Mental Capacity Law Newsletter June 2016: Issue 66

Court of Protection: Practice and Procedure

Introduction

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: Neil Allen comments on the Law Commission's interim statement, Charles J on deputies and Article 5, and an updated Guidance Note on judicial authorisation of deprivation of liberty;

(2) In the Property and Affairs Newsletter: Senior Judge Lush on the difference between property and affairs and welfare deputies and new OPG guidance;

(3) In the Practice and Procedure Newsletter: an appreciation of Senior Judge Lush by Penny Letts OBE ahead of his retirement in July;

(4) In the Capacity outside the COP Newsletter: a major report on the compliance with article 12 CRPD of the three jurisdictions of the United Kingdom and a guest article by Roy Mclelland OBE on the new Mental Capacity (Northern Ireland) Act 2016;

In large part because its editors have been all but entirely subsumed with work on the report on CRPD compliance, there is no Scotland newsletter this month.

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 relevant to social work professionals will also shortly appear on the SCIE website.

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Denzil Lush – an appreciation

[*Editorial Note: we are delighted that Penny Letts OBE, has prepared the following appreciation of Senior Judge Lush, ahead of his imminent retirement in July: he will be a huge loss, and we will miss him greatly*]

My first contact with Denzil was during the late 1980s when I was Secretary to the Law Society's Mental Health and Disability Committee. Part of my role was to promote the provision of comprehensive legal services to older people and people with mental and physical disabilities and also to answer queries from solicitors relating to their practice in these areas. Denzil, then a solicitor in private practice in Exeter, was one of the first to recognise the law relating to older people as a speciality in its own right, encompassing not only wills and probate but also the need to prepare for old age and possible incapacity through (at that time) Enduring Powers of Attorney and 'Living Wills'. There was no need to answer queries from Denzil – he was already an expert in the field – but he readily shared his expertise to enable me to answer queries from others. In particular he sent me a precedent for a Living Will, unusual in those days, but a regular request in my postbag. This was one of a number of precedents and checklists that Denzil had drafted himself, drawn from his own experience in practice, which later found their way into his book *Elderly Clients: A Precedent Manual* (Jordans, 1996), now in its 5th edition (Caroline Bielanska (Ed), 2016) and an essential resource for elder law practitioners.

Recognising such flair and expertise, it was not long before Denzil was appointed as a member of the Mental Health and Disability Committee in the early 1990s (with his perfect memory for details, I know Denzil will remember the exact date, but I can make no such claim!) and he served on the Committee until his appointment as Master of the Court of Protection in April 1996. Those were exciting years for the Committee, particularly in its work campaigning for reform of the law relating to mental capacity and in its efforts to fill in the gaps while waiting for legislative change. Denzil took a major part in that work. He represented the Committee on the BMA steering group which produced the code of practice on *Advance Statements about Medical Treatment* (BMA, 1995) and was also a member of the working party which produced *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (BMA and Law Society, 1995). Denzil's contributions to the guidance continue to be influential (see for example *Masterman-Lister v Brutton & Co* [2002] EWHC 417 (QB)) and have survived into the 4th edition (Alex Ruck Keene (Ed), 2015). Denzil was also the moving force behind the Law Society's *Enduring Powers of Attorney: Guidelines for Solicitors* (Law Society, 1995) which later became one of the Law Society's first Practice Notes.

Even after becoming Master of the Court of Protection, Denzil continued to support the Committee's work and to encourage me in my own attempts at writing about related areas of law. In November 2000, he paid me the greatest compliment by putting my name forward to join him and Niall Baker, solicitor (now partner) at Irwin Mitchell, as key speakers from the UK to give presentations at two conferences in Japan, focussing on adult guardianship and the protection of people who lack mental capacity. The trip was a truly memorable experience and a lot of fun – not least our first evening in Yokohama when looking for somewhere to have a quiet drink, we inadvertently found ourselves in a brothel! Denzil dined out on that story for months after! But this trip, organised by

Professor Makoto Arai of Chibo University and special adviser to the Japanese government, was later to lead to both Denzil and Prof Arai becoming members of the international team of lawyers who drafted the Yokohama Declaration on Adult Guardianship Law in 2010.

I left the Law Society in 2001, since when I have worked as an independent consultant, writer and trainer on mental health and capacity law. I owe much of my freelance career to Denzil, both in terms of work he has put my way and the support he has given me through generously sharing his knowledge, expertise and contacts. In particular, Denzil was a keen supporter and major contributor to the *Elder Law Journal* (Jordans) which I had the privilege to edit during the first 5 years of its existence. That he had time for me during those busy and demanding years - when he, first as Master and then as Senior Judge of the Court of Protection, was fully involved in the lead up to and implementation of the Mental Capacity Act 2005 – is testament to the kind, generous and helpful person he is.

As for retirement, I have just beaten Denzil to it! While enjoying the freedom, I still find it strange that I no longer need to try to keep up with the ongoing developments in mental capacity law! But what I will miss most is regular contact with the admirable and inspirational people involved in this area of law – particularly Denzil. I wish him all the best for a happy and fulfilling retirement.

Protecting P – lessons from the family court?

Re E (A Child) [2016] EWCA Civ 473 (Court of Appeal (McFarlane, Gloster LJ and Macur LJJ)

Other proceedings – family – public law

Summary

This appeal followed care proceedings involving four children: A, B, C and D. D alleged that she had been sexually abused by her father and by her brother, A. A, who was 15 years old, was assessed as having a 'borderline to low average' ability in most areas of function, but with an 'extremely low to low average' ability to process information that was given to him. He was represented in the proceedings by a CAFCASS guardian and was not capable of instructing a solicitor directly.

The appeal raised a number of issues, including the approach to whether a child witness should be called in the course of family proceedings, and the process and content of the 'Achieving Best Evidence' interviews conducted by the police. For present purposes, we focus upon the Court of Appeal's examination of the approach to be taken by those representing a child where the child is themselves accused of being the perpetrator of abuse.

A's solicitor and guardian visited A to go through the evidence against him and the judge directed the guardian to file a statement giving an account of the visit. A apparently indicated that inappropriate sexual behaviour had occurred in which he had been involved. The judge at first instance made findings that A had been controlled by his father into committing acts of indecency. The father appealed against the judge's findings of fact made against him and his son, A.

The court found that there were a number of aspects relating to A's involvement in the proceedings and the findings that were made with respect to him that gave rise to real concern. At paragraphs 90-91, Lord Justice McFarlane said:

> *The first relates to the professional responsibilities of A's solicitor and guardian during the process of trying to obtain his instructions on the allegations that were to be made against him in the proceedings. A, as a party to the proceedings who is represented by his own solicitor, must be entitled to the same protection afforded to all other individuals who undertake communications with their lawyers. No suggestion was made in the hearing of this appeal that any different standard or approach should be taken to A either because he is a child or because he may lack the capacity to instruct his solicitor directly…*
>
> *It is obviously most important that, in the case of a vulnerable young person, those who are instructed to act on his behalf where he or she is facing serious factual allegations are utterly clear as to their professional responsibilities and astute to ensure that their young client's rights are properly acknowledged and protected.*

The Court of Appeal expressed *"very grave doubt as to the evidential value of this whole procedure."* The court allowed the father's appeal. It set aside the findings of fact and remitted the case to be heard before a different judge.

Comment

As McFarlane LJ noted, the guidance given by Lady Hale in *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12 as to the need to give appropriate consideration to a child giving evidence in a case appears to have been largely ignored in the years since the judgment of the Supreme Court was handed down. However, it will soon be given further endorsement by amendments to the FPR 2010 and Practice Directions in accordance with recommendations from the President's working group on children and other vulnerable witnesses. It is to be hoped that it will also be matched in due course by guidance as to the need to give equivalent consideration to P giving evidence.

The court's comments in relation to the procedural obligations incumbent upon those dealing with vulnerable individuals are highly relevant to COP practitioners. Although a guardian is not in the same position as a litigation friend, the comments made by McFarlane LJ would appear equally pertinent to litigation friends and the lawyers that they instruct. This means, in particular, that real care must be exercised before information is put before the court in the form (for instance) of an attendance note of attendance upon P which discloses that P may have committed offences.

Treading a very careful line – disclosure of sensitive information

Local Authority X v HI [2016] EWHC 1123 (Fam) (Family Division (Roberts J))

Other proceedings – family – public law

Summary

This case concerned a 15 year old boy (I) in care proceedings. He revealed certain sensitive information about himself to professionals. His strong wish was that the information should not be disclosed to his parents and stepmother. I's guardian made an application to restrain the local authority from disclosing to I's parents the information which I had shared with professionals. I's father and stepmother opposed the application. The court expressed the view that it was difficult to see how the information had any relevance to the issues to be decided. However, the court was prepared to assume that

it had some tangential relevance and to apply the balancing test.

On one side of the balance was whether disclosure of the information would involve a real possibility of significant harm. The court was satisfied that there was a clear risk that the consequences of disclosure of the material might result in I's disengagement from the professionals who had provided him with guidance and support since his reception into care. It was essential that I believed that he could repose trust and confidence in those professionals and the care and support they would be providing. Moreover, any prospect of repairing the relationship between I and his father would inevitably involve some therapeutic input from professionals. It would be harmful to I if the chance to restore some form of relationship with his father was jeopardised because of disclosure of information which I regarded as confidential.

The next stage of the balancing exercise was whether the overall interests of I would benefit from non-disclosure. At this stage, the court had to weigh the interests of I in having the material properly tested and the magnitude of the risk that harm would occur and the gravity of that harm. As the court had already indicated that the information was of doubtful relevance there was little benefit to I in ventilating the material before the court. If I's wishes were overruled, the distress in relation to disclosure to his parents would be compounded by the knowledge that these very private matters might be the subject of forensic scrutiny and debate in court. The distress might compound fears about maintaining an open relationship in future with professionals who were charged with responsibility for his wellbeing. There was ample evidence to substantiate the positive benefits which had already flowed from I's ability to confide in others. The court found that both the magnitude of the risk of the harm occurring and the gravity of that harm would be substantial and significant. The balance at this stage clearly fell in favour of non-disclosure.

The final step was to weigh up the interests of the respondents (I's father and stepmother) in having the opportunity to see and respond to the material. This involved a rigorous consideration of the engagement of their Article 6 and Article 8 ECHR rights. The court decided that whilst the respondents' Article 8 rights were engaged, they could not take precedence over I's Article 8 rights and I was clearly expressing a wish for no communication with his father or stepmother. As to the respondent's Article 6 rights, the court could had already decided that the information was of tangential or minimal relevance and would not impact upon the outcome of the proceedings or future planning for I. The court's clear conclusion was that the harm which would be caused by disclosure of information which had little, if any, relevance to the issues would be wholly disproportionate to any legitimate forensic purpose. The information would therefore not be disclosed to I's parents.

Comment

The court in this case provided some helpful general guidance as to the proper approach to be taken when balancing competing interests in relation to disclosure of sensitive information. The court placed particular weight on the fact that I had *"expressed in the clearest terms his wish that the family should not have access to the information. Those wishes deserve the court's respect, albeit in the context of the overall balancing exercise."* Such an approach resonates with section 4(6) of MCA which places an obligation on the decision maker to take into

account P's wishes and feelings so far as reasonably ascertainable when making any best interests decision.

Psychologists as experts in the Family Courts in England and Wales: Standards, competencies and expectations

This joint guidance from the Family Justice Council and the British Psychological Society is aimed at family law practitioners but is equally valuable to COP practitioners. Psychologists are often invited to conduct adult mental capacity assessments relating to capacities to engage in the legal process, to give evidence or to give consent in matters such as adoption, sexual contact, financial matters or living arrangements. The guidance provides helpful practical advice for psychologists who act as expert witnesses in court including the time ranges which would typically facilitate appropriately detailed assessments which are often requested by the courts. It is also useful for those instructing expert witnesses and includes a handy checklist for instructing solicitors at appendix 5. The guidance is available here.

Short note: Exceptional Funding – back to square one

The Court of Appeal has recently overturned the decision of Collins J declaring the Exceptional Case Funding Scheme as operated is unlawful. In *(1) The Director of Legal Aid Casework (2) The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464, the Court of Appeal (Briggs LJ dissenting) held that the scheme was lawful, although noting that the extent of difficulties identified by solicitors in accessing the scheme was "troubling."

International family law guidance documents

The President, Sir James Munby, has recently published Guidance on Liaison between Courts in England and Wales and British Embassies and High Commissions abroad, available here. Whilst predominantly aimed at practitioners/the judiciary concerned with children cases with an international element, this Guidance will also be relevant for those concerned with cross-border cases involving adults with impaired capacity.

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Conferences at which editors/contributors are speaking

The Use of Physical Intervention and Restraint: Helpful or Harmful?

Tor will be speaking at this free afternoon seminar jointly arranged by 39 Essex Chambers and Leigh Day on 13 June. Other confirmed speakers include Bernard Allen, Expert Witness and Principal Tutor for 'Team-Teach,' two parents / carers and Dr Theresa Joyce, Consultant Clinical Psychologist and National Professional Advisor on Learning Disabilities on the CQC. For more details, and to book, see here.

Mental Health Lawyers Association 3rd Annual COP Conference

Charles J will be the keynote speaker, and Alex will be speaking at, the MHLA annual CoP conference on 24 June, in Manchester. For more details, and to book, see here.

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 seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Deprivation of Liberty in the Community

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

Taking Stock

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

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early July. 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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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.

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

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

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.

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

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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

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