Mental Capacity Law Newsletter July 2016: Issue 67

Essex CHAMBERS

Court of Protection: Practice and Procedure

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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University College London Hospitals NHS Foundation Trust v Miss G [2016] EWCOP 28 (Peter Jackson J)

Media – court reporting

Summary

Miss G was in a permanently vegetative state as a result of a heart attack that caused irreversible hypoxic brain injury. She was being kept alive by means of clinically assisted nutrition and hydration (CANH). The parties agreed that it was not in Miss G's best interests for CANH to be continued and the court made declarations accordingly.

A reporting restrictions order (RRO) had been made which applied for one month after Miss G's death. The Trust, supported by Miss G's family, applied for the reporting restrictions order to be extended indefinitely. The Trust argued that there was no public interest in Miss G or her family being named at any stage. Miss G's family members were private people who were unhappy at the thought of any publicity, particularly at such a difficult time. The Official Solicitor (on behalf of Miss G) and the Press Association opposed the application.

The court concluded that the existing RRO would not be varied and would cease one month after Miss G's death and would not be varied. The court's reasons were summed up as follows:

> *The names of those who are born and those who die are rightly a matter of public record. The fact that someone has died is always a matter of proper public interest and the ability to record it is a normal incident or society. It is probable that in this case and others like it there will be a coroner's inquest, held in public. These features will normally be present in cases involving the withdrawal of treatment and in such cases those seeking report restrictions, particularly open-ended ones, will in practice have to show that privacy considerations outweigh them. I cannot therefore agree with the Trust's submission that there is no legitimate public interest in Miss G's identity being known.*

Further, the court distinguished the earlier case of *Re V* [2016] EWCOP 20 (reported in our May 2016 newsletter), in which the RRO was extended indefinitely, by emphasizing the fact-specific nature of the analysis. Where an RRO is made in a case where death is foreseeable, the court should consider whether the appropriate duration is to be until death, until a fixed date after death or until further order.

Comment

It is unclear quite where the balance is to be struck between the public interest of identifying the individual and protecting the private interests of the individual's family. The court accepted that the circumstances were undoubtedly *"distressing"* to family members but there was *"no evidence that the identification of Miss G would harm family members or be a significant infringement of their privacy"*. One of the factors which militated against extending the RRO, in contrast to the case of *Re V*, was that there was unlikely to be any significant reporting of the personal details of this case, still less intrusive reporting. The lifting of the RRO therefore depended, in large part, on the understanding that media reporting would be sensitive and responsible as opposed to the reporting of *Re V* which was described as *"prurient rather than in the public interest"*.

To anonymise or not (2)

M v Press Association [2016] EWCOP 34 (Hayden J)

Media – court reporting

Summary

This decision of Hayden J follows his judgment in *M v Mrs N* [2015] EWCOP 76. To recap, Mrs N was profoundly impaired both physically and cognitively in consequence of the progressive degenerative impact of Multiple Sclerosis. Her treatment was being provided through a percutaneous endoscopic gastrostomy (PEG) tube. The court made a declaration that it was in Mrs N's best interests to withdraw clinically assisted nutrition and hydration.

The court also made a reporting restrictions order (RRO) prohibiting the identification of M and Mrs N in any press report during Mrs N's lifetime and for seven days after death. The RRO was extended until 14 days after the final judgment in *Re V* [2016] EWCOP 21 which was handed down on 4 May 2015 (and reported in our May 2016 newsletter).

In reliance on *Re V*, M subsequently made an application to extend the RRO in this case *"until further order of the court"*. In support of the application, M argued that there would be significant interference with the family's Article 8 rights if the court permitted Mrs N to be named. This was a private Jewish family, well-known in the wider community. The family had been distressed by their involvement in the COP proceedings and by the press interest.

In balancing in the competing interests, including M's deep seated wish to preserve her mother's anonymity, the court came to *"the firm conclusion that the balance here weighs more heavily in favour of freedom of expression."* Hayden J reasoned at paragraph 30:

> *Judges of this Court are not inured to the day to day realities in these cases. I have no doubt that those closest to M and her family, those who matter to the family the most, will have identified Mrs N from the facts of the case. For those beyond that circle, the name of the individual serves only to make her story more real and the issues it raises more acute. Therein lies the public interest. By contrast the introduction of both Mrs N's and M's name into the public domain has relatively limited impact on M's privacy or Article 8 rights more generally. Certainly there is no real evidence to that effect.*

Hayden J further commented at paragraphs 33 and 34:

> *Of course, as has now been analysed in a number of cases in the Court of Protection, evaluating P's best interests will invariably involve the Judge considering the wider canvas of P's life, often via the conduit of evidence from family members. Inevitably, that involves an inquiry into the private sphere which will usually engage facets of the rights protected by Article 8. It is unlikely, in my view, that many cases will be confined solely to assessing the advantages or disadvantages of a particular course of treatment without considering some of the circumstances of the individual patient. In this case whilst I have undoubtedly considered features of Mrs N's life, character and personality, the issue of withdrawal of hydration and nutrition from a patient in MCS is plainly the predominant one. Indeed, I think it can properly be characterized as one of the major issues in contemporary life.*

> *The challenge, in the parallel analysis of the competing rights and interests in play, is that the rights in contemplation are of wholly different complexion. The exercise involves the juxtaposition of the intensely personal (grief, loss, privacy) alongside the conceptual (the public interest, the freedom of the press, the effective dissemination of information, the administration of justice). In a jurisdiction where there is a human, and inevitable pull to the protection of the vulnerable, (this is after all the Court of Protection), it is easy to overlook how some of the wider, abstract concepts also protect society more generally and in doing so embrace the vulnerable.*

Comment

Like case of *G* [2016] EWCOP 28, noted above, this case demonstrates the intensely fact-specific analysis required when considering the appropriate duration of a RRO. In particular, the court seized upon one feature of this case which had particular resonance. That was that Mrs N had been involved in litigation over 40 years ago concerning her son's paternity at time when public attitudes were far less liberal and people perhaps quicker to condemn the private lives of others. Those proceedings were heard in open court, to which the press would have full access, and involved discussing the most personal aspects of her private life. These events were seen as defining Mrs N's *"indomitable spirit"*.

Whilst Charles J in *Re V* gave extensive general guidance as to the correct approach to be applied these cases, the application of that guidance to specific facts remains challenging. In contrast to the earlier case of *Re* V, the court noted that the reporting of this case had almost entirely been confined to the legal and medical issues as this case represented an evolution in the existing case law extending declaratory relief for the first time to those in a minimally conscious state. There had been no evidence of press intrusion having occurred in the last few months. Whilst the body of case law on this important issue continues to gather momentum, it is clear that the principle of open and transparent justice can only be sustained by sensitive and responsible reporting.

Short Note: costs and the media

Charles J has recently handed down his judgments upon the costs consequences of the decision in *Re V* [2016] EWCOP 20. In *Re V* [2016] EWCOP 29, he refused the applicant's application for part of her costs to be paid by the media respondents on the indemnity basis. The application was brought in part on the basis of the conduct of the relevant media bodies. Following the approach taken by the President in *Re G* [2014] EWCOP 5, Charles J considered (at paragraph 20)

> *that basing a costs order against the Respondents on their conduct and reporting that I criticised would be a back door, an unprincipled and an arbitrary approach to expressing disapproval of, or punishing, that conduct because it would be based on the point that they participated and argued against the application whilst others, whose conduct was also criticised, did not. However, I leave open whether in other circumstances equivalent conduct could properly be taken into account to found either an order for costs or the basis of their assessment.*

Court of Protection statistics

The statistics for January to March 2016 are now out.

In January to March 2016, there were 7,225 applications made under the MCA 2005, up 9% on the equivalent quarter in 2015. The majority

of these (54%) related to applications for appointment of a property and affairs deputy. Following the introduction of new forms in July 2015, applicants must make separate applications for 'property and affairs' and 'personal welfare'. This is why there were fewer 'hybrid deputy' applications compared to previous years.

There were 6,554 orders made, similar to the same quarter in 2015. Most (52%) of the orders related to the appointment of a deputy for property and affairs. The trend in orders made mirrors that of applications and has been steadily increasing since 2010 albeit at a faster rate.

Applications relating to deprivation of liberty increased from 109 in 2013 to 525 in 2014 to 1,497 in 2015. There were 678 applications made in the most recent quarter, triple the number made in January to March 2015. The overall increase follows the decision in *Cheshire* West. Of the 678 applications made in January to March 2016, 459 (68%) came from a Local Authority, 185 (27%) from solicitors and 34 (5%) from others including clinical commission groups, other professionals or applicants in person. Over half (52%) of the applications were made under the streamlined process set out in *Re X and others* [2014] EWCOP25.

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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

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

Scottish contributors

Adrian Ward
Jill Stavert

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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.