Mental Capacity Law Newsletter July 2016: Issue 67

Court of Protection: Health, Welfare and Deprivation of Liberty

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: some light shed on undoing advance decisions to refuse medical treatment;

(2) In the Property and Affairs Newsletter: Senior Judge's last judgment (on dispensing with service) and the latest LPA/deputy statistics;

(3) In the Practice and Procedure Newsletter: different aspects of (and consequences of) reporting restrictions;

(4) In the Capacity outside the COP Newsletter: guidance on s.20 Children Act 1989 'consents' and capacity, powers of attorney and managing telephone subscriber accounts;

(5) In the Scotland Newsletter: an update on practice before the Glasgow Sheriff court, a round-up of relevant case-law, and the review of the Council of Europe's Recommendation CM/Rec(2009)11 *on principles concerning continuing powers of attorney and advance directives for incapacity*.

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.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor
Beverley Taylor

Scottish contributors
Adrian Ward
Jill Stavert

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When is an advance decision not binding?

Re QQ [2016] EWCOP 22 (Keehan J)

Medical treatment – advance decisions

Summary and comment

In this case, Keehan J was concerned with the question of whether it was in the best interests of QQ, a young woman with a diagnosis of an emotionally unstable personality disorder and schizophrenia, to receive anti-coagulation medication on a prophylactic (i.e. anticipatory) basis so as to prevent episodes of deep vein thrombosis. The actual decision (that she lacked the relevant decision-making capacity and that the treatment was in her best interests) was very shortly reasoned, and we would not report it but for the obiter observations of the judge about the construction of s.25(2)(c) MCA 2005.

Section 25(2)(c) MCA 2005 is ambiguous. It provides that an advance decision is not valid if P "*has done anything else* [i.e. other than withdrawing it at the time they had capacity or granted an LPA subsequently which contains 'overriding' powers'] *clearly inconsistent with the advance decision remaining his fixed decision*."

The wording of s.25(2)(c) raises two real questions:

1. Does it only cover actions carried out prior to the onset of incapacity, or can it also cover the position where a person no longer has capacity to alter or withdraw their advance decision (and as a corollary whether to accept or refuse medical treatment)? In other words, is it apt to cover the situation envisaged by Munby J in *HE v A Hospitals NHS Trust* [2003] 2 FLR 408 where a person still has the ability (to a greater or lesser extent) to express his wishes and feelings whilst not retaining the capacity to alter or revoke his advance decision?; and

2. What exactly does 'do' mean for purposes of s.25(2)(c)? Does it require that a person has taken a positive action (such as, in *HE*'s case, convert to Islam and thereby abandon the central tenet of the value structure upon which the decision was based, or, perhaps more commonly, accepting treatment offered by a medical professional), or can it extend to words (instance demanding or indicating that they would accept treatment)?

Alex discussed some of the issues involved here in an article written several years ago, noting that there had yet to be specific judicial consideration of the meaning of s.25(2)(c).

In *Re QQ* Keehan J gave some passing (obiter) consideration to the meaning of the provision. It was obiter because he accepted that QQ had at all material times lacked the capacity to make decisions in relation to the medication.

> It follows [he held] that I do not accept that when QQ made an advance decision in August 2015 in relation to her treatment that she was capacitous and therefore that it is a valid or lawful advance decision. If I were to be wrong on that issue, I accept Mr Wenban-Smith's submission that the contrary views that QQ has recently and fleetingly expressed from time to time, namely that she would accept treatment, would not of themselves invalidate, pursuant to s 25 (2) (c) of the Mental Capacity Act 2005, what would otherwise have been a valid advance decision.

Keehan J's judgment is – for these purposes – frustratingly brief. However, he undoubtedly left

open the possibility that a person can render invalid an advance decision that they have made to refuse treatment after the point that they have lost capacity both to withdraw it and to make decisions as to medical treatment (and hence it is prima facie applicable), for instance by making sustained (incapacitous) indications that they either wished or would accept medication that they had previously sought to refuse in their advance decision.

On one view, this must be right, and indeed, as noted in the article, it seems to us that in reality it is all but inconceivable that both clinicians and the courts would stand by and decline to treat a patient who (albeit from the other side of capacity) was seeking to undo an ADRT that they had previously made. It also acknowledges the reality that (in most cases) it is not actually possible to anticipate precisely how you might feel at the point when you are deemed to lack capacity to make decisions as to your own medical treatment, and what at that point you might or might not want.

On another view, both as a matter of strict construction of the Act and from a purely philosophical perspective, we might question whether this is correct. The very point of an advance decision to refuse treatment is that you are seeking – in advance of incapacity – to lay down your refusal to consent to that treatment, which you intend to be binding as if you were capacitously refusing at the point it is being offered it. It is, viewed from this perspective, a remarkably stark example of the 'self-binding' or Ulysses directive, and you should (arguably) be held to the consequences of your decision even at the point when, by definition, you are not in a position to make it.

In due course, it may well be that there will need to be a decision (or possibly statutory reform) which will assist us calibrate ADRTs in such a way as to ensure that they serve as a tool to exercise legal capacity without (inadvertently) binding those who make them into irreversible and (properly) unconscionable situations. The recent Essex Autonomy Project Three Jurisdictions Project report touched upon this dilemma by reference to Article 12 CPRD (see pp.33) , and it is one that will only become more prevalent as – is to be hoped – the use of ADRTs become more widespread.

Short note: delay in determining CANH withdrawal applications

In *Cumbria NHS CCG v Miss S & Ors* [2016] EWCOP 32, Hayden J was confronted with a dismally familiar situation, namely that disputes as the precise state of consciousness of 'P' gave rise to a delay in the determination of an application for withdrawal of clinically assisted nutrition and hydration ('CANH'). Hayden J reiterated that:

> *the avoidance of delay in medical treatment cases is an important imperative, as I have now said in a number of judgments. This is not to say that assessments ought to be rushed or that delays may not sometimes be clinically purposive, but respect for a patient's autonomy, dignity and integrity requires all involved in these difficult cases to keep in focus that these important rights are compromised in consequence of avoidable delay. Those who are beyond pain, understanding or without any true consciousness require vigilant protection of their rights and interests, all the more so because of their unique level of vulnerability. Equally I cannot over-emphasise the importance of listening to the family who ultimately know the patient's personality best. That is not to say that their wishes and views*

> *should be determinative, but it is extremely important that they are heard and their observations given appropriate weight.*

Separately, Hayden J reiterated his observations from the case of Mrs N that consciousness can be a somewhat elusive concept and that awareness "*is not reducible to a test or clinical sign and will frequently contain what may be a significantly subjective element*," the assessment tools have an inevitably subjective complexion to them as well, and that professional enthusiasm and determination are admirable qualities, "*but it is important to guard against overly optimistic assessment driven by a vocational desire to make a difference*."

We are hopeful that steps in train at present will go some considerable way to reducing the delays (rightly) identified by Hayden J as causing real distress in these applications, by ensuring that the proper evidence (including, where the necessary element of independent scrutiny) is prepared before the application is brought, rather than being identified as necessary only part-way through. We will report upon these developments as soon as we are able.

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Conferences at which editors/contributors are speaking

4th World Congress on Adult Guardianship

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

ESCRC seminar series on safeguarding

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

Deprivation of Liberty in the Community

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

Taking Stock

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

Alzheimer Europe Conference

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

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 August. 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.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

Editors

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Editors and Contributors

Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

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

Neil Allen: neil.allen@39essex.com

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

Annabel Lee: annabel.lee@39essex.com

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

Anna Bicarregui: anna.bicarregui@39essex.com

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.

Simon Edwards: simon.edwards@39essex.com

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.

Adrian Ward adw@tcyoung.co.uk

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

Jill Stavert: J.Stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.