140 of Schedule A1, the RPR is obliged to:

- Maintain contact with the relevant person;
- Represent the relevant person in matters relating to or connected with Schedule A1;
- Support the relevant person in matters relating to or connected with Schedule A1

Baker J made clear that this obligation includes:

- Taking all steps to identify whether P wishes to exercise the right to apply to the Court of Protection (or the right to review) and, if so, it is the RPR's duty to ensure that the application is brought (para 73).
- Representing and supporting P in making an application to the Court of Protection where the RPR concludes that P would wish to make

the application in circumstances where P is unable to communicate that wish (para 77); and

- In supporting P, the RPR must assess for himself or herself whether an application should be made to the court in P's best interests, independent of any wishes expressed by P, and must therefore assess for himself or herself the matters in s 21A(2) namely:
    - Whether P meets one or more of the qualifying requirements;
    - The period for which the standard authorisation is to be in force;
    - The purpose for which the authorisation is given; and
    - The conditions subject to which the authorisation is given (paragraph 78).

The role of a s.39D IMCA

Baker J made clear that the role of a s.39D IMCA is much more limited. Under the MCA, the IMCA is obliged to:

- Take such steps as are practicable to help P and the RPR to understand the effect, purpose, duration, conditions, and reasons for the DOLS authorisation, and the relevant rights and how to exercise them;
- Take such steps as are practicable to help P or the RPR to apply to court or exercise the right of review.

By contrast with the RPR, it is not the role of the IMCA:

- Where P is unable to express a wish, either verbally or through behaviour, to analyse whether P would wish to apply. That is the role of the RPR.
- To consider whether there is any other reason to apply to the court to consider the questions in s 21A(2). That is also a matter for the RPR (para 84).

Comment

This is a very important judgment that makes for essential reading for all RPRs and IMCAs, as well as other practitioners. At the heart of this case is the court's general guidance at paragraph 86 which will no doubt provide a very useful reference point for practitioners when approaching the question of whether to issue s21A proceedings.

There are a number of interesting points arising out of this judgement:

Capacity

The first is the starting point of Baker J's approach, which is for RPRs and IMCAs to consider *"whether P has capacity to ask to issue proceedings"* (para 86(1)(a)). Baker J made clear that this capacity test was different to the test for capacity to conduct proceedings in that it had a lower threshold. It simply *"requires P to understand that the court has the power to decide that he/she should not be subject to his/her current care arrangements."* In the event that P has capacity to ask to issue court proceedings, then plainly those wishes must be followed. It is quite possible that P may have capacity to ask to issue court proceedings but

lack capacity to conduct the proceedings (in which case, P will require a litigation friend in the usual way).

Would P wish to apply to court?

In the event that P lacks such capacity, the crucial question to ask is *"whether P is objecting to the arrangements for his/her care, either verbally or by behaviour, or both, in a way that indicates that he would wish to apply to the Court of Protection if he had the capacity to ask"* (para 86(1)(b)).

It is therefore clear that practitioners should take into account verbal and non-verbal behaviour when considering the question of whether P is objecting and would wish to apply to court. It is important that the focus of the question is on whether P wishes to apply to the court and not simply whether he or she objects to the arrangements for his or her care (para 76). However, a note of caution: practitioners should be alert to the fact that P might wish to make an application to court even though P says that he/she does not wish to, and vice-versa (para 86(4)) (AJ might well have been an example of the former[1]). In considering whether P's behaviour constitutes an objection, regard should be had to other possible reasons for P's behaviour such as whether P is on medication (although Baker J does not explicitly accept or reject the local authorities' contention that certain behaviour may be the symptom of a mental health condition) (para 86(3)). This can make it extremely difficult for RPRs and IMCAs to accurately assess whether P really wants to, or would want to, apply to court. In cases of doubt, we suggest that RPRs should also apply the best interests test in para 86(5) of Baker J's judgment.

The role of best interests

Baker J rejected the Official Solicitor's contention that an RPR's decision to apply to court is always a best interests' decision. Instead, *"[w]here the RPR concludes that P wishes to apply to the court, it is not the function of the RPR to consider whether such an application would be in P's best interests"* (para 74).

However, when the RPR decides, independent of P's wishes, that an application should be made to court under s. 21A, then he is bound to apply the best interests principle (para 80). So, in short, *"the best interests principle does not apply where the RPR is facilitating P's wish to apply to the court, but it does apply when the RPR himself is deciding whether or not to apply"* (para 81).

It is very important that the second limb of the RPR's duty to make an application to court in P's best interests is not overlooked, even where P is not objecting (verbally or by his behaviour) to his care arrangements or expressing any wish to apply to court. RPRs must assess for themselves whether the conditions of a standard authorisation are met and whether the arrangements are the least restrictive. This is a vital part of the overall protection afforded for P's rights. As Baker J recognised in the judgment, it is the statutory scheme as a whole that guarantees that P's rights under Article 5(4) are adequately protected (para 85).

Flowchart

Tor has produced a flowchart summary of Baker J's judgment, available here.

[1] See para 67 of the judgment of Baker J "*In oral evidence, Ms G* [the BIA] *confirmed that she knew from the outset that AJ objected to being in care, but that she was adamant that she didn't want to use her right to appeal. She wanted nothing to do with lawyers, but rather wanted Mr. and Mrs C to do what they could to get her out*."

Section 21A under the microscope[2]

Briggs v Briggs [2016] EWCOP 48 (Charles J)

Article 5 – DOLS Authorisations – Medical treatment – Deprivation of liberty

Summary

In this case, Charles J had to decide whether it was possible for the question of whether it is a person's best interests to continue to be given clinically assisted nutrition and hydration ('CANH') to be determined in proceedings brought under s.21A MCA 2005. The question arose because the applicant – the wife of, and RPR for a man in a minimally conscious state – brought an application under s.21A MCA 2005 challenging the DOLS authorisation in place at the hospital he was in. She did so on the express basis that doing so would allow her to claim legal aid on a non-means-tested basis so as to be able to have legal representation to be able to argue her case that continuation of CANH was not in his best interests. Her position was opposed by the Official Solicitor, the Legal Aid Agency and the Secretary of State (as the Ministry of Justice and Department of Health collectively) on the basis that:

1. On the Official Solicitor's case, non means tested funding is not available to present arguments relating to the care, support or treatment of a P as they related to conditions of detention, and were therefore outside the scope of s.21A (Article 5 not relating to conditions of detention);

2. On the Secretary of State's case, such funding was only available where the issues related to "physical liberty."

Charles J, in an extensive and wide-ranging judgment, came to the very clear conclusion that both of these arguments were wrong, and that it was entirely proper for the Court of Protection on a s.21A application to consider the question of whether CANH was in Mr Briggs' best interests as part and parcel of the discharge of its functions under s.21A MCA 2005. The following conclusions from his judgment are of particular relevance or importance:

1. The clear conclusion that a DOLS authorisation does not authorise the care plan for, or medical treatment of P, or protect those who are providing them from liability for so doing. It is limited to authorising the deprivation of liberty that those acts create (paragraph 48);

2. The determination of whether the deprivation of liberty is in P's best interests, necessary and proportionate "*has to involve consideration of P's circumstances in a hospital or care home and so of the care, support and treatment proposed or provided to meet P's needs in them even if it is limited to a consideration of their effect*" (paragraph 50), and hence "*the determination of the questions posed by the definition of the best interests condition must involve a consideration of: i) the impact of possible and available alternatives and issues of degree, and ii) as far as reasonably ascertainable P's past and present wishes and feelings, beliefs and values and factors that P would be likely to consider if he were able to do so*" (paragraph 52);

3. That generally the COP should take control of all aspects of the case when proceedings are

[2] Note, Tor and Annabel being involved (in different capacities) in this litigation, this note is prepared without their input.

brought under s.21A MCA (even if an authorisation should remain in place to allow non-means-tested legal aid to continue to be justified: paragraphs 29-34). This was particularly the case in the proceedings before him given the nature of the CANH best interests issue (paragraph 70), in which the determinative or central issue was whether CANH is in Mr Briggs' best interests and the conclusion on it should found an order under s. 16(2) MCA 2005. The determination of that issue by the COP would found and so was directly relevant to its consideration of its exercise of its functions under s.21A (which it can exercise whether or not proceedings have been issued under s.21A) (paragraph 76);

4. Whatever the precise requirements of Article 5 ECHR, a literal construction of DOLS shows that they went beyond that required to meet Article 5 and effectively include the best interests test that is applied whenever a decision has to be made pursuant to the MCA for a person who lacks capacity to make that decision himself (paragraph 87). This showed that:

> *91.* […] *in a case such as this when the purpose of the placement in the hospital is obviously for care and treatment the "all or nothing approach" advanced effectively on the basis that P will continue to be deprived of his liberty whatever regime of treatment is put in place (and so whether or not CANH is in Mr Briggs' best interests) runs contrary to a best interests consideration of the circumstances P (Mr Briggs) is in on the ground as it seeks to exclude a consideration of P's views etc. under s. 4(6) and whether the conditions can be improved or made less restrictive under s. 1(6) of the MCA.*
>
> *92. Alternatively, if it is said that the views of P on (life sustaining or other) treatment can be taken into account in considering whether he should be deprived of his liberty (or his personal liberty should be removed) this takes one back to the central issue in this case namely the impact of Mr Briggs' views etc. under s. 4(6) on whether treatment should be withheld with the consequence that he should be allowed to die. It would be very artificial and in my view callous to say that this was irrelevant to the issues relating to his physical liberty, or the termination of the exiting DOLS authorisation, because during the period after the cessation of the CANH leading up to his death his physical liberty would not change even if (as is at least likely) he moves from the hospital to a hospice.*

5. The acknowledgement that the best interests assessor will not be able to carry out the intense scrutiny that the COP can and would have practical difficulties in challenging the medical decisions that found protection from liability under s. 5 MCA. Charles J noted, however, that the assessor could reach his best interests assessment on the basis of the views of the treating team leaving it to P or his RPR to challenge the authorisation or put a condition on the authorisation or limit its duration to enable any dispute to be put before the COP (paragraph 94);

6. Further, even if the best interests requirement under DOLS was limited in the way that the Official Solicitor and the Secretary of State argued, the best interests test as then applied by the Court of Protection in determining whether CANH should be continued was related to matters arising under s.21A(2)(a)-(d), because (1) it

was related to the best interests condition of the best interests requirement; (2) and provided the answers or information relevant to the answers to the questions of: (a) the period of the standard authorisation (e.g. until a move to a hospice or a rehabilitation unit); (b) the purpose of the standard authorisation, namely whether the treatment should or should not include CANH; and (c) conditions of the standard authorisation (e.g. about preparations to be made for a move). These answers informed – Charles J held – what the COP can order under s.21A(3) by way of variation or termination of the standard authority itself or by direction to the supervisory body (paragraphs 96-99). Charles J noted in this regard that:

> *102. This view of the width of what the COP can properly do under s. 21A is confirmed when other types of case are considered. For example, when P is in a care home the best interests issues can encompass changes in the care plan (incorporated into or on which the standard authorisation is based) involving less restrictive options, the giving of medication covertly or in particular circumstances, the use of restraint, more visits to the community and contact. Even if they are outside the factors to be considered under the qualifying requirements (and so the best interests condition) they:*
>
> *i) inform and so relate to the matters referred to in s. 21A (2)(b) to (d), and*
>
> *ii) inform the order or orders to be made under s.21A(3), (6) and (7) in respect of the DOLS authorisation that has been granted (and if necessary extended by the COP applying the approach in Re UF).*

7. Finally, Charles J noted that, on a purposive intention of the legislation, Parliament would not have intended the COP to be concerned with the distinctions advanced in this case by the Secretary of State, the LAA and the Official Solicitor:

> *108. Absent the issue relating to the availability of non means test legal aid, which it is common ground is irrelevant, these distinctions are not agreed between them, give rise to fine, difficult and potentially emotionally draining issues (e.g. whether a decision that leaves out of account the views etc. of P on whether he should be detained at place A or place B relates to his personal liberty or a deprivation of his liberty within Article 5 having regard to its subjective element) and are irrelevant because the COP can deal with all issues in this case in an application brought in reliance on s. 21A or an application brought seeking orders under ss. 15 and 16 of the MCA.*
> […]

Charles J therefore held that Mrs Briggs could properly raise the issue of whether CANH should be continued as part of her s.21A challenge as RPR for her husband. We address the substantive decision in relation to her husband's treatment in the separate case comment below.

Comment

On one view, it would appear odd that a s.21A application could be used as a vehicle to challenge decisions about CANH, and it is undoubtedly the case that Mrs Briggs was "lucky" that there happened to be in place a DOLS authorisation at the hospital to allow her to do so (note that Charles J expressly did not decide whether or not in fact Mr Briggs was deprived of

his liberty, as this was assumed to be the case for purposes of the preliminary issue decided here).

However, once one steps away from the specific place that CANH has as a type of serious medical treatment ('SMT') and the mindset of SMT cases, Charles J's logic would seem impeccable. DOLS may have been designed to plug the Bournewood gap, and to that end could have been limited solely to a determining whether or not the deprivation of liberty was necessary and proportionate (the test for Article 5 purposes). However, the scheme undoubtedly went further to include a specific best interests requirement which, in turn, requires the application of the best interests test under s.4 MCA 2005. Once the best interests genie was let out of the bottle, that must carry with it the connotation that those concerned with considering the requirement (and the court on a s.21A application) must have a wide view of the nature and purpose of the authorisation and – in turn – asking whether the care and treatment which gives rise to the need for it is, in fact, in the person's best interests.

It is, perhaps, not surprising – given the implications for legal aid in s.21A applications – that the Secretary of State/Legal Aid Agency are seeking permission to appeal to put the best interests genie back in its bottle.

Best interests and life-sustaining treatment[3]

Briggs v Briggs (No 2) [2016] EWCOP 53 (Charles J)

Best interests - Medical treatment

Summary

On 3 July 2015, Paul Briggs was the victim of a road traffic accident when he was travelling to work on his motorcycle. As a result of that accident he suffered serious brain and other multiple injuries and was rendered unconscious. He was minimally conscious state (MCS) and does not have the capacity to make decisions relating to his care and treatment or to communicate his wishes and feelings to others. His survival depended on the package of the care and treatment he was receiving in hospital. That care and treatment included clinically assisted nutrition and hydration (CANH). If that treatment was no longer given he would die.

In circumstances described in our case note on the earlier decision in this case ([2016] EWCOP 48), his wife brought proceedings on their face to challenge the DOLS authorisation in place at the hospital where he was being cared for, but in reality to seek a determination as to whether it was in her husband's best interests to continue to be given CANH or to be moved to a hospice where he would receive palliative care but no further CANH, and would, as a result, die.

His family and a police colleague of Mr Briggs described – in oral evidence the force of which Charles J described as not being easy to convey to those who had not heard it – a picture which convinced Charles J:

> *in the sense that I am sure (and so have no reasonable doubt) that if Mr Briggs had heard the evidence and argument that I have, including the evidence about his best case scenario and the possible distress, pain and difficulties he and his family may face if his CANH treatment is not continued he would have would have decided not to give consent to the continuation of his CANH treatment. I*

[3] Note, Tor and Annabel being involved (in different capacities) in this litigation, this note is prepared without their input.

add that he would have been supported in this decision by his family and they would have faced the tragic consequences of his accident together (paragraph 98).

There was therefore, in light of the approach taken by the treating NHS Trust and CCG, a profound clash of principles identified by Charles J at paragraph (28) of his overview between:

a. The sanctity of life and so the preservation and prolongation of Mr Briggs' life. Understandably this lies at the heart of the strongly held and consistent view of Mr Briggs' treating consultant that it would be unethical to withdraw his treatment by CANH and so deprive him of the opportunity of leading a life of value.

b. Autonomy and so self-determination which enables a person with capacity to do so to refuse life-sustaining treatment and so as a consequence to choose the side-effect of death. That decision can be made for any reason including that in existing or defined future circumstances that person considers that his or her life is or would be intolerable or has or would have no value and so not worth living. Understandably, the family want to achieve the result that they are convinced Mr Briggs would have wanted and decided on.

The Official Solicitor, as litigation friend for Mr Briggs, contended that the court should adjourn the matter for reconsideration after 6 months of treatment and rehabilitation which would allow a better informed neurological diagnosis and prognosis. The most realistic best case scenario, it was said, would be that, ultimately, Mr Briggs would:

a. Not regain mental capacity to make complex decisions
b. Be happy
c. Be able to make simple choices such as what colour t-shirt to wear
d. Have some pleasurable experiences
e. Have some painful experiences
f. Be unlikely to be depressed given his lack of insight, including lack of insight as to his pre-injury life, and pre-injury expressed wishes and feelings
g. Not have any improvement in his physical abilities
h. Be severely physically impaired
i. Need 24 hour care and be dependent on others for all activities of daily living
j. Have some improvement in his medical symptoms with the optimal treatment that would be available, including PSH, dystonia, groaning and contractures.

Because of the way in which the case was put by the NHS bodies (and the Official Solicitor), Charles J was required to go back to first principles as regards the construction and application of the MCA 2005, and also to conduct a detailed review of the case-law. This required him to consider, inter alia:

1. The background law and principles (paras 8-42), including – importantly – an analysis of the significance of Advance Decisions to Refuse Treatment and powers of attorney. As Charles J noted (at para 28), the sections of the MCA relating to these provisions "*are directed to enabling people with the relevant capacity to make choices refusing a wide range of future treatment (including life-sustaining treatment), or to giving donee(s) of a lasting power of attorney power to give or refuse consent to refuse any such treatment, at a time when the donors lack capacity and when, because of brain or other injuries, they may be very different and have very different perspectives on a whole range of issues including the quality of their life.*" This therefore carried with it the conclusion that "*the right to self-determination can dictate*

future decisions or steps to be taken in future" (para 30);

2. The making of best interests decisions (including by the court) in respect of life-sustaining treatment (paras 43-75), including in particular, an identification of the "holistic" approach to the application of the MCA identified by the Supreme Court in *Aintree* and its implications. Whilst Charles J emphasised that the test to be applied by the court is not – in general – a "*what P would have done test*," but a test requiring weighing and balancing, he expressly endorsed, "*as showing that P is at the very heart of the decision-making process*," the approach originally set down by HHJ Marshall QC in *S and S (Protected Persons)* [2010] 1 WLR 1082, namely that:

> *55. In my judgment it is the inescapable conclusion from the stress laid on these matters in the 2005 Act that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision-making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself.*
>
> *56. The 2005 Act does not, of course, say that P's wishes are to be paramount, nor does it lay down any express presumption in favour of implementing them if they can be ascertained. Indeed the paramount objective is that of P's "best interests". However, by giving such prominence to the above matters, the Act does, in my judgment, recognise that having his views and wishes taken into account and respected is a very significant aspect of P's best interests. Due regard should therefore be paid to this recognition when doing the weighing exercise of determining what is in P's best interest in all the relevant circumstances, including those wishes.*

3. At para 53, Charles J further emphasised that, whilst there is a strong presumption – which set the default position – that it is in a person's best interests to stay alive, it is a starting point but does not dictate what the relevant person's attitude (wishes and feelings) are now or were in the past. At para 62(ii) made clear that "*if the decision that P would have made, and so their wishes on such an intensely personal issue can be ascertained with sufficient certainty it should generally prevail over the very strong presumption in favour of preserving life*." Perhaps the core of his decision is to be found at paragraphs 69 to 74 thus:

> *69.* […] *the MCA requires a holistic and enabling approach and in my view this means that the court can and should take a realistic approach to the way in which people conduct their lives and make their decisions and so:*
>
> *(i) firstly make findings on the evidence relating to the matters set out in s. 4(6) on the attitude and approach of the relevant individual when he or she had capacity to the fundamental and deeply personal principles now at stake relating to the giving or continuance of life-sustaining treatment, and then*
>
> *(ii) apply those findings to the*

relevant circumstances in which the best interests decision now has to be made on whether life-sustaining treatment should be given or continue to be given to that person, to determine what decision he or she would have made if they now had capacity and so, in exercise of their right of self-determination was able to make the decision.

70. At step (ii), the court will address points that the evidence shows that the relevant person (P) did not specifically consider aspects of the present situation (e.g. being in MCS, the detail of his or her present position and best case scenario, difficulties and consequences of withdrawing CANH) and take them into account in a holistic way with all other factors, including the strong presumption in favour of preserving life and so the powerful instinct for survival, in determining how they would affect the attitude and choice of that particular P.

71. I acknowledge and urge that the evidence and reasoning relied on to reach a conclusion that P would not have given consent to the relevant life-sustaining treatment, and then to rely on it as a weighty or determinative factor to depart from the default position that P's best interests are promoted by preserving his or her life, require close and detailed analysis which founds a compelling and cogent case that this is what the particular P would have wanted and decided and so considered to be in his or her best interests.

72. It is also obvious that the existence of a relevant written statement (referred to in s. 4(6)(a)) would be helpful and so of particular relevance in the way that an advance directive or living will was before the MCA was enacted. But it is also obvious that in real life many if not most relevant expressions of wishes and feelings will not be in writing.

73 This approach promotes the protection and preservation of life of severely disabled people who lack capacity and whose survival is dependent on life-sustaining treatment because it requires that the factors assessed on a past and present basis are sufficiently compelling to outweigh the very strong presumption that underlies the default position (see for example and by analogy the citation from and the decision in In re AK (Medical Treatment: Consent) [2001] 1 FLR 129 at paragraph 83 of Baker J's judgment in Re M). As I have said, that intense analysis will address points that the evidence shows that P did not specifically consider aspects of the present situation.

74. I have deliberately not tried to set out how convinced the court has to be about what P would have decided if he or she was able to do so because, in my view, the weighing exercise is so case and issue sensitive and is not a linear or binary exercise, and because here I am sure (in the sense that I have no reasonable doubt) on the decision that Mr Briggs would have made if he was able to do so.

4. Earlier cases (paras 76-82), in which Charles J analysed previous case-law, and found made clear that he preferred the (post-*Aintree*) approach taken by Pauffley J in *United*

Lincolnshire Hospitals NHS Trust v N [2014] COPLR 60 and that of Hayden J in *Re N* [2016] COPLR 88, to that taken (pre-*Aintree*) by Baker J in *W v M* [2012] 1 WLR 1653;

5. The effect of s.4(5) MCA 2005 (paras 83 to 94), Charles J having little difficulty dispensing with the argument that s.4(5) MCA precluded him from making a welfare order/declarations which would have the effect of bringing about Mr Briggs' death.

At the end of his judgment (which also included a careful rehearsal both of the medical evidence and the powerful evidence as to Mr Briggs as a person), Charles J concluded that:

> *128. In my view, on an in all the relevant circumstances approach to the very difficult issue in this case the weighing exercise comes down to whether Mr Briggs' best interests are best promoted by giving more weight to:*
>
> *(i) the very strong presumption in favour of preserving life, or*
>
> *(ii) the great weight to be attached to what Mr Briggs as an individual would have decided himself if he had the capacity and so was able to do so.*
>
> *129. I have concluded that as I am sure that if Mr Briggs had been sitting in my chair and heard all the evidence and argument he would, in exercise of his right of self-determination, not have consented to further CANH treatment that his best interests are best promoted by the court not giving that consent on his behalf.*
>
> *130. This means that the court is doing on behalf of Mr Briggs what he would have wanted and done for himself in what he thought was his own best interests if he was able to do so.*

Charles J therefore granted the order sought by Mrs Briggs. As we went to press, the Official Solicitor was seeking permission to appeal, the order of Charles J being stayed in the interim. Whilst we understand that the basis of this application is the direction that Charles J gave himself as to the weight to be afforded to the presumption in favour of life, it is also clear that Charles J was concerned by the approach taken by the Official Solicitor to the family's evidence:

> *97. The Official Solicitor, or his lawyers, rejected the warning given by Hayden J in Sheffield Teaching Hospitals NHS Foundation Trust v TH [2014] EWCOP 4 where the judge said that his lawyers had not absorbed the force of the emphasis placed on a holistic evaluation by the Supreme Court. Worryingly, as in the case before Hayden J, the Official Solicitor, through his lawyers, sought to rely on the ways in which Mr Briggs' mother and one of his brothers had expressed themselves as a basis for weakening the force of their evidence. It would be surprising if loving family members did not express themselves in terms that differed in some respects and arrived at their conclusions for reasons that differed in some respects and over different periods of time. Complete consistency of approach and expression would give rise to more concern. I express the hope that the Official Solicitor will in future not seek to test family evidence in such a pedantic and so unsympathetic and unhelpful a way.*[4]

Comment

This judgment represents – we suggest – the

[4] It also appears from the 'Storify' – the curated collection of Tweets from the hearing and supporting materials gathered by Celia and Jenny Kitzinger – relating to the case that Charles J may have had concerns about the approach of the clinicians, but these do not appear to feature in the judgment.

paradigmatic application of the principles at the heart of the MCA 2005 governing best interests decision-making, as interpreted (or, more properly perhaps, confirmed) by Lady Hale in *Aintree*. Charles J sought carefully – and with due caution given the potential impact of his decision – to make the decision that was right for Mr Briggs as an individual human being.

Running through the judgment as an unspoken (and possibly unrecognised) undercurrent is Article 12(4) of the Convention in the Rights of Persons with Disabilities, as the various parts of the Act that Charles J explored and analysed seek to provide in different ways for the upholding, insofar as possible, of an individual's legal capacity notwithstanding their present inability to make their own decisions.

Whilst not strictly relevant (on one view) for his analysis, Charles J's exegesis of the role of LPAs and ADRTs make clear how such are designed to operate as important – empowering – tools to secure the right of self-determination even in the face of subsequent (mental) incapacity. In this regard, of particular importance are:

1. His clarification (at para 20) as to the precise requirements of ADRTs concerning life-sustaining treatment, noting that to call them "stringent" (as did Baker J in *W v M*) is to overstate the case, because they do not require that the person making it has any particular knowledge or have had any particular advice. Indeed, as Charles J noted at para 22, "*what is provided is less stringent that what the common law requires for the signing of a bank guarantee*;"

2. The confirmation that whilst there are "safety nets" in the form of s.25(2)(c) and 25(3) MCA, setting a low threshold for rendering an ADRT invalid – whether on the basis of the sanctity of life or otherwise – "*would run counter to the enabling intention of ss.24 to 26 MCA 2005*" (para 22). As he noted, further, even if the provisions did show that the ADRT was invalid or inapplicable, such that the best interests test became determinative, the court would nonetheless have to take into account the impact of the removal of the person's right to self-determination that they have sought to exercise by making the advance decision (para 22);

3. The clear statement (at para 31) in determining what is to happen to, or in respect of them in future (whether by making an ADRT: "*In making that decision individuals will not know what they will actually feel or want and so have to predict it. To make that prediction they will take into account a range of factors relating to their beliefs, values, lifestyle, wishes and feelings. That is not an easy task for them and their personal history, character, wishes, feelings, belief and values will be central to their performance of it*;"

4. Confirmation that where an individual does not make the future decision themselves but gives a donor of an LPA the power to make it, the donor(s) will be making the decision for themselves "*in light of the circumstances that exist at the time and with their knowledge of what the donor would have wanted them to do*" (para 32, emphasis added).

It is a matter of some regret that Charles J did not confirm expressly what follows as a logical consequence of these propositions (and we suggest clearly flows from the wording of the Act itself), namely that where there is in place a valid and applicable ADRT and/or an attorney with the requisite authority there is no need for application to court before treatment is either

withdrawn or withheld, there being no "space" for the court to make any best interests decision on the person's behalf. Charles J certainly recognised that there would be no such space (see para (10) of his overview and his agreement that if Mr Briggs had made a relevant ADRT "such an advance decision it would have been decisive and so no decision would have had to have been made under the MCA best interests test"), and we suggest that this provides a strong – obiter – pointer that an application is not required.

Similarly, where a person has not provided formally for the future exercise of their right of self-determination, the approach adopted by Charles J prioritises, at least in the specific case of determining whether consent should be given or refused to life-sustaining treatment, the identification and then the formal adoption of the decision that P would have made.

Importantly, however, Charles J – correctly – made clear that the best interests test is not a simple "substituted judgment" test. To that extent, and as discussed in the EAP Reports on the compatibility of the MCA with the CRPD, the test is not compatible with Article 12 as interpreted by the UN Committed on the Rights of Persons with Disabilities. However, the list of situations he gives at para 60 of where the court is not enabling P to do what he could or would want do for him or herself if of full capacity is instructive:

> *(i) P's history may show that he or she has made a series of damaging investment or lifestyle decisions and so although if they had capacity they would be likely to do so again the court (or other decision maker) can conclude that it would not be in their best interests for such a decision to be made on their behalf,*
>
> *(ii) it is not uncommon that what P would have wanted and would now want is not an available option,*
>
> *(iii) it is not uncommon that very understandable expressions of present wishes and feelings "I want to go home" would not be made if P was able to weigh the existing competing factors by reference to P's beliefs and values, and in any event are not in P's best interests, although current expressions of wish can inform which of available alternatives has the best chance of being successfully implemented,*
>
> *(iv) the point that an individual and a court cannot compel a doctor to give certain types of treatment is a factor in cases relating to life-sustaining and other treatment (as an individual can only exercise his or her right of self-determination between available choices), and*
>
> *(v) the existence of clinical conditions, physical illness and the types of life-sustaining treatment (e.g. resuscitation or treatment in intensive care) and the pain or loss of dignity they cause can be highly relevant factors in reaching a conclusion contrary to the evidence of P's family that P would have wished treatment to continue (see for example NHS Trust v VT [2014] COPLR 44, a decision of Hayden J).*

Two of these situations (ii) and (iv) in particular are ones where (on a proper analysis) P's lack of capacity is irrelevant – they could not get what they would or do now appear to want whether or not they were said to have the mental capacity to make the decision. The third of the situations represents one where it might properly be said that there might well be a clash between P's

present wishes and feelings and their pre-existing beliefs and values: or, framed in CRPD terms, that there is a clash between their will – if such is intended to capture a more 'essential' aspect of the person – and their (more immediate) preferences. The first and last of the situations (in particular the first) represent an approach to best interests which would appear to prioritise a more "objective" view of what would best serve the person. But in none of them, and crucially, does Charles J suggest that it is not important to seek to ascertain P's wishes and feelings in relation to the matter. Further, in each situation it is arguable that what the court is seeking to do is to find a way to weigh and balance those wishes and feelings against other factors: in other (CRPD) words to find a way to "*respect the rights, will and preferences*" of the person. It is in teasing out precisely what "respect" means in this context that the real demands of Article 12(4) CRPD will make themselves clear.

Interestingly, Charles J notes at a different part of the judgment (para 49) that his approach to resolving the potential for an inconsistency between past and present wishes and feelings is to place less weight on present wishes, as "*what the relevant person says, does, demonstrates or communicates about the matters referred to in s.4(6) has to be assessed against the background that he or she does not have capacity to make the relevant decision and so to weigh those matters with the relevant factors*." This may be a matter which falls for further consideration in a case where such a mismatch is in fact in issue (as was not the case here). We also note a rather different way in which a mismatch was approached in the case of *SAD v SED* discussed in the Property and Affairs section of this Newsletter.

We note, finally, that whilst paragraph 48 might be read as suggesting that doctors are entitled to place a higher weight upon "medical" or "ethical" (for which we read "a belief in the sanctity of life") matters than upon what P might have wanted, this must be read in its context of a dispute between the family and the treating team as to where P's best interests lie which is before the court to be resolved. Further, we certainly do not read this paragraph as suggesting that all disputes as to medical treatment as the very essence of decision-making under the MCA should be collaborative (see *G v E (Deputyship and Litigation Friend)* [2010] EWCOP 2512 at para 57:

> *The Act and Code are therefore constructed on the basis that the vast majority of decisions concerning incapacitated adults are taken informally and collaboratively by individuals or groups of people consulting and working together. It is emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons. Experience has shown that working together is the best policy to ensure that incapacitated adults such as E receive the highest quality of care),*

There are, further, a host of mechanisms to enable disputes to be resolved without recourse to the court (see, in particular, in this regard, the work of the Medical Mediation Foundation).

Of course, the question of whether cases of this nature have to come to court even where there is no dispute is a currently a very hot topic (see inter alia Alex's post and article on the topic, and the article by Lynne Turner-Stokes in the Journal of Medical Ethics), but that is not a matter upon which Charles J touched in his judgment.

When enough is enough

Abertawe Bro Morgannwg University LHB v RY and CP [2016] EWHC 3256 (Fam) (Hayden J)

Best interests – medical treatment

Summary

In this case, Hayden J returned to a theme that has been exercising him increasingly. As he noted during exchanges with Counsel for a family member in an application for withdrawal of life-sustaining treatment from a person said to be in a PVS following severe hypoxic damage:

> *6.* […] *I have been concerned in a number of cases now by the apparent readiness of the profession involved in Court of Protection cases to adjourn these difficult applications for a wide and ever-varying variety of enquiry. This is all entirely well-motivated and there is no doubt that the proper instinct to preserve the sanctity of life must always remain in clear focus when evaluating a course that may lead to the death of a patient. However, it is well established that this important principle does not exist in a vacuum.*

In support of the principle that the sanctity of life is not the sole governing principle, he cited passages from *Re N* [2015] EWCOP 76, *Pretty v United Kingdom* [2002] 35 EHRR 1, and *Airedale NHS Trust v Bland* [1993] AC 789, before noting that:

> 11. *As a Judge sitting in the Court of Protection, I have experience of litigants seeking very extensive assessments and re-assessments, in a way that occurred in the Family Division in Children Act 1989 proceedings, most particularly in public law care proceedings. The reasons for both strike me as similar, namely that the decisions the Court is asked to make are of such great importance and carry such profound consequences that there is, I think, a forensic instinct to leave no stone unturned. I am bound to say however, that I sometimes feel that I am being asked to authorise a petrological survey on the upturned stone. Just as the Family Justice reforms have re-emphasised the real dangers to vulnerable children caused by avoidable delay, so to, it seems to me, practitioners in this field must recognise that delay which is not, on a true analysis, either constructive or purposeful is almost certainly damaging and thus inimical to P's welfare.*

He continued that:

> *12. Though avoidance of delay is not a statutory imperative in the Mental Capacity Act 2005 the principle is now so deeply embedded in the law of England and Wales and across every jurisdiction of law that it should be read into Court of Protection proceedings as a facet of Article 6 and 8 ECHR. It requires to be restated that the Court of Protection Rules provide for the Court to restrict expert evidence and assessment…*

He noted that he had revisited the core principles because:

> *13. I have real misgivings whether the proposals for further assessment and inevitably further expert opinion can properly be said to be in RY's best interests. RY, I have been told, is a deeply religious man. His family are similarly committed to their faith. Mr Sachdeva agrees that their position can be stated starkly and without nuance. They would wish RY to have life no matter how fragile or vestigial. Though others might regard their father's life as entirely compromised or even debased they would prefer that to his death. This is a fundamental tenet of their beliefs which resonates throughout the Judeo-*

Christian and Islamic faiths.

14. Having watched the clinicians from the Health Board in the courtroom this afternoon I had a very strong sense that they were unconvinced as to whether this proposed course was consistent with their ethical obligations to their patient. Their unease was almost palpable, even before Mr Chisholm informed me that the clinicians shared many of the concerns that I articulated during the course of exchanges with counsel.

However, in light of video evidence that had come to light which revealed a level of consciousness that was not consistent with the rest of the available clinical information, Newton J acceded with reluctance to a delay for further assessments, noting that:

20. Given the scale of the hypoxic damage, the preponderant evidence suggests that any significant improvement may be rather a forlorn hope. I think RY's family should be under no delusion as to the prospects. That 'flicker of hope', says the Official Solicitor, is one that should be pursued on RY's behalf. Ultimately, I have acceded to that submission but I do so on a very particular basis and that is that the assessment process, which has been outlined in framework this afternoon, is carefully monitored and that the SMART assessment, is commenced no later than 6th December. If, at any point between today and the end of January when I anticipate this case will return to me, those treating RY feel that this delicately poised decision has shifted, so that ongoing treatment and/or assessment does not continue to be in his best interests, I spell out in clear and unambivalent terms that I regard it as the duty of the Health Board to return the case to Court expeditiously. Sympathetic though I am to the views of RY's family and the complete integrity with which they seek to convey RY's views to the Court, their own views and feelings must always remain subordinate to RY's best interests, objectively assessed.

21. The care plan requires to be specific, focused, choate and detailed, bearing in mind, as I have emphasised that prolongation of the investigation may be contrary here to the patient's best interests. On this basis, and for these reasons, I am prepared to make the declarations that the parties seek today, including the necessary step of a tracheostomy which I understand, all being well, will be completed within the next twenty-four to forty-eight hours.

Comment

This case reveals a real tension between the – understandable – desire of family members (and other parties) before the Court of Protection to examine every possible avenue which might support their case, and the need both (1) to ensure that cases are determined without undue delay; and (2) not to inflict assessments on P which may not merely give rise to a delay but actively to harm their interests. Although serious medical treatment cases such as that before Hayden J fall outside the Case Management Pilot, these issues arise – albeit perhaps on a less dramatic scale – in many welfare cases, highlighting, above all, the need for robust judicial management of cases to ensure that, at each stage, a proper answer can be given as to why any particular step or assessment is being undertaken.

Hayden J's comments about the place of sanctity of life in the making of best interests decisions in this arena also chime with the considerably more detailed analysis by Charles J in *Briggs v Briggs (No 2)* case that we cover above.

LPAs, capacity and revocation

SAD and ACD v SED (Unreported, *Case no. 12791319* (4 November 2016) DJ Glentworth

Lasting Powers of Attorney – Revocation

Summary

This is the first post-MCA case to consider the issue of capacity to revoke a lasting power of attorney ('LPA').[5] SED decided with capacity to appoint her daughters, SAD and ACD (as well as her mother), under a property and financial affairs LPA. The evidence suggested that this was to guard against the financial consequences of hypomania resulting from her bipolar disorder. Eighteen months later she signed a deed to revoke the LPA. This decision was challenged by her daughters on the basis that their mother lacked capacity to make that revocation decision, and they were concerned to prevent the sale of her property in England.

According to s.13(2) MCA 2005, P may at any time revoke their LPA when s/he has capacity to do so. The evidence was disputed. The solicitor, in whose presence the deed was signed, believed she had capacity at the time. A consultant neuropsychiatrist instructed months later believed to the contrary. Building on the unreported case of *Re S* (13 March 1997), DJ Glentworth held that the information relevant to a decision to revoke was:

1. Who the attorneys are;

2. What authority they have;

3. Why it is necessary or expedient to revoke the power;

4. The foreseeable consequences of revoking the power;

5. The reasons for the original decision to appoint the attorneys.

The court held, on a fine balance, that the mother lacked capacity to revoke the LPA. In particular, at that time she was unable to use or weigh information as to why it was expedient or necessary to revoke it, nor properly to consider her current wishes and weigh them against her purpose in signing the LPA in the first place.

Turning to s.22(3) MCA 2005, the issue was then whether the court ought to revoke it. This was an option if the court was satisfied that the daughter(s) had behaved, or proposed to behave, in a way that contravened their authority or was not in their mother's best interests. There was no evidence of contravention. And, in terms of best interests, the court focused on the harm that was arising from the attorneys not giving effect to their mother's current wishes and feelings; that is, the very thing their mother wanted to safeguard against. In those circumstances, the court revoked the LPA and appointed a financial deputy.

Comment

This is a useful decision as it sets out the information relevant to a decision by the donor to revoke an LPA. Our one note of caution relates to the court's approach to revocation under s.22(3) MCA 2005. It appears to us that the issue is *not* whether revocation is in P's best interests, but whether the attorneys' behaviour has or

[5] In *Re Harcourt*, SJ Lush made clear that the CoP can revoke an LPA where the donor lacks capacity to do so, but did not specify the components of the capacity test.

would contravene P's best interests. It is a fine, but important distinction.

An interesting feature of the judgment is the way in which the court sought to wrestle with P's past wishes and feelings (relied upon by the daughters in support of the LPA), against her present wishes and feelings (relied upon by P in support of a deputy). In the instant case, her present wishes and feelings were given priority, but this will not always be the case (see also the discussion in the *Briggs v Briggs (2)* case note in the Health, Welfare and Deprivation of Liberty section of this Newsletter). However, on a proper analysis, P's wishes and feelings were relevant insofar as they related to the attorneys' behaviour. In this case, it appears that the daughters' exercise of the LPA would not be in their mother's best interests as they were doing the very thing their mother previously wanted them to do, namely to go against her incapacitated wishes and feelings during a hypomanic episode.

Capacity and IVAs

Fehily and Fehily v Atkinson and Mummery [2016] EWHC 3069 (Ch) (High Court (Chancery Division)) (Stephen Jourdan QC sitting as a Deputy High Court Judge)

Other proceedings – Chancery

Summary

This was an appeal against a district judge's refusal to annul a bankruptcy order. The grounds of appeal centered on whether the appellant had the mental capacity to enter into an Individual Voluntary Arrangement (IVA) breach of which had led to the bankruptcy order being made.

The chronology was that in November 2011 HMRC presented a bankruptcy petition against the appellant, her husband and two others based on unpaid partnership tax. All four proposed an IVA, the court made an interim order (staying the petition and other execution until the IVA proposal could be put to creditors) and subsequently the IVA was approved by creditors in February 2012 and the petition dismissed.

The two others complied with the terms of the IVA but Mr and Mrs Fehily did not. Thus, in June 2013 the IVA's supervisors petitioned for the bankruptcy of Mr and Mrs Fehily on that ground. On 2 August 2013 the court made bankruptcy orders against both. On 6 August 2013 they applied for the bankruptcy orders to be annulled. The application was eventually dismissed in November 2014. Mrs Fehily obtained permission to appeal and Mr Fehily did not.

Initially the application to annul was pursued on the basis that the bankruptcy orders were unfair. In early 2014 it was first suggested that Mrs Fehily lacked mental capacity to enter into the IVA and to litigate and that on those grounds the bankruptcy order should be annulled.

In August 2014 the court appointed Mrs Fehily's daughter to represent her pursuant to Insolvency Rule 7.44. In November 2014, however, the court held that Mrs Fehily had capacity to enter into the IVA in February 2012 and to litigate in August 2013. The court, therefore, refused to annul the bankruptcy order.

Mrs Fehily's appeal, which was again brought on her behalf by her daughter, argued that the lower court had applied the wrong test of capacity in relation to the IVA and was wrong on the evidence as well. There was no appeal against the finding of capacity to litigate in August 2013.

As regards the issue of evidence of capacity, the court did not have a formal capacity assessment. There were letters from the appellant's GP but they did not address the specific issue. The appellant sought to adduce fresh evidence on the appeal but it was not admitted, partly because it could have been made available to the lower court but also because it took the matter no further.

That lack of formal medical evidence of want of capacity was sufficient to persuade the lower court to reject allegations of incapacity and the appeal court to reject the appeal.

Of more interest is the question of the correct approach to issues of capacity in relation to IVAs. The argument on appeal proceed on the basis that the test was the common law test of capacity applicable to contracts and other voluntary transactions such as gifts or wills and there was no reference to the test of capacity in the MCA (indeed there was no mention of the MCA at all).

The lower court had applied the test as set out in *Chitty on Contracts* as follows.

> *At common law, the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. There is no fixed standard of mental capacity which is requisite for all transactions. What is required in relation to each particular matter or piece of business transacted, is that the party in question should have an understanding of the general nature of what he is doing.*

The appellant criticised that formulation and said that the judge had not applied it properly anyway. The appeal court rejected the latter argument and after a long review of authorities held in relation to the former at paras 101-103 as follows:

> *101. In my view, there is a distinction between the key features of a transaction, and ancillary, incidental or procedural aspects of it. I think that the requisite capacity is to understand the key features. It is not necessary that a person has capacity to understand every detail of the proposed transaction. In Banks v Goodfellow, at 567, Cockburn CJ, delivering the judgment of the court, quoted with approval from an American judgment: "It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms." Hoffmann J said in Re K, "... one cannot expect that the donor should have been able to pass an examination on the provisions of the Act". In Masterman-Lister, Chadwick LJ said at [79]:*
>
> > *'a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language'.*
>
> *102. In conclusion, I think that the law is as stated by the High Court of Australia in Gibbons v Wright. The summary of the law in Chitty, taken from that case, is accurate, although it would be possible to misinterpret it as only requiring the capacity to form a general impression of the nature of a contract, rather than the capacity to absorb, retain, understand, process and weigh information about the key features and effects of the contract, and the alternatives to it, if explained in broad terms and simple language.*
>
> *Although it would be possible for someone not familiar with this branch of the law to misinterpret the test stated in Chitty, if they*

> *did no more than read the relevant paragraph in the textbook, I do not think that DJ Parnell did that. DJ Parnell referred earlier in his judgment, when considering litigation capacity to Masterman-Lister, so it is clear that he had that decision in mind. That is the leading modern case on the test for deciding if a person has mental capacity. He identified in his judgment the key features of the IVA and I think, reading his judgment as a whole, that he did have in mind the need to assess whether Mrs Fehily had the mental capacity to understand and weigh those features, and the alternative to the IVA, namely that the bankruptcy petition would proceed to a hearing. I therefore reject the argument that DJ Parnell failed to apply the right test for assessing Mrs Fehily's mental capacity to enter into the IVA. I am satisfied that he applied the right test. "*

The judge then went on to consider whether the IVA was necessarily void if the appellant had, in fact, lacked capacity to enter into it. He held that an IVA is analogous to a contract with creditors and, therefore, if the creditors had no reason to know of the incapacity, then the IVA was not void. He further held that the creditors and the IVA supervisors did not know of the alleged incapacity: see paras 116-127.

Comment

The appellant's difficulty in this case arose mainly from the fact that there was no formal mental capacity assessment. This underlines the necessity that anyone asserting want of capacity whether at common law or under the MCA must have such evidence save in the clearest of cases.

The appeal court did not have to deal with the issue of litigation capacity but had it done so, it would have had to apply MCA principles because both the CPR and the Insolvency Rules define incapacity with reference to the MCA.

It is worth noting that the Insolvency Rules make somewhat different provision with regard to incapacity enabling the court to appoint a representative where a party lacks capacity to administer his property and affairs. There is no provision that proceedings are void if this is not done (See rr 7.43 and 7.44). This contrasts with the situation under CPR 21.3(4).

That said, in *De Toucy v Bonhams 1793 Ltd* [2011] EWHC 3809 (Ch); [2012] B.P.I.R. 793, the court held that the CPR must also be applied in these circumstances so that if the court has reason to believe that a party lacks capacity, it must make sure that the party is properly represented. That case states, however, that if bankruptcy is inevitable, there may be no need for a representative or litigation friend or to annul a bankruptcy order in the absence of such (as the case may be).

Litigation friends, influence and trusts

OH v Craven [2016] EWHC 3146 (QB) (High Court) (Queen's Bench Division) (Norris J)

Other proceedings – Civil

Summary

This case is obligatory reading for anyone involved in a case where it is envisaged that there will be a personal injury exceeding £1m.

It involved one case where C was a minor who would have capacity on majority and one case where C was an adult who had had a litigation friend as evidence suggested he lacked litigation

capacity but later evidence concluded he had capacity to manage his property and affairs.

In each case, there was an application that sums in excess of £2m should come out of the CFO and go into a PI trust where the trustee was linked to the litigation firm.

The judge held that this gave rise to an *Etridge* [2001] UKHL 44 situation of presumed undue influence and that the adult C and the minor C's litigation friend should have or have the opportunity to have independent advice (at the litigation firm's expense): see paras 30-32.

He also held that where the fund was over £3m consideration should be given to the appointment of an independent protector of the trust: see para 32.

Comment

The approach of the court, plainly, came as a surprise to the applicants' legal advisers (see para 15). They had not anticipated the attentions of a Queen's Bench judge. The ruling, logically, also applies wherever a large PI trust is envisaged even without any court involvement.

Statutory wills and family relations

In *Re J* [2016] EWCOP 52 HHJ Karen Walden-Smith dealt with an application for a statutory will where P had fallen out with one of her two sons. One of her sons had obtained from P's late husband the transfer of the family home by undue influence. P, when having capacity, made a will that gave all her estate to the other son. She then started proceedings for the setting aside of the transfer which ended with a compromise after she had lost capacity resulting in the property being transferred back to P. Part of the compromise was that P's deputy would apply to the Court of Protection for an order that P male a statutory will leaving her estate to her two sons in equal shares.

All parties agreed that the Court of Protection was not bound by the compromise so the question before the Court of Protection was whether P should make a statutory will so that the son who had obtained the family home should get some benefit from P's estate and if so how much.

The court recited the test and the authorities and concluded (in line with the submissions that the Official Solicitor made on P's behalf as her litigation friend) as follows:

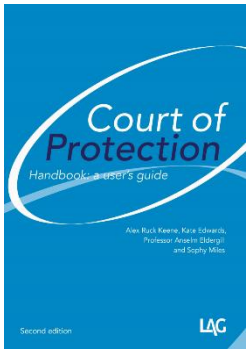
> *51. In my judgment J would not have wanted to leave A totally out of inheriting anything now that the family home and the land adjoining Y Road have been restored to her. In my judgment, she would also acknowledge the fact that A had compromised the undue influence claim and that the basis of the compromise was that the Deputy would apply for a statutory will on terms that the estate would be left equally to both D and A. A must have been advised that the terms of the compromise did not bind the Court of Protection and that it would be for the Court to determine in accordance with the provisions of the MCA 2005. I do not accept the suggestion or threat made by A that a failure of the Court to determine that the statutory will should leave the estate in equal shares to both the sons would leave J at potential risk of litigation. I do not accept that it could realistically be argued that there has been a breach of the agreement contained in the order. The Deputy has done exactly that which he was required to do, in seeking an order for a statutory will with the estate to be divided equally.*

> *52. It is in the best interests of J for a statutory will to be executed on her behalf whereby three quarters of the residuary estate goes to D, and to RSM should he predecease J, and the remaining quarter should go to A, and to his children should he predecease J.*

Attorney Disclaimer Forms

The OPG has published forms that attorneys can use if they want to disclaim their role. For attorneys appointed under an LPA, the form can be found here; for attorneys appointed under an EPA, the form can be found here.

Court of Protection Handbook 2nd edition



Alex, exploiting shamelessly his position as editor, is very pleased to announce that the entirely updated second edition of the Court of Protection Handbook is now available from the LAG bookstore. The new edition has been rewritten to take account of the amendments made by the Court of Protection (Amendment) Rules 2015, the Case Management Pilot that started in September 2016 and the Transparency Pilot that started in January 2016, along with coverage of the Re X procedure for judicial authorisation of deprivation of liberty. It also includes new practical guidance for improving the participation of P.

The website has also been thoroughly updated to include a whole new suite of – free – downloadable precedent orders (including those used by the judiciary in the Case Management Pilot). As ever, feedback is very welcome, to alex.ruckkeene@39essex.com.

When to commit

Devon CC v Kirk [2016] EWCA Civ 1221 (Court of Appeal) (Sir James Munby P, Black and McFarlane LJJ)

COP Jurisdiction and powers – contempt

Summary

In September 2014 Devon County Council commenced proceedings in the CoP under the MCA 2005 with respect to MM, a man in his eighties who, it is agreed, suffers from dementia and lacks the mental capacity to make decisions about his own care and welfare. In 2013 MM signed a Power of Attorney appointing Mrs Kirk together with another individual as attorneys both for health and welfare and for property and affairs, under the MCA 2005. At the time the CoP proceedings were commenced, MM had been moved by Mrs Kirk from his longstanding home in Devon to live with her in another part of England. Although MM has lived in England for very many years, he was, by birth, Portuguese, and originated from the island of Madeira, where some of his family members still live. Within the CoP proceedings a report was commissioned from an independent social worker on the question of MM's future care and, in particular, whether it was in his interests to remain living with Mrs Kirk, or to return, albeit to a care home, in his home area in Devon where he had lived for the previous fifty years and where he had developed and maintained a large circle of friends. The independent social work report was produced on 20th April 2015. It recommended a return to Devon. Within days Mrs Kirk removed MM from the jurisdiction of England and Wales, without any notice to the professionals in the case, and travelled with him to Portugal. MM had remained in Portugal since that time. Shortly after arrival he took up residence in a care home where he remained. Mrs Kirk subsequently returned to her home in England without him.

During the ensuing eighteen months various High Court Judges, sitting in the CoP, made orders designed to achieve the return of MM to England so that he might be placed in a care home in Devon. It appeared that the care home in Portugal will not release MM from their care without an express authority to do so from Mrs Kirk. The CoP orders were therefore directed at Mrs Kirk so as to require her to take such steps as

were necessary to achieve MM's return to this jurisdiction and, in later order, specifically directing her to sign the appropriate paperwork authorising the care home in Portugal to release him. She did not do so, even following a fully contested welfare hearing before Baker J in which he found that it was in his best interests to be returned to Devon, and contempt proceedings were issued against her.

Between the contempt proceedings being issued and being heard before Newton J, Mrs Kirk, acting as a litigant in person, had issued a notice of appeal in the Court of Appeal against the decision of Baker J, although she did not ask for a stay of Baker J's order.

It was common ground before Newton J that Mrs Kirk had failed to comply with the order. Indeed, in the face of the court, she continued to refuse to sign the form of authority before Newton J at the hearing. He therefore had no option but to find contempt of court proved. As regards disposal, he noted that the options were limited, Mrs Kirk having little income and no assets; he therefore "*reluctantly concluded that there now being no other way, it seems to me, of enforcing the court order; that I am left with no alternative but to pass a sentence of imprisonment, however much I have made it perfectly clear that I do not wish to do so*." He sentenced her to six months' imprisonment, but gave her one last chance to sign the order within seven days. She did not do so, and was imprisoned.

Her case came before the Court of Appeal which expressed its disquiet at what had happened. As McFarlane LJ noted:

> *27. I am bound to record that I find the circumstances of this case to be of significant concern. The Court of Protection has sentenced a 71-year-old lady to prison in circumstances where the lady concerned is said to be of previous good character and where, as the judge acknowledged, she has been acting on the basis of deeply held, sincere beliefs as to the best interests of MM for whose welfare she is, as the judge found, genuinely concerned. The ultimate purpose of her incarceration is to achieve the removal of an 81-year-old gentleman, who has suffered from dementia for a number of years, from a care home in one country to a care home in Devon which is near his longstanding home and within a community where he is well known. Those stark facts, to my mind, plainly raise the question of whether the COP was justified, on the basis that it was in MM's best interests to do so, in making an order which placed Mrs Kirk in jeopardy of a prison sentence unless she complied with it. That aspect of the case, however, is a matter which goes to Mrs Kirk's application for permission to appeal the original order, to which I will turn in due course.*

McFarlane LJ (with whom the other members of the Court of Appeal agreed) found that Newton J had been wrong to determine the committal application in circumstances where she was seeking permission to appeal the order of Baker J.

He then granted permission to Mrs Kirk to appeal the order of Baker J on the basis that, whilst her simple disagreement with Baker J's conclusions did could not found an appeal:

> *33. Where Mrs Kirk may have an arguable appeal is in relation to the order that followed on from the overall welfare determination insofar as it made her subject to mandatory orders to sign documents which were backed up by a penal notice and an express warning of potential committal proceedings. It is certainly possible to argue that any determination of MM's welfare should have included consideration of how any move from*

> *Portugal to Devon could be achieved. Where, as was apparently taken to be the case before Baker J, it is said that the move could only be secured by placing Mrs Kirk under threat of the sanction of imprisonment, it is arguable that the very question of whether Mrs Kirk should be put in that position and face the prospect of a prison sentence for non-compliance should have been addressed by the COP in the context of MM's welfare. In short terms, that question might be 'is the move to Devon still in MM's best interests if it may only be achieved by sending to prison someone whose interests he could be expected to have at heart, had he the capacity?'*
>
> *34. In addition, during the course of the oral hearing before this court, the issue of what alternative means there may have been to achieve MM's repatriation without having to require Mrs Kirk's signature was raised but not satisfactorily answered.*
>
> *35. Neither of the above points were seemingly addressed by Baker J in the main welfare judgment which has now been transcribed. It is not clear whether the judge gave a short further judgment on the question of whether or not Mrs Kirk should be compelled, on pain of committal, to sign the documents or whether there was any other alternative method of achieving MM's move to Devon without directly involving Mrs Kirk. A transcript of any further judgment, if given, must now be obtained.*

Sir James Munby P also noted – and deplored – the difficulties encountered by Mrs Kirk's legal representatives in gaining access to her in prison.

Comment

The point identified by McFarlane LJ in granting Mrs Kirk permission to appeal the decision of Baker J is a very significant one. Albeit that the situation before the court was more extreme than some (in that P had been taken out of the country) the situation where it would only be possible to compel obedience with a welfare order by taking draconian steps against a family member/friend is far from uncommon, and poses particular difficulty where (as here) there are grounds to consider that P themselves may well not wish such steps to be taken. We will therefore watch carefully for, and report upon, the full appeal judgment in due course.

Dismissing or withdrawing?

A Local Authority v X (2) [2016] EWCOP 50 (Holman J)

COP Jurisdiction and powers – interface with public law proceedings

Summary

In the sequel to the case that we reported in our last Newsletter, concerning whether the Court of Protection should embark upon a full capacity determination in respect of Mr X in circumstances where the funding local authority had indicated that it simply could not meet the costs of his care within his own home, matters took a slightly unexpected turn.

First, it turned out that, in fact (and unsurprisingly given the level of his needs), Mr X's funding would be more likely to be an NHS than a local authority responsibility.

Second, a further report from the independent psychiatrist concluded that, in fact, Mr X did have capacity to make decisions upon his residence and care. This was in line with the report from his consultant psychiatrist to the same effect.

The local authority sought permission (under Rule 87A of the COPR, introduced with effect from July 2015) to withdraw proceedings as it was no longer the relevant funding body; alternatively, they sought that, if the CCG wished to reinstate the proceedings, the local authority should be allowed to withdraw from the proceedings. The Official Solicitor's position was that the evidence in relation to capacity was now so clear that the court should formally make a declaration to this effect under s.15(1)(a), which would have the effect of bringing the proceedings to an end. The local authority argued that their application under Rule 87A should be determined first, both because it had been lodge first, and as a matter of logic.

Holman J held as follows:

> *"My view on these competing arguments is as follows. I am faced today with applications that I should exercise discretions arising both under section 15 of the Act and rule 87A of the rules. I do not accept that I need, chronologically or logically, to exercise my discretion under rule 87A before giving any consideration to the discretion under section 15 of the Act itself. Both these applications are currently before the court at a single hearing, and it seems to me that I should give composite consideration to my exercise of the discretions under them. I accept the submission of Ms. Dolan* [on behalf of the Official Solicitor] *that when there is clear evidence from two consultant psychiatrists, who formerly both considered that a patient lacked capacity but now consider that he does have capacity, the court must be very cautious about improperly leaving the proceedings in being. The existing jurisdictional foundation for these proceedings is the earlier interim orders that the patient lacks capacity, which themselves subsisted on the basis of the earlier opinions of both Dr Isaac and the treating psychiatrist. Those psychiatrists having now changed their opinions, I could not leave those interim declarations in place. In the absence of an interim declaration, the presumption of capacity under the Act would, in any event, revive. But it does go further than that. The clear opinion of these two consultant psychiatrists, both of whom have now known this patient over a period of time, is to the effect that he does have capacity with regard to his residence and care.*

Holman J considered that the evidence was "*currently all one way. It is to the effect that a patient, who was previously considered to lack capacity, does now have capacity. I agree with Ms. Dolan that, at any rate on the facts and in the circumstances of this case, that conclusion should be clearly and formally expressed by a declaration made under section 15. It is true that the written evidence of the two psychiatrists has not been 'tested' by cross-examination by or on behalf of the local authority but, as I have said, they do not have any positive evidence to the contrary*." He therefore made a declaration to that effect under s.15(1)(a) and did not grant permission to the local authority to withdraw proceedings which had ceased to have effect at the moment he made that declaration.

Comment

This is of some interest as the first reported judgment to consider the new Rule 87A. What we look forward to in due course is a case which the court in determining that application confirms that it is making a case management decision, rather than a decision for or on behalf of P (such that it is not therefore bound to act in P's best interests). We suggest that, by analogy with the position under the FPR, it is a case management decision, albeit one taken with P's interests squarely in mind: see *Re W (Care Proceedings: Functions of Court and Local*

Authority) [2013] EWCA Civ 1227. On the facts of the instant case, that issue did not fall for determination, and Holman J was plainly right to determine the greater – whether P had capacity – before determining the lesser – whether proceedings should be withdrawn – so as to put to matter further questions about his capacity beyond question.

As to the much bigger issue lurking behind the original *Re X* case – what the CoP should do in the face of an assertion by a public body that only one option is available – judgment was reserved following a day and a half hearing before an impressively interventionist Supreme Court in *Re MN*.

Criticising witnesses – the limits

Re W (A child) [2016] EWCA Civ 1140 (Court of Appeal) (Sir James Munby P, McFarlane and Clarke LJJ)

COP Jurisdiction and powers – experts

Summary

The central issue in this appeal, of relevance by analogy to proceedings before the Court of Protection was this:

> *Can a witness in Family proceedings, who is the subject of adverse judicial findings and criticism, and who asserts that the process in the lower court was so unfair as to amount to a breach of his/her rights to a personal and private life under ECHR Art 8, challenge the judge's findings on appeal?*
>
> *If so, on what basis and, if a breach of Article 8 is found, what is the appropriate remedy?*

This shortly stated issue gave rise to a number of procedural and substantive legal issues, described by Lord Justice McFarlane (who gave the sole judgment) as a series of landmines, the detonation of any one of which would be likely to prevent the appellants from reaching their goal.

The issue arose as part of care proceedings in which there had been a fact finding by a judge as to whether a child (C) had been sexually abuse by members of her family. The judge found that there had not been any sexual abuse. That conclusion was not challenged on appeal. The judge also made subsidiary findings that a social worker (SW) and a police officer (PO) together with other professionals and the foster carer, were involved in a joint enterprise to obtain evidence to prove the sexual abuse allegations irrespective of any underlying truth and irrespective of the relevant professional guidelines. The judge found that SW was the principal instigator of this joint enterprise and that SW had drawn in the other professionals. The judge found that both SW and PO had lied to the court with respect to an important aspect of the child sexual abuse investigation. The judge found that the local authority and the police generally, but SW and PO in particular, had subjected C to a high level of emotional abuse over a sustained period as a result of their professional interaction with her. In addition to the specific adverse findings made against the local authority, SW and PO also complained that there was no justification for the judge deploying the strong adjectives that he used in describing the scale of his findings in a judgment which, in due course, in its final form, would be made public. The judge proposed to name SW and PO in the judgment.

The local authority, SW and PO sought to appeal in order to have certain parts of the judgment excised before it was made public. The argument they made was procedural – they stated that the first time they had known that the judge was

going to make such serious findings about their conduct was when he gave an oral bullet point judgment and that they had not been given any opportunity to address the issues during the hearing. McFarlane LJ notes that on review of the transcripts of the hearing it was apparent that the cross-examination of SW and PO had not raised any of the issues which the judge later included in his judgment.

The main procedural and substantive legal hurdles were:

- Were SW and PO entitled to appeal against the judgment at all, not being original 'parties' and not seeking to appeal the central 'decision of the court' (namely the finding that there had not been any sexual abuse)? (See section 31K of the Matrimonial and Family Proceedings Act 1984)?

- If they were able to appeal, were SW and PO afforded the protection of Article 8 in these circumstances and if so were those rights breached by the lower court?

- Was the local authority (which as a body corporate was not entitled to rely on Article 8) entitled to argue that the lower court had breached Article 6?

- What remedy applied if the relevant breaches were made out?

Parties?

The judgment sets out a detailed analysis of the definitions of a party and an intervenor which are not replicated here. SW and PO were witnesses at the fact finding but once the judge's adverse findings were made as part of the oral bullet point judgment, they sought and were granted the chance to be represented and make submissions. It was argued on their behalf that this gave them the status of parties or intervenors.

The Court of Appeal held that on the facts of this case both SW and PO achieved "intervenor" status, and were therefore additional 'parties' to the proceedings relating to the terms of the judgment.

It was further held that due to the clear ruling of the Court of Appeal in *MA Holdings Ltd* [2008] EWCA Civ 12, it was unnecessary to establish with certainty the precise procedural status of SW and PO in the lower court in order to determine whether or not they could act as "appellants" in the Court of Appeal.

Finally where it was established that an individual's rights under ECHR, Art 8 had been breached by the outcome of the proceedings in the lower court, then the Court of Appeal had a duty under s.3 HRA 1998 to afford that individual a right of appeal.

A decision/determination/order/judgment?

The appellants were seeking to challenge subsidiary internal findings of the judge and not any order made, which on its face would serve as a bar to any appeal (appeals normally lying against an order).

The judgment analyses this issue in detail, considering the case of *Cie Noga SA v Australia and New Zealand Banking Group* [2002] EWCA Civ 1142; [2003] 1 WLR 307 (the leading authority on the distinction to be drawn between those aspects of a lower court's conclusions which are properly susceptible to appeal, and those which are not). The Court of Appeal concluded that as the ECHR was not engaged on the facts of *Cie*

Noga it was not necessary to follow the approach of the court in that case.

The Court of Appeal concluded that the judge's findings themselves were a 'judicial act' which, on the facts of the case, were capable of being held to be 'unlawful' under HRA 1998, s 7(1) and therefore the proper subject of an appeal, without having to consider whether or not they were a 'decision', 'determination', 'order' or 'judgment'.

Did SW and PO enjoy protection with respect to Art 8 private life rights and were those rights breached?

McFarlane LJ's answers were "yes and yes." The judgment contains a detailed consideration of the scope of Article 8 and makes clear that it encompasses an individual's right to engage in a particular profession. The case provides a summary as follows:

(a) In principle, the right to respect for private life, as established by Art 8, can extend to the professional lives of SW and PO (*R (Wright) v Secretary of State for Health and R (L) v Commissioner of Police for the Metropolis*);

(b) Art 8 private life rights include procedural rights to fair process in addition to the protection of substantive rights (*Turek v Slovakia* and *R (Tabbakh) v Staffordshire and West Midlands Probation Trust*);

(c) The requirement of a fair process under Art 8 is of like manner to, if not on all-fours with, the entitlement to fairness under the common law (*R (Tabbakh)* referring to Lord Mustill in *R v Secretary of State for the Home Department, Ex Pte Doody*);

(d) At its core, fairness requires the individual who would be affected by a decision to have the right to know of and address the matters that might be held against him before the decision-maker makes his decision (*R v Secretary of State for the Home Department, Ex Pte Hickey (No 2)*);

(e) On the facts of this case protection under Art 8 did extend to the 'private life' of both SW and PO (see the full facts of the case but with relevant facts in particular being that SW had been suspended and it would impact on PO's ability to give evidence and be involved in similar matters);

(f) The process, insofar as it related to the matters of adverse criticism that the judge came to make against SW and PO, was manifestly unfair to a degree which wholly failed to meet the basic requirements of fairness established under Art 8 and/or common law. In short, the case that the judge came to find proved against SW and PO fell entirely outside the issues that were properly before the court in the proceedings and had been fairly litigated during the extensive hearing, the matters of potential adverse criticism had not been mentioned at all during the hearing by any party or by the judge, they had certainly never been 'put' to SW or PO and the judge did not raise them even after the evidence had closed and he was hearing submissions.

Useful guidance was given to judges conducting cases where adverse findings were likely to be made:

(a) Ensure that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;

(b) Prior to the case being put in cross-examination, provide disclosure of relevant court documents or other material to the witness and allow sufficient time for the witness to reflect on the material;

(c) Investigate the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness.

In the present case, once the judge had formed the view that significant adverse findings might well be made and that these were outside the case as it had been put to the witnesses, he should have alerted the parties to the situation and canvassed submissions on the appropriate way to proceed. One option at that stage, of course, was for the judge to draw back from making the extraneous findings. But if, after due consideration, it remained a real possibility that adverse findings may be made, then the judge should have established a process that met the requirements listed above.

Local authority: breach of fair trial rights

Given the firm and clear view that the court took as to the degree to which the process adopted fell short of the standard of fairness to which those affected were entitled, it was unnecessary to do more than record that the same conclusion, in the context of Art 6 and the common law, must apply with respect to the adverse findings made against the local authority which had not been canvassed during the hearing and were outside the issues in the case.

Remedy

It was incumbent on the court to provide a remedy and, so far as may be possible, to correct the effect of the unfairness that had occurred. In the present case what was sought was the removal from the judgment of any reference to the matters that were found by the judge against SW, PO and the local authority that fell outside the parameters of the care proceedings and had not been raised properly, or at all, during the hearing.

McFarlane LJ held that those sections should be removed and further noted:

> *So that there is no ambiguity as to words such as 'removal' or 'redaction' in this context, I make it plain that the effect of any change in the content of the judge's judgment that is now made as a result of the decision of this court is not simply to remove words from a judgment that is to be published; the effect is to set aside the judge's findings on those matters so that those findings no longer stand or have any validity for any purpose. The effect is to be as if those findings, or potential findings, had never been made in any form by the judge".*

Comment

The facts of this case were extreme and McFarlane LJ was keen to emphasise that it should not lead to any 'defensive judging'. The family court and the COP often have to scrutinise carefully the conduct of professionals as part of deciding a case and as long as that is undertaken fairly there is no issue. In this case it appears that neither in cross examination by the family's representative nor in questioning by the judge were the social worker, the police officer or the local authority alerted to the highly damaging conclusions which the judge then set out in his 'bullet point' judgment.

The case is also an interesting source of detailed analysis on the nature of parties/intervenors and

what can be the subject of an appeal - where a person's human rights are engaged or a fair trial is at stake, an appeal can be made outside the narrow interpretation of an order/decision or determination.

Short Note: statutory charge and Article 8 damages

Although not a Court of Protection case, the case of *P v A Local Authority* [2016] EWHC 2779 (Fam) is interesting and relevant for what is said about the legal aid statutory charge in a claim for damages for breach of Article 8 ECHR.

In this case, P was 17 year old who had been born female but wanted to change his identity to male. His relationship with his adoptive parents broke down because of their difficulties in coming to terms with his decision. P stated that he did not want his adoptive parents to be involved with his life and he was moved by the local authority to live with foster carers. During wardship proceedings, the court ordered that the local authority should not share with P's adoptive parents any information regarding P's medical treatment or wellbeing without P's express consent. However, the local authority disclosed personal information about P to third parties who were friends of P's adoptive parents. When P found out, his mental health was severely compromised and he made a number of suicide attempts and self-harmed. He later brought a claim against the local authority for damages for breach of Article 8 ECHR.

Although P had received legal aid during the wardship proceedings, the LAA refused to grant legal aid for the proposed damages claim. The local authority conceded liability and offered to pay damages of £4,750 to P. The court approved the damages award but had to deal with the issue of whether the statutory applied. If the statutory applied to the damages award then P would receive no damages from the human rights claim as the entire award would be owed to the LAA for the costs incurred during the wardship proceedings. The LAA declined to waive the statutory charge.

The High Court (Family Division) held that the statutory charge did not apply to P's damages award as the LAA had refused to fund P's human rights claim. The damages awarded to P were recovered in a claim that did not have the benefit of a public funding certificate. The Court found that there was no legal or factual connection between the wardship proceedings and the human rights claim and so damages awarded for the human rights claim could not be recovered by the LAA for legal aid granted in the wardship proceedings.

The Court also described the LAA's approach in this case as being *"extremely unfortunate"* and some aspects of their decisions were *"plainly wrong and/or unreasonable and… difficult to understand, if not incomprehensive"* (para 77). The Court made plain its view that *"it would be extremely regrettable if P were to be denied the benefit of damages awarded to him as a result of the considerable emotional distress and harm to his mental well being he has suffered as a result of the wrongful conduct of an organ of the state."* It was unfortunate that the wording of the regulations meant that the Lord Chancellor, through the director of the LAA could only exercise his power or discretion to waive the statutory charge at the time when the determination of funding was made and no at some later date. It was not clear to the court why the discretion to wave the statutory charge had been fettered in that way.

There are two important lessons that can be learned from this case by COP practitioners. First, it is not unusual for human rights claims to follow COP proceedings, especially where there has been a successful s.21A MCA 2005 challenge which may open the door to a damages claim for unlawful deprivation of liberty in breach of Article 5 ECHR or breach of Article 8 ECHR. Whilst there is an entitlement to non-means tested legal aid in section 21A challenges, legal aid is often not available for any subsequent human rights claims. Applying this case by analogy, the LAA would not be able permitted to apply the statutory charge to recover non-means tested legal aid in s 21A proceedings where the LAA had refused to fund the subsequent human rights claim. Second, any request to the LAA to waive the statutory charge must be made at the time of the funding decision. There would appear to be (for no good reason) no power or discretion for the LAA to waive the statutory charge after the funding decision has been made.

President's guidance on allocation of work to s.9 judges

Sir James Munby P, as President of the Family Division, has issued new guidance on the allocation of work to s.9 judges. It is of relevance to the Court of Protection in that it provides (in material part) that proceedings under the MCA 2005 in the Court of Protection shall not be allocated or transferred to a section 9 judge (treated as a Tier 3 judge for purposes of the COP allocation rules, PD3B COPR 2007 para 3(viii)) without prior authorisation from the FDLJ (or in a case of urgency from the Urgent Applications Judge of the Family Division, or other Judge of the Family Division).

COP statistics for July to September 2016

The statistics for July to September (available here) contain the following highlights.

In July to September 2016, there were 7,762 applications made under the Mental Capacity Act 2005, up 19% on the equivalent quarter in 2015. The majority of these (54%) related to applications for appointment of a property and affairs deputy.

There were 6,684 orders made under the MCA, 10% lower than the same quarter in 2015. Almost half (46%) of the orders related to the appointment of a deputy for property and affairs. The trend in orders made has dropped in recent quarters, in contrast to the steady increase seen for applications.

Applications relating to deprivation of liberty increased from 109 in 2013 to 525 in 2014 to 1,497 in 2015. There were 781 applications made in the most recent quarter, double the number made in July to September 2015. Of the 781 applications made in July to September 2016, 538 (69%) came from a Local Authority, 216 (28%) from solicitors and 27 (3%) from others including clinical commission groups, other professionals or applicants in person. Half of applications for deprivation of liberty were made under the *Re X* process.

National Mental Capacity Forum News

The NMCF has launched a new online space for members of the Forum. On registration, members will be able to access dedicated information – including the growing collection of excellent blogs and information about future events – and also to hold online discussions with other members. You can sign up here.

The Forum has also launched a short film which sets out the principles of the Mental Capacity Act in a simple way that works for all sectors. Please feel free to use this video and to encourage others to share it too. If you think there are other videos like this that would help you in your work, please feel free to share your thoughts on the new online forum.

The second mental capacity action day will be on 27 February 2017, with the theme 'Supporting decision making'. If you wish to nominate a colleague who did not attend this year's event please email nmcf1@justice.gsi.gov.uk. The day is, however, expected to be heavily over-subscribed. The forum has space for a maximum of 150 people and will need to ration places to ensure a good geographical spread and range of professionals.

Finally, the indefatigable Baroness Finlay, chair of the Forum, will shortly be publishing her first annual report, which we will cover in the next issue of this Newsletter.

New consent guidelines from the Association of Anaesthetists of Great Britain and Ireland

The AAGBI has just published new guidelines on consent for anaesthesia. Previous guidelines on consent for anaesthesia were issued by the AAGBI in 1999 and revised in 2006. The new guidelines have been produced in response to the changing ethical and legal background against which anaesthetists, and also intensivists and pain specialists, currently work, while retaining the key principles of respect for patients' autonomy and the need to provide adequate information. The main points of difference between the relevant legal frameworks in England and Wales and Scotland, Northern Ireland and the Republic of Ireland are also highlighted in a document which may be of more general use for anyone seeking to understand the differences in approach between these jurisdictions to questions of consent to medical treatment more broadly.[6]

Care Act Guidance updated to take account of *Cornwall* decision

The Department of Health has finally updated its statutory guidance under the Care Act 2014 to take into account the judgment of the Supreme Court in *Cornwall Council v Secretary of State for Health and Others* [2015] UKSC 46 (reported in our July 2015 newsletter). It deals with the vexed question of how to determine ordinary residence where P lacks capacity to decide where to live.

In *Cornwall*, the Supreme Court considered where P was ordinary resident in Cornwall, Wiltshire or South Gloucestershire. P had severe physical and learning disabilities and lacked the capacity to decide where to live. He lived with his parents in Wiltshire until he was four years old. Wiltshire Council then arranged for P to live with foster carers in South Gloucester where he lived for the next 14 years. After P turned 18, he went to live with his former foster carers before

[6] Full disclosure: Alex was a member of the working party.

moving to two different care homes in Somerset. In the meantime, P's parents had moved to Cornwall and P occasionally went to stay with them in Cornwall. Applying a modified version of the test in *Shah* [1983] AC 309, a majority of the Supreme Court decided (to some surprise) that P was ordinarily resident in Wiltshire.

The *Shah* test provides that ordinary residence is determined by reference *to "a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."* However, the *Shah* test cannot be applied directly without modification to people who lack capacity to make decisions about their accommodation as it requires the voluntary adoption of a place of residence.

The revised Care Act 2014 statutory guidance provides at paragraph 19.32:

> *…with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.*

The Supreme Court's decision in *Cornwall* also has significant implications for determining the ordinary residence of looked after children transitioning to adult social care services. In this respect, the revised statutory guidance provides at paragraph 19.38:

> *… for the purposes of the 2014 Act, and where relevant, the 1984 Act, any person who moves from accommodation provided under the 1989 Act to accommodation provided under the 1948 Act, or 2014 Act, which is accommodation to which the deeming provisions under the 1948 Act or the 2014 Act apply, remains ordinarily resident in the local authority in which they were ordinarily resident under the Children Act.*

In cases where the deeming provisions do not apply, the starting point is still the presumption that the adult is ordinarily resident in the area in which they were ordinarily resident under the Children Act. Paragraph 19.41 states:

> *…although the provisions of the Children Act normally no longer apply once a young person reaches 18, local authorities should start from a presumption that for the purposes of the 1948 Act or the 2014 Act the young person remains ordinarily resident in the local authority in which they were ordinarily resident under the 1989 Act. However, this is only a starting point and if the young person remains in the area in which he was placed as a child or moves to a new local authority area the presumption may be rebutted by the circumstances of the individual's case and the application of the Shah test.*

You can access the full guidance here and our updated guidance note on ordinary residence here.

It is frustrating that the updated statutory guidance is currently only available online in html format and not downloadable in pdf or otherwise available in any hardcopy format. The guidance in its entirety is unwieldy and very difficult to

navigate. We would welcome a more workable and user-friendly format from the Department of Health.

Short note: another personal injury funding impasse

As reported in Community Care, St Helen's council has refused to comply with the findings of a Local Government Ombudsman report which stated that it should fund care for a man with a brain injury who had received a personal injury award of £3m. The council said his care should be funded by the personal injury award but a Local Government Ombudsman investigation published in July 2016 rejected this and found the council at fault.

The ombudsman found the council had failed to act in line with case law and government guidance in place at the time, which stated that councils could only take into account the income generated from a personal injury claim, but not the capital itself and recommended the council should carry out a financial assessment for the man, calculate the funding required to meet his eligible needs and pay any money due to him from January 2012.

St Helens council rejected those recommendations, stating that it disagreed with the ombudsman's interpretation of case law and has arguing that the case should be considered by the High Court as it could set a precedent for similar cases.

The council maintained that funding the man's care would amount to a "double recovery", whereby a person receives council funding and personal injury damages for their care costs.

The council's refusal to accept the ombudsman's recommendations and the suggestion that there should be litigation triggered a second complaint and subsequent investigation. A report published in December concluded that the man should not have to use his personal injury award to fight a legal battle with the council.

It appears that as part of the initial investigation, the council told the ombudsman that comments made in the case of *Peters v East Midlands SHA* [2009] EWCA Civ 145 about the need to avoid breaching the principle of double recovery were relevant to this complaint.

In the *Peters* case, the Court of Appeal ruled that because the court had awarded future care costs, there was no duty on the deputy to seek public funding from a local authority, because this would be double recovery.

However, the Ombudsman found that in this case no such restriction had been placed on the man's deputy and no amount for his future care costs had been set out in the court order. Further, the *Peters* judgment came out after the man's personal injury claim was settled and, in a separate case also involving St Helens Council, it was decided that *Peters* could not be applied retrospectively.

We note in this regard that the fraught interaction between deputies and public funding bodies will be looked at by the Court of Appeal in due course as permission has been granted to Manchester City Council to challenge the decision in *Tinsley v Manchester City Council and others* [2016] EWHC 2855 (Admin) we reported upon in the November Newsletter. Although this will be in the context of s.117 MHA 1983, it is likely that their approach will take account of the wider interaction.

Self-neglect and capacity: Serious Case Review into the Case of Mr C

On 3 October 2016, the Bristol Safeguarding Adults Board published a report into the death of Mr C, who died in a house fire in Bristol on 6 September 2014, which makes both depressing and important reading for practitioners grappling with the difficult issue of self-neglect.

Mr C had suffered from mental health problems since May 1985. He had also used street drugs throughout his life. He had been known to a variety of agencies locally. He was open about his drug use and believed that this had no negative impact on his mental well-being. In the period from 1997-2011 Mr C was admitted to psychiatric in-patient services on eight occasions. Mr C was not always willing to engage with services and his behaviour caused sufficient concern to his landlord, BCC Housing Services, that in 2003 they obtained a Deed of Variation to his tenancy agreement, so that it became a condition of his tenancy that he engage with support services.

Mr C's circumstances changed in 2012. His son, who had previously been an important source of practical and emotional support informed AWP formally, that because of his father's increasingly difficult behaviour related to his use of cocaine and the threat of danger to himself he was no longer able to continue to support his father as he had been doing up until then.

Mr C was admitted to hospital for a short period in June 2012, and at his discharge meeting it was noted that Mr C did not accept he had any chronic mental health needs and rejected any care planning processes that could help him avoid crisis or improve his quality of life. In the light of Mr C's unwillingness to engage with services, the decision was taken at a meeting in September 2012 to discharge Mr C from mental health services.

Thereafter, his increasingly erratic behaviour was characterised primarily being anti-social, exacerbated by his use of drugs. Consequently his behaviour was no longer seen in terms of mental illness, and the police no longer responded by using s.136 MHA 1983, which in the past had led to a hospital admission. Instead the agencies involved had to find an alternative way of responding to the situation that was now viewed as anti-social behaviour.

In the period June 2013 to September 2014, concerns were increasingly expressed about his setting fires on his balcony, as well as about the cluttered state of his flat and his ability to self-care. The Case Review set out a depressing litany of failed attempts to coordinate interventions between agencies prior to his death in September 2014.

The Serious Case Review found that:

> *Mr C's mental illness was, by its nature cyclical. Periods of relative stability were followed by periods when his behaviour aroused concern both for his and others' safety. Agencies were in touch with each other during these crisis periods, but there is no evidence of overall analysis or planning to inform a shared strategic approach. Each episode or incident tended to be viewed in isolation and not in context, either of Mr C's previous history, or of other agencies' experience of him. His history of serious mental illness was downplayed when the decision was taken to discharge him from secondary mental health services in 2012. This meant that the pattern of his breakdowns was not factored in when agencies were assessing or considering appropriate responses to his various anti-social behaviours.*

The inconsistency of joint working meant that individual agencies did not have a clear idea of what input was being provided to Mr C by others, so, for example, no agency appears to have registered the significance of his son's withdrawal or responded to his reasonable expectation that Mr C would now need to be monitored more closely.

There appears to have been no proactive input from the GP throughout the period under review, which is a concern given the key role of GP's in the continuing care of all people who experience serious mental ill health and the NICE clinical guidelines (CG185) on Bi-polar Disorder. Equally, there is evidence that the GP was not involved in Mr C's discharge from mental health services.

Looking at the whole narrative it appears that for much of the time Housing Officers were working alone, and were not able to rely on consistent help from other agencies. This meant that they were not always aware of the most effective referral route to find the help they thought Mr C needed.

None of the agencies saw it as their role to provide a leadership or coordinating function across all partners. This meant for example that information was not shared when one partner decided to discharge, was not taking up a referral, or was passing it to another agency. When referrals were passed on from one agency to another, there was no follow up to see what had happened as a result of the referral.

The lack of consistent joint working meant that frontline staff did not have the opportunity to learn about the way that other agencies work, how to target referrals or what their duties or powers are. This lack of understanding also meant that agencies were unable to escalate their concerns effectively when they identified deterioration in Mr C's situation.

The findings of the review highlighted a number of key things, particularly around how agencies recognise and deal with the complex issues of self-neglect and mental capacity. It looked also at how risks are identified and managed, how concerns are shared and escalated within and across organisations and the importance of context on how decisions are made. The report also highlighted the impact that restructuring had on agencies' responses.

A number of recommendations were made in the report.

- An escalation process be put in place so that concerns can be more easily flagged and shared across agencies;
- The development of multi-agency guidance about cases of self-neglect;
- Policies, practice and guidelines in relation to engaging with individuals with co-morbid mental health and drug misuse issues should be reviewed in the light of learning from this case;
- Review of training and adherence to policies in respect of practice in relation to mental capacity assessments;
- Ensuring implementation of the recommendations across agencies and scrutinising changes to ensure they are long-lasting.

Beverley Taylor

[*Editorial Note: this will be Beverley's last contribution to the Newsletter as she is now*

entering a well-earned retirement from the law. We are extremely grateful to her for her contributions both to this Newsletter and more widely in her numerous guises, not least at the heart of the Official Solicitor's office for many years and on the Law Society's Mental Health and Disability Committee.]

Section 136 guidance document for London

A guidance document, *Mental Health Crisis Care for Londoners: London's section 136 pathway and Health Based Place of Safety specification*, has just been published aimed at stakeholders involved in the s.136 MHA 1983 pathway, specifically, London's police forces, London Ambulance Service, Approved Mental Health Professionals and Acute and Mental Health Trusts. It outlines a consistent pathway of care across London and a minimum standard for Health Based Place of Safety sites.

The guidance covers the s136 pathway from when the individual is detained in a public place, conveyance processes, the interface with Accident and Emergency departments and processes at the Health Based Place of Safety (including the Mental Health assessment and arranging follow up care). Importantly, it sets out specific arrangements between the various organisations involved in each stage of the pathway, and therefore should go some way to eliminating debates on the ground as to responsibilities in the face of individual cases.

CQC annual report on MHA 1983

The Care Quality Commission (CQC) has published its annual report on the Mental Health Act which makes for sobering reading. The headline concern is that the number of uses of the MHA has been rising, and 2014/15 saw the highest ever year-on-year rise (10%) to 58,400 detentions.

The report acknowledges that the reasons why increasing numbers of mental health patients are being detailed are likely to be complex and vary from area to area. However, the report identifies that one potential cause is the Supreme Court's decision in *Cheshire West* in 2014. The report states:

> *It is likely that this has reduced the proportion of patients admitted to mental health beds on an informal basis, as services become more sensitive to issues of unauthorised deprivation of liberty (also referred to as 'de facto detention') and seek to avoid it. Allowing for some caution as the dataset is not complete, the number of patients detained under the MHA at any one time may now be surpassing the number of beds occupied by informal patients. This would be an important change in the profile of resident patients: before 2014/15, there were always more informal than detained patients in mental health beds.*

We welcome the news that the number of informal patients has decreased. One of the key objectives of the DOLS regime when it was introduced was to protect the rights of informal patients, who were being 'de facto' (objectively) deprived of their liberty without proper procedures (the so called "Bournewood gap"). We are however concerned to hear that there are now more patients detained under the MHA than ever before. The report identifies a number of significant failings, many of which are repeated in previous reports, and it is alarming that, in 2015/16, the CQC *"found little or no improvement in some areas that directly affect patients, their families and carers."* This is one piece of a bigger picture which strongly suggests that our health and social care services are in crisis.

The international protection of vulnerable adults: recent developments from Brussels and The Hague

[*Editorial Note: we are delighted to be able to reproduce here as a guest article a post by Pietro Franzina, Associate Professor of International Law at the University of Ferrara (Italy), from the Aldricus blog*]

On 10 November 2016, the French MEP Joëlle Bergeron submitted to the Committee on Legal Affairs of the European Parliament a draft report regarding the protection of vulnerable adults.

The draft report comes with a set of recommendations to the European Commission. In the draft, the European Parliament, among other things, "deplores the fact that the Commission has failed to act on Parliament's call that it should submit … a report setting out details of the problems encountered and the best practices noted in connection with the application of the Hague Convention [of 13 January 2000 on the international protection of adults, also known as Hague 35], and 'calls on the Commission to submit … before 31 March 2018, pursuant to Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity."

A document annexed to the report lists the 'principles and aims' of the proposal that the Parliament expects to receive from the Commission. In particular, following the suggestions illustrated in a study by the European Parliamentary Service [reported on in our November 2106 Newsletter], the regulation should, *inter alia*, "grant any person who is given responsibility for protecting the person or the property of a vulnerable adult the right to obtain within a reasonable period a certificate specifying his or her status and the powers which have been conferred on him or her," and "foster the enforcement in the other Member States of protection measures taken by the authorities of a Member State, without a declaration establishing the enforceability of these measures being required." The envisaged regulation should also "introduce single mandate in anticipation of incapacity forms in order to facilitate the use of such mandates by the persons concerned, and the circulation, recognition and enforcement of mandates."

In the meanwhile, on 15 December 2016, Latvia signed the Hague Convention of 2000 on the international protection of adult. According to the press release circulated by the Permanent Bureau of the Hague Conference on Private International Law, the Convention is anticipated to be ratified by Latvia in 2017.

The Convention is presently in force for nine countries: Austria, the Czech Republic, Estonia, Finland, France, Germany, Monaco, Switzerland and the United Kingdom. As far as the UK is concerned, however, the Hague regime, pursuant to a declaration made by the British Government in accordance with Article 55, only extends to Scotland.

Constitutional procedures aimed at the ratification of (or accession to) the Convention have been initiated in other countries. [Editorial Note: this does not, sadly, include any current proposal in the United Kingdom to extend ratification to England and Wales].

The Council of the European Union periodically requests Member States to indicate whether they intend to become a party to the Convention (or to state the reasons why they do not wish to). The latest compilation of replies is in a (partially accessible) Council document dated 4 November 2016. The document, available here, also provides information as to the experience developed so far with respect to the Convention in the Member States that have ratified it.

Earlier compilations drawn up for the same purposes may be found here (2010) and here (2015).

Book corner

For all those of you looking for last minute Christmas presents, or otherwise to stock the shelves, we present a few recent book reviews by Alex. In all cases, by way of full disclosure, he thanks the publishers for providing him with copies (and expresses his readiness to review other books in the area of mental capacity law, broadly defined).

Disabled Children: A Legal Handbook (2nd edition): Steve Broach, Luke Clements and Janet Read (Legal Action Group, 2015, paperback/eBook, £50)

The second edition of this book is a real tour de force. As with the first edition, but comprehensively updated and significantly expanded, it takes the reader through the bewildering complexity of statutory provisions non-statutory provisions, codes of practice and case-law that set down the law in relation to children with disabilities. It does so from a resolutely practical perspective sensitive to the needs of children with disabilities, their families and carers, and reflecting the deep expertise of the authorial team (joined for this edition by a number of expert contributors).

For present purposes, I would single out the chapter on decision-making: the legal framework (chapter 7), which provides as secure a guide as possible to the strange contortions that the law ties us into as we seek to divide those below 18 to those who may lack competence and those who may lack capacity. How the Mental Capacity Act applies to those aged 16 and 17 is extremely poorly understood in general, in my experience, and the chapter is extremely helpful in this regard, and in outlining (insofar as it is sensibly possible to do so given the grey areas of the law that exist) when and how those with parental responsibility may decide on behalf of their children

Almost the best thing about the book is that, thanks to the Council for Disabled Children, it is available to download in its entirety for free from their website. Not least because it runs to 597 pages, and because the proceeds go towards the marvellous Legal Action Group, do please consider purchasing it!

The Modern Judge: Power, Responsibility and Society's Expectations (Sir Mark Hedley, Jordan Publishing, 2016, paperback, book and ePDF £20.00)

In *The Modern Judge: Power, Responsibility and Society's Expectations*, Sir Mark Hedley conveys in a very short compass the fruits of a lifetime in the law, and displays the wisdom that made him one of the most respected family and Court of Protection judges. In a series of short chapters, originally delivered as lectures at Liverpool Hope University, Sir Mark asks profound questions as to the place of the judge in society and to the basis and justification for their role in determining

cases involving the welfare of children and those falling within the scope of the MCA 2005. Although he disclaims any attempt to characterise the book as a scholarly text, reflecting instead his own experiences at the Bench, it does not need to be festooned with footnotes in order to achieve its goals.

For me of most importance, perhaps, was the clear identification of the role of judge as individual human being, seeking to exercise a discretion granted to them, the width of which is very little understood by members of society more generally. Sir Mark is very right to ask whether this model is preferable to a model based on clear rules (or the administration of an algorithm). He is also undoubtedly correct to note that whilst rules have the benefit of certainty, they have the ability to generate harsh results in some cases; whilst, conversely, discretion can avoid this outcome, it can also lead to uncertainty and difficulty in predicting the outcome of taking any case to court. Further, the greater the discretion granted to judges, the more significant the role of their own value-systems and the greater the obligation upon judges to be self-aware as to the "baggage" that they are bringing to the determination of any case.

On balance, he makes a convincing case for discretion, not least given the fact that as our society continues to evolve and become more diverse, what might constitute generally acceptable norms upon which rules can be founded becomes ever more difficult. But he is absolutely right to identify that leaving judges with such discretion (or indeed actively imbuing them with it) does commensurately increase the need to identify a real basis on which the trust is warranted. The twin qualities that Sir Mark advocates for judges, of humility (recognising the inherent fallibility of the system) and confidence (in navigating a way to a decision), are undoubtedly ones that he displayed throughout his judicial career. To the extent that other judges reflect such qualities, I would suggest that such does indeed represent a sound basis for reposing trust in them.

Indeed, I would also suggest that the same questions and the same principles apply to all those who seek to apply s.4 MCA 2005 outside the court system, given the way in which the Act has made so many more people informal "judges" in this context, both as to capacity and to best interests.

I would very strongly recommend this short but profound to book for anyone concerned not just with the role of the judiciary in the context of children and incapacity, but also with the wider balancing exercise between protection and autonomy that is required in both of these spheres by others outside the courtroom.

Lasting Powers of Attorney: A Practical Guide (Craig Ward, Law Society Publishing, 2016, paperback £59.95)

This is the third edition of a work which does precisely what it says on the cover, setting out in very considerable (one might almost say exhaustive) almost all conceivable matters relating to the creation, operation, and control of powers of attorney. It is particularly helpful in its focus on the bigger picture of powers of attorney, as can be seen in three examples.

The first is the examination of the law and good practice relating to the instruction of a solicitor to prepare an LPA, which raises distinct (albeit related) issues to that involved in the creation of

an LPA itself. Importantly, the author does not stop at questions of capacity, but goes on to look at the issues of potential vulnerability and undue influence covered in the recent Law Society Practice Note, *Meeting the Needs of Vulnerable Clients*.

The second is the very clear and helpful discussion of how LPAs interact with advanced decisions to refuse treatment, which is an area which can really trip people up.

The third and final example is to be found in appendix in which the author draws on empirical research that he has conducted into why the court is so reluctant to grant health and welfare deputyships. The results of that study emphasise the importance of establishing (wherever possible) a power of attorney for health and welfare matters in advance of incapacity.

The author also has a particular interest in how LPAs can be used by those in business to secure their interests in periods of incapacity. The operation of LPAs in this context raises complex questions given the numerous duties imposed on directors and others by company law. The book provides a surefooted guide to those seeking to set up and make use of powers of attorney in this area.

Given the exhaustive nature of the book, it is a (small) shame that the author does not take the opportunity, even in an appendix, to consider how LPAs may fit into the context of the CRPD and the requirement under Article 12 that states take measures to secure the effective exercise of legal capacity by everyone on an equal basis. On one view such powers are very much in line with the CRPD, but, as discussed in the recent EAP Three Jurisdictions Report, the way in which they are currently provided for under English law does make for some interesting tensions (see §6.3 of the report). And on a very minor technical note, I would say that (picking up paragraph 1.6.2 of the book), it is in fact clear that the provisions of Schedule 3 relating to certificates are not in force in England and Wales, see the decision of the President in *Re PO*).

But these are very minor niggles, and overall the book makes essential reading for anyone (and in particular any solicitor) concerned with these powerful tools.

Delegation by attorneys: comparisons

There is concern in England & Wales about the practical application of guidance from their Public Guardian on delegation by attorneys to discretionary investment managers of investment management decisions under Lasting Powers of Attorney ("LPAs"). Under the guidance an attorney under an LPA can appoint a bank or IFA to make investment decisions provided that there is specific authority in the LPA. However, where an attorney is already using a discretionary manager without express power in the LPA, it would appear that retrospective consent is required from the Court of Protection.

This gives rise to comparisons both between the Scottish position and that in England & Wales, and also comparisons between guardians and attorneys under Scottish legislation. Cross-border, there is a major contrast between the standard forms for LPAs in England & Wales, with boxes to tick for matters excluded; and the freedom of form in Scotland, subject to certain basic statutory requirements, but the converse starting-point that the attorney only has whatever powers are conferred, rather than presumed powers with stated exceptions. The issue now causing concern in England & Wales points to a similarity in both systems in that some powers are of a "higher level" nature and always require to be explicit. That now appears to be the position in England & Wales for power to appoint a discretionary fund manager. Similarly, in Scotland we have the position established in *McDowall's Executors v IRC* [2004] STC(SCD) 22 that power to make gifts must be clear and explicit, rather than apparently encompassed within more general powers, to be effective. Otherwise, as in that case, gifts made even seven years before death will be ineffective for IHT purposes! In the area of welfare powers, the same principle is thought to apply to power to authorise a deprivation of liberty: it must be clear and explicit. Strangely, however, and as we have commented before, power to authorise a restriction of liberty would be automatically deemed to have been conferred upon any welfare guardian or welfare attorney, without any explicit such power, under the proposals to address deprivation of liberty issues from Scottish Law Commission. Following consultation earlier this year, Scottish Government is understood to be moving forward with consideration of that and related issues.

Within Scotland, we are left with concerns about the differences in provisions in the Adults with Incapacity (Scotland) Act 2000 for attorneys and guardians respectively, and the basic interpretation question of whether a provision applied to one and not the other must be regarded as deliberately excluded for the other. Thus, to take examples, the Public Guardian can give instructions under section 64(7) to guardians but not to attorneys (with a degree of protection for guardians, provided that something does appear to be within their powers); attorneys but not guardians benefit from the provisions in section 17 that they are not obliged to do things which "would, in relation to …. value or utility be unduly burdensome or expensive"; and in the case of joint appointments where matters are not explicitly regulated, guardians but not attorneys have the "fall-back" provisions of section 62(6)–(9).

On the question of delegation of authority, guardians have express power to delegate under section 64(6). Although this is not replicated in the provisions for attorneys, the editors understand that the Public Guardian (i.e. Scotland's Public Guardian) takes a "read-across" from guardianship in relation to attorneys,

allowing attorneys to appoint a portfolio manager if there is power to invest and power to appoint experts, but this is a "temporary fix" pending clarification by legislation. In making such judgements, the Office of the Public Guardian helpfully apply the principles and the broad issues of benefiting the adult, safeguarding the adult, and general duties to the adult.

By way of postscript, it is notable that an item in a recent STEP bulletin regarding the issue under LPAs refers to "The England & Wales Office of the Public Guardian". While technically not quite correct, that is a considerable improvement upon the failure of that Office to make it clear that it is the Office so named for England & Wales, established subsequently to "The" Office of the Public Guardian under the 2000 Act. While not required to do so, Scotland's Public Guardian helpfully applies the qualification "Scotland" while the counterpart in England & Wales, obliged by convention as the subsequent statutory creation to make a distinction, unhelpfully fails to do so.

Adrian D Ward

"A fairer Scotland for disabled people"

Scottish Government has published its Delivery Plan for the United Nations Convention on the Rights of Persons with Disabilities, available here. It sets out 93 actions which Scottish Government has committed to take forward during the current parliamentary term. These include reviewing policies on guardianship, and considering circumstances in which supported decision-making can be promoted. Scottish Government confirms that it plans to work with disabled people and organisations that represent them to develop changes to the Adults with Incapacity (Scotland) Act 2000 in relation to deprivation of liberty, and to assess compliance with the UN Convention on the Rights of Persons with Disabilities by 2018. Scottish Government has also made a commitment to work with the Law Society of Scotland in promoting a specialism in disability discrimination law.

In his capacity as convener of the Mental Health and Disability Sub-Committee of the Law Society of Scotland, Adrian welcomed the commitments in the Plan and confirmed that the Society looked forward to continuing to work with Scottish Government in these areas. That was referred to in the debate in the Scottish Government on the Delivery Plan on 8th December 2016 when George Adam (Paisley) (SNP) said: "The delivery plan recognises the human rights of disabled people and it must underpin all our activities across the whole range of policy and legislation that affects disabled people. The Law Society of Scotland praises the Scottish Government for taking a groundbreaking approach."

Adrian D Ward
Jill Stavert

Capability to stand trial: doing it back to front

On 1st December 2016 the High Court of Justiciary Appeal Court issued its decision in *Charles Murphy v HM Advocate* [2016] HCJAC 118, allowing an appeal against the decision of a trial judge to refuse a plea in bar of sentence. The appellant had been convicted in January 2015 of seven charges involving serious assault, rape, lewd and libidinous practices, indecent assault and assault with intent to rape. The jury found him guilty. He had been on bail during the trial. He was remanded in custody pending sentence. The court sought a social work report.

The social work department indicated that they were unable to prepare a report due to the poor presentation of the appellant and his apparent dementia, and recorded that the prison social worker had expressed concerns about his mental health and that he "appeared to fail to understand the Court process, what he had pled, or why he was due in Court on 26 February 2015". It was felt that his mental status required to be clarified by means of a psychiatric assessment. That psychiatric assessment concluded that the appellant suffered from mixed Alzheimer's and vascular dementia; that he was incapable of giving instructions or participating effectively in the sentencing process; that he was likely to have been unfit at trial; that his disorder was progressive and treatable only with palliative care; and that there was no medical basis for compulsory measures of treatment. The trial judge refused a plea in bar of sentence and sentenced the appellant to five years imprisonment.

The judgment of the Appeal Court narrates a lengthy history. This note should be read subject to consideration of the full history. This note records only the indicators suggesting that there should have been a plea in bar of trial before the trial took place in January 2015, or failing that, that the position should have been addressed during the trial.

In May 2014 the solicitors then acting for the appellant were advised of the appellant's diagnosis of mild dementia or Alzheimer's. They thereupon advised the Crown of that diagnosis, with the suggestion that the Crown might wish to obtain a report from the doctor concerned. No such report was instructed. Also in May 2014, the defence agents spoke to a doctor who confirmed the diagnosis and who advised that if written confirmation of the diagnosis was required "for practical purposes he [the appellant] should need a report from a forensic psychiatrist". Again, no such report was obtained. It would appear that the defence agents proceeded solely upon their own assessment that the appellant was fit to instruct them.

In September 2014 the appellant's granddaughter, upon whom he relied to a considerable extent, texted the defence agents *inter alia* saying that "My granddad has comp confused me about the case". This does not seem to have prompted any re-consideration.

During the trial itself the granddaughter texted *inter alia* "I was jst wondering how it went today my granddad cant really tell me anything bcos he cant remember and can only give us bits and pieces that don't make sense. Its really frustrating". The following day she texted *inter alia* "again my granddad is frustrating me and cant tel me how he feels it went today".

Subsequent medical assessment was found by the Appeal Court to be "particularly telling" in that it included the comment that it was "strongly indicative that [the appellant] cannot convey to the people that he trusts what is going on". As so often happens, it was noted that despite findings indicative of "very significant impairment/dementia" people with such a condition "can present as superficially plausible" – a situation widely recognised by solicitors and other professionals engaged in the field of intellectual disabilities. It was pointed out - again in the subsequent medical evidence – that what lies beneath the plausibility is often an inability to understand and take account of changing and developing circumstances, such as the appellant would have heard while listening to the evidence.

It is disappointing that in a situation where, on a fair reading of all of the information and evidence

before the Appeal Court, the extent of impairment of the appellant's intellectual capabilities by the time that he stood trial, if then fully and properly assessed, would probably have supported a plea in bar of trial, all concerned – including the trial judge at time of sentence – proceeded regardless, and it was only upon appeal that the situation was assessed and addressed. Justice did prevail, but was seriously delayed.

Adrian D Ward

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Conferences at which editors/contributors are speaking

Royal Faculty of Procurators in Glasgow

Adrian will be speaking on adults with incapacity at the RFPG Spring Private Law Conference on 1 March 2017. For more details, and to book, see here.

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. 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 February. 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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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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