Mental Capacity Law Newsletter November 2016: Issue 70

Compendium

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: the new COPDOL 10 form comes into force on 1 December, an *MN*-style case management decision, Baker J on life and death and Strasbourg's latest on deprivation of liberty;

(2) In the Property and Affairs Newsletter: trusts versus deputies, undue influence and wills, and useful STEP guidance for attorneys and deputies

(3) In the Practice and Procedure Newsletter: important practice guidance on participation of P and vulnerable witnesses, naming experts and child competence to instruct solicitors;

(4) In the Capacity outside the COP Newsletter: new guidance from the Royal College of Surgeons and the College of Policing, and an important decision of the German Federal Constitutional Court on forced treatment and the CRPD;

(5) In the Scotland Newsletter: new guidance on supported decision-making (of relevance also in England and Wales) and problems with MHOs.

We have also updated our guidance note on judicial deprivation of liberty and are very pleased to announce a new guidance note (written by Peter Mant) on mental capacity and ordinary residence.

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

For all our mental capacity resources, click here.

Contents

New COPDOL 10 form 2
State funding and the CoP 2
Baker J, 'A matter of life and death': The Oxford Shrieval Lecture, 11 October 2016 3
CQC State of Care report 5
LGA State of Nation report on adult social care 6
Guidance Note on mental capacity and ordinary residence 7
Short Note: Strasbourg's latest on DoL (1) 7
Short Note: Strasbourg's latest on DoL (2) 8
Thank you! 9
When to Trust 10
The CoP, personal injury and deputies 11
Short Note: Contesting influence 13
STEP guidelines for attorneys and deputies 13
Autumn Edition of *In Touch: the OPG's newsletter for Deputies* 13
New guidance issued on facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings 14
Short note: protecting British nationals abroad 14
Short note: naming experts 14
Competence, understanding and influence 15
Short Note: Capacity and settlement agreements 19
New consent guidance from the Royal College of Surgeons 19
New College of Policing mental health guidance 19
Mental Health Act Survey 20
Supported decision-making guidance 20
A major step forward in CRPD compliance by the German Federal Constitutional Court? 20
European Parliament Report on Protection of Vulnerable Adults 30
Mental Welfare Commission for Scotland: Supported Decision Making: Good Practice Guide 34
Lord Neuberger on the role of a constitutional court 34
MHO shortages and delayed reports – again! 35
PQ as attorney of Mrs Q against Glasgow City Council [2016] CSOH 137 37
New book: Mental Health, Incapacity and the Law in Scotland 40
Conferences at which editors/contributors are speaking 41

New COPDOL 10 form

The new COPDOL 10 form to be used for *Re X* applications comes into force on 1 December, and an updated version of our guidance note can be found here. Please note that you cannot use the new form before 1 December, hence why the version of the form available here says "embargoed."

State funding and the CoP

A Local Authority v X [2016] EWCOP 44 (Holman J)

CoP jurisdiction and powers – interface with public law proceedings

Summary

In this case, Holman J took a very *Re MN*-style case management decision in relation to the question of whether it was necessary to proceed with a full hearing to determine capacity issues in relation to a severely injured man entirely reliant on state care where the relevant local authority made it clear that it was not in position to afford a package of care at his home. Declining set down directions to proceed to an "abstract" determination of capacity in proceedings which had already cost at least £130,000 in public funds, Holman J noted that:

> *25. The very sad reality of this case and the plight of this person is that, for the rest of his life, he will inevitably be almost totally dependent upon the State for the provision of all his most basic care and needs. It has to be accepted that that care and those needs can*

only be provided for within a framework that is realistically financially viable.

26. Frankly, if the local authority are unwilling or unable to fund a safe package of care within his own home, there is no other person or body who can, or will do so. Subject only to any possible judicial review of the decision of the local authority, the required safe level of care simply will not be available for him in his home. Of course, if he does have capacity to decide upon his residence, he could, theoretically, discharge himself from the hospital where he is currently being very well cared for and somehow make his way to his home and try to care for himself there. Realistically, his health would very rapidly deteriorate and, frankly, unless re-admitted to hospital, he would die. There is nothing in anything that I have currently heard or read in this case to suggest that he has that sort of "suicidal" ideation, but, rather, he longs to live life to the fullest extent that he can.

27. The patient needs to be given an opportunity now to reflect upon the realities that face him. He needs an opportunity to reflect upon this decision of the local authority. He can fairly ask through the Official Solicitor what minimum and lesser level of care the local authority would be willing to fund if he does have capacity to decide to return home and does, in fact, choose to return home. I do not know what answer the local authority will give; but one possibility is that they will say that they cannot fund any care on that basis, for the situation would be so unsafe for him that they would not be willing to participate in it.

28. So I regret to have to say that, from the perspective of today (and subject to any judicial review), the realistic options in this case may be very limited indeed. If that is so, the question of the capacity of the patient to make decisions with regard to his care may be a very abstract one since, frankly, he may have very little room for capacitous choice.

29. In all these circumstances, I have expressed today, and continue to have, considerable concern and misgivings at the prospect of a hearing lasting several days in late November, involving evidence from at least two psychiatrists as well probably as other witnesses and, indeed, evidence from the patient himself, when there may be very little practical point or purpose in that hearing. It seems to me that there is a real risk here of throwing yet more money away in legal expenditure for very little effective purpose.

Holman J therefore set down a further short directions hearing prior to the full four day hearing to allow (in particular) the local authority to answer the questions posed of them by the Official Solicitor, and the man to reflect upon his situations, and to take stock then whether there was any real point or purpose in the longer hearing currently listed to take place the next week.

Comment

Unusually, we will refrain from making any specific editorial comment here because two of your editors (Alex and Neil) are appearing shortly in the Supreme Court on opposite sides of the *MN* appeal in which the precise limits of the CoP's jurisdiction vis-à-vis the Administrative Court will be the subject of detailed scrutiny. We will bring you news of the outcome of the appeal as soon as we are able.

Baker J, 'A matter of life and death': The Oxford Shrieval Lecture, 11 October 2016

In this fascinating lecture, Baker J considers the

law on the withdrawal of artificial nutrition and hydration in the context of disorders of consciousness and considers:

1. What do we mean by "capacity"?
2. What we know about disorders of consciousness?
3. How do we decide what should happen in such cases?
4. What are the ethical principles underlying the decision?
5. Are judges the right people to be making these decisions?

His Lordship highlights the lack of definitive criteria of awareness, and the challenges this poses to those involved. He observes that in contrast to LPAs, advance decisions are little-known and little used. And reference is made to the significant issue surrounding the need for court involvement. Namely, whether in light of Practice Direction 9E para 5(a), an application to the Court of Protection is required where an advance decision to refuse ANH has been made, or a health and welfare LPA acting within the scope of their express power makes the critical decision:

> *It is to say the least unfortunate that there should be such uncertainty and it is to be hoped that the opportunity will arise soon for the courts to resolve this question.*

Tracing the case law from *Bland*, his Lordship observes the trend away from the short-circuiting of a best interests analysis by labelling the patient's condition as "futile", towards the favouring of a balancing exercise. Following *Aintree*, Baker J identifies the following consequences:

> *First, the best interests approach, based on the factors identified in s.4 of the MCA, should be applied in every case. Secondly, all arguments based on the "futility" of treatment are confined to cases of* [vegetative state] *and, in so far as medical science is moving to the view that disorders of consciousness should be seen as a spectrum and the concept of VS outmoded, it may be that it is no longer appropriate to decide any cases on that basis. Thirdly, if it is right that "the purpose of the best interests test is to consider matters from the patient's point of view", it seems likely that the courts will now focus much more intensely on identifying the patient's wishes, feelings, values and beliefs looking carefully at all statements, formal and informal, made by the patient at an earlier stage to a greater extent than hitherto. As a result, although there will undoubtedly continue to be a strong presumption that it is in a person's interests to stay alive, it may be somewhat easier for that presumption to be rebutted.*

Quite rightly, his Lordship highlights the surprising lack of ethical arguments – and, most importantly, ethical experts – in such Court of Protection proceedings. Noting the proposed amendment by the Law Commission, to give greater priority to P's wishes and feelings when considering best interests, Baker J discusses the dangers of an approach that focus exclusively on identifying such wishes and feelings, quoting Charles Foster: "*when, if ever, will a patient be in a sufficiently receptive state of mind for perfectly autonomous decision-making?*". His Lordship goes on to state that, "*no man is an island*", so "*it must be wrong to give unqualified pre-eminence to the individual*". And too great an emphasis on

wishes and feelings risks overlooking the importance of other aspects of the person.

As to when cases must come to court, according to Baker J: "*At present, however, all cases involving a proposal to withdraw ANH from a patient in a VS or MCS have to be brought to court, even when all interested parties are unanimous that the proposed withdrawal is in the individual's best interests*." Considerable sympathy is expressed with the view of those who contend that such proceedings should no longer be required as a matter of course. And he would not wish to retain the obligation indefinitely. But that time, he says, has yet to come:

> *But as I have, I hope, demonstrated above, both medical science and the law are still evolving. Until such time as we have greater clarity and understanding about the disorders of consciousness, and about the legal and ethical principles to be applied, there remains a need for independent oversight.*

A pre-proceedings protocol could lead to significant reduction in delays so that, if all parties agree and all the necessary evidence is available, there is no reason why the court's decision should not be made within weeks. Indeed, there is an urgent need for a more streamlined procedure to avoid undue cost and delay:

> *In my opinion, however, applications to the court should continue to be obligatory in all cases where the withdrawal of ANH is proposed, at least for the time being. Whoever makes the decision will never find it easy. On the contrary, all these cases are challenging and the responsibility grave. But that is only to be expected when the issue is a matter of life and death.*

Comment

The uncertainty raised by the Practice Direction is certainly unfortunate. But it only refers to cases which "should" – not "must" – be brought to court. And, more significantly, where there is an unquestionably valid and applicable advance decision to refuse the relevant treatment, or a health and welfare LPA with express power to decide, there is in fact no decision for the court to make. For example, in relation to the former, MCA s.26(1) states: "*the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued*". Indeed, it is likely that more withdrawal cases are not being brought to court compared to those that are.

As detailed in Alex's blog, the estimates (based on numbers of patients with prolonged disorder of consciousness in nursing homes in the UK) range from 4,000-16,000 patients being in a vegetative state, with three times as many in a minimally conscious state. Whereas there have only been around 10 reported cases since October 2007. There will have been some others which do not result in a judgment, but such cases are supposed to be heard in public and (at least since the President's transparency guidance was issued in January 2014) judgments published.

Neil Allen

CQC State of Care report

The CQC has published its annual state of care report. For present purposes, we focus on the section dedicated to DOLS. The chapter picks up examples of improvement in practice, especially in the adult social care sector, but (in a continuing theme) noted variations in practice, especially in

acute hospital and mental health trusts. The following aspects of practice in particular were singled out:

- Variation in levels of staff training and understanding;
- Variable practice in how capacity assessments and best interests decision-making are carried out and documented; and
- Variable practice in the management of applications for authorisation to deprive a person of their liberty.

In respect of the latter, CQC noted in particular:

- instances where individuals appear to potentially have been deprived of their liberty unlawfully – such as without the provider seeking authorisation to do so or where authorisations had expired;
- providers taking a 'blanket approach' to authorisation applications, including submitting applications for individuals with capacity;
- decisions about DoLS (including conditions of authorisations) not communicated appropriately (such as recording them in an individual's care plan) and/or complied with;
- concerns about the use of urgent deprivation of liberty authorisations, including lack of understanding and continued use beyond their expiration dates;
- authorisations not being kept under review.

LGA State of Nation report on adult social care

The Local Government Association (LGA) has published its 2016 state of the nation report on adult social care funding, which makes a useful counterpart to the CQC report noted immediately above. The findings are sobering and the forecast is bleak. Since 2010, councils have had a 40% reduction to their core government grant. The LGA estimates that local government faces an overall funding gap of £5.8 billion by 2019/20. Much of the pressure lands on adult social care funding. For councils with adult social care responsibilities, roughly 30-35% of total budget will be spent on adult social care as a minimum. As such, services will have to offer a significant contribution to the council's full savings requirement to help tackle the overall funding gap.

The report contains a range of interesting views and perspectives from all across the sector, including from local authorities, care providers and service user groups. However, the message that adult social care is underfunded is clear, unanimous and unequivocal. From across the sector, the urgent calls for additional funding are being made loud and clear. Unfortunately, these calls may go unanswered if adult social care is not seen as a priority by the government and the public. A successful solution to this problem will depend in part on raising awareness amongst the public of what social care is, why it matters and why it must be valued as a public priority. For the full report, please see here.

Guidance Note on mental capacity and ordinary residence

Responding to (many) requests, we are delighted to be able to direct you to a new guidance note, written by Peter Mant, on mental capacity and ordinary residence.

Short Note: Strasbourg's latest on DoL (1)

We briefly mention the case of *Kasparov v Russia* [2016] ECHR 849 because it provides a summary of the ECtHR's latest thinking as to what amounts to a deprivation of liberty. Mr Garry Kasparov, the Russian chess grandmaster, was prevented from leaving Sheremetyevo airport to travel to an opposition rally. The government denied that he was deprived of liberty. According to the ECtHR:

> *"36. In assessing whether someone has been "deprived of his liberty" within the meaning of Article 5 of the Convention, the relevant principles are as follows:*
>
> *(i) The starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question ... The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance ...*
>
> *(ii) The requirement to take account of the "type" and "manner of implementation" of the measure in question enables the Court to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good ...*
>
> *(iii) It is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation. The characterisation or lack of characterisation given by a State to a factual situation cannot decisively affect the Court's conclusion as to the existence of a deprivation of liberty ...*
>
> *(iv) The right to liberty is too important in a "democratic society", within the meaning of the Convention, for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to e taken into detention. Detention may violate Article 5 of the Convention even though the person concerned has agreed to it ... For the same reason, if person initially attends a place of detention such as a police station of his own free will ... or agrees to go with the police for questioning ..., this is not in itself determinative of whether that person has been deprived of his liberty.*
>
> *(v) The Court will also examine the degree of coercion involved. If, upon an examination of the facts of the case, it is unrealistic to assume that the applicant was free to leave, this will normally indicate that there has been a deprivation of liberty ... This may be the case even when there is no direct physical restraint of the applicant, such as by handcuffing or placement in a locked cell ...*
>
> *(vi) Article 5 § 1 of the Convention may apply even to deprivations of liberty of a very short length ..."*

The Court accepted that Mr Kasparov was deprived of liberty for the following reasons.

When he attempted to check-in at 8.30 a.m., he was asked to follow a police officer from the check-in hall; he was taken to a separate room at the airport; his ticket and passport were seized; he remained in that room, while being questioned and searched, until 1.30 p.m.; and during that time, an armed guard standing in the doorway prevented him from leaving. So he was under the exclusive control of the police from 8.30 a.m. to 1.30 p.m.

Short Note: Strasbourg's latest on DoL (2)

In *Červenka v The Czech Republic* (Application no. 62507/12, decision of 13 October 2016), the ECtHR considered the position of Mr Jaroslav Červenka, who had alcoholic dementia and who was declared to lack legal capacity. His court-appointed guardian had consented on his behalf to his admission to a care home. The ECtHR held that he was deprived of his liberty there for the following reasons:

> *103. In the present case, the applicant was declared fully incapacitated at the relevant time and the Government admitted that he could not leave the social care home on his own during the day without being accompanied or without the psychiatrist's approval. He was compulsorily placed in the social care home on the basis of an agreement signed by his public guardian. While he did not show clear disagreement on the day of his admission to the social care home or shortly beforehand, from his subsequent conduct it was obvious that he had not consented to his placement there. The Court further notes that although the applicant was placed in a private social care institution (see paragraph 24 above), his confinement was requested by his public guardian, the Prague 11 Municipal Office, which had been appointed by the court (see paragraph 7 above). Therefore, the responsibility of the authorities for the situation complained of was engaged.*

Domestic law regarded the applicant as being at the care home voluntarily, because of the guardian's consent. But the Court held that a procedure which merely required the public guardian's consent to the care home admission did not provide a sufficient safeguard against arbitrariness, contrary to Article 5(1)(e) (para 110). The applicant contended that there ought to have been an automatic review under Article 5(4) but the ECtHR did not go that far. After repeating its well-established principles, the ECtHR emphasised that "*The Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness*" (para 132).

The ECtHR repeated that special procedural safeguards may be called for to protect the interests of those who, on account of their mental illness, are not fully capable of acting for themselves. The court referred back to *Shtukaturov v. Russia* (no. 44009/05, ECHR 2005), where it found that a remedy which could only be initiated through the applicant's mother – who was opposed to his release – did not satisfy the requirements of Article 5(4). In the present case, the applicant's detention lasted more than six months "*which cannot be considered too short a period to initiate judicial review*" (para 133). Given the domestically perceived voluntary nature of his care arrangements, there were no domestic proceedings to challenge their lawfulness, contrary to Article 5(4).

Given the considerable anguish and distress

which could not be made good by a mere finding of a Convention violation, the ECtHR awarded him EUR 15,000 in respect of non-pecuniary damage.

Comment

That the ECtHR found that the circumstances amounted to a deprivation of liberty is perhaps not surprising, although it is a useful reminder that the fact a person is not accompanied on outings from a place is not enough to take them out of the scope of deprivation of liberty if their ability to come and go is under the control of another.

It is also worth stressing that this was a private care facility, but there was the requisite element of State imputability by virtue of the court having appointed the public guardian that consented to the admission. The decision reinforces the need to use DoLS where a health and welfare deputy consents to the person's admission to residential care. It also resonates with *AJ v A Local Authority*, by emphasising the importance of enabling a person to challenge their detention without being dependent upon a representative who opposes their release. Finally, the awarding of compensation for the anguish and distress ought not to go unnoticed.

Thank you!

It would be churlish of us not to thank those whose recommendations secured Chambers the (only) top tier ranking for health and welfare Court of Protection work in Chambers and Partners 2017, ranked several of the editors highly, and suggested that Tor and Alex are respectively the queen and king of the Court of Protection. We are very grateful!

When to Trust

Watt v ABC [2016] EWCOP 2532 (Charles J)

Best interests – Property and affairs

Summary

In this case Charles J was considering the issue of whether P's funds from a personal injury award of £1.5 million should be administered through a deputyship or a trust. Charles J had approved the settlement sitting as a QB judge. There was an issue as to P's capacity to manage his property and affairs and Charles J held that P lacked such capacity but that there was a small chance that P might regain capacity and the issue should be kept under review (paragraph 7).

At paragraph 8, however, Charles J stated that the given the unusual and difficult nature of the case, the deputyship order should not have been made by an authorised officer.

The evidence suggested that with support P would have capacity to make decisions about how to spend the income from his award (paragraph 11). It also suggested that in the event that P regained capacity to manage the capital element of his award, he would be very vulnerable to exploitation (paragraph 16). There was also a serious risk of a breakdown in the relations between P and his professional advisers (paragraph 15).

This lead Charles J to suggest that it would be in P's best interests for the award to be settled on irrevocable trusts which allowed P autonomy over income but would not allow P access to capital even if he regained capacity (paragraphs 17 and 18). He thus, at paragraph 65, directed the parties to produce an analysis of the rival options (including but not only their costs).

He then turned to considering *SM v HM* [2012] COPLR 187 (a decision of HHJ Marshall).

That case is often cited as authority for the proposition that there is a strong presumption in favour of a deputyship over a trust. Charles J held that it was not or if it was, then it was wrong (paragraph 69).

At paragraphs 76-79 he said this:

> *76. Rather, it introduces a reasoning process that can, for example, start with all of the factors that favour the appointment of a deputy over other results and so points that deputies are appointed and regulated under a statutory scheme (a) which is directed to persons who lack capacity and so need someone to make decisions for them, and (b) which has statutory tests for decision making, access to the COP, checks and balances and provisions that provide security (and so the points made in paragraphs 32 to 34 of SM v HM and paragraph 53 hereof).*
>
> *77. I fully accept and acknowledge that the weight of those factors in many cases (and perhaps the great majority of cases) will outweigh factors in favour of the COP making an order that empowers persons other than a deputy (and so trustees) to make decisions about P's property and affairs, and so the appointment of a deputy can be said to be the norm.*
>
> *78. But I repeat that in my view the normality of the appointment of a deputy does not create a presumption, starting point or bias that needs to be displaced.*

79. I accept that in many circumstances only fine or pedantic differences can be said to exist between a rebuttable presumption and a starting point that recognises the existence of a normal arrangement. However, in my view, an approach based on a strong presumption that has to be displaced has been at the heart of the result in this case that factors against the appointment of a deputy, and so the Breakdown Risks and the Vulnerability Risk, were effectively ignored until it was too late to assess whether they founded the result that the weight of competing factors favoured the creation of an irrevocable trust.

Lastly, at paragraph 92, Charles J summarised points that should be considered in analogous cases:

"I make the following points:

(1) The management regime for a substantial award of damages should be considered as soon as is practicable.

(2) This will involve a careful consideration of what the claimant (P) has and does not have the capacity to do and of his or her likely capacity and/or vulnerability in the future. This is relevant to both jurisdictional and best interests issues.

(3) It will also involve the identification of all relevant competing factors and should not proceed on the basis that there is a strong presumption that the COP would appoint a deputy and would not make an order that a trust be created of the award. Rather, it would balance the factors that favour the use of the statutory scheme relating to deputies (that often found the appointment of a deputy in P's best interests) against the relevant competing factors in that case.

(4) It will also involve the identification of the terms and effects (including taxation) and the costs of those rival possibilities.

(5) Care should be taken to ensure that applications that are not straightforward are not decided by case officers in the COP but are put before judges of the COP.

(6) The possibility of listing case management hearings or the final hearing of QB proceedings before a judge who is also nominated as a COP judge should be considered. However, the potential for conflict between the respective roles of the judge in the two courts (e.g. one arising from a consideration of without prejudice communication in respect of the QB proceedings concerning its settlement that is not agreed or not approved by the COP judge) and the respective jurisdictions of the two courts need to be carefully considered.

The CoP, personal injury and deputies

Tinsley v Manchester City Council and others [2016] EWCOP 2532 [2016] EWHC 2855 (Admin) (Administrative Court (HHJ Stephen Davies sitting as a judge of the High Court))

Best interests – Property and affairs – CoP jurisdiction and powers – interface with civil proceedings

Summary

In this case P had received a large personal injury award in 2005 as a result of a serious brain injury. He had been compulsorily detained under the Mental Health Act 1983 so under s. 117 of the Act he was entitled to aftercare services on his discharge which the relevant authorities were not

entitled to charge him for. (*R v Manchester City Council ex parte Stennett* [2002] 2 AC 1227).

At the trial of his claim, the defendant had argued that in the light of that, P could not claim damages for the sums that he needed for such after care. The judge at that trial (Leveson J as he then was) at paragraph 126 of his judgment held that it was not unreasonable for the claimant to refuse to accept local authority provision and so he was able to claim the full cost of private care (*Tinsley v Sarkar* [2005] EWHC 192 QB).

At paragraph 122 of his judgment, however, Leveson J had appeared to suggest that the local authority could take into account a person's resources when assessing their need for care under section 117.

After the award, P went into private care funded from his damages. Unfortunately, because of possible mismanagement of the award, P's resources were not going to be adequate in the long term and so a new deputy applied to the relevant local authority and CCG for the provision of aftercare under section 117. They refused citing the fact that P had an award for that purpose. P brought proceedings for judicial review.

HHJ Stephen Davies upheld P's claim, holding that the defendants could not use the fact of P's award to refuse to provide for his admitted needs (see paragraph 26). It seems that he differed from Leveson J's view that a local authority (or CCG) could take account of a person's resources in the light of the Court of Appeal's decision in *Crofton v NHSLA* [2007] 1 WLR 923. That was a decision on s.2 Chronically Sick and Disabled Persons Act 1970 and by reference to its functions under s.29 National Assistance Act 1948 but the judge held that the same principles applied, namely that the providing authority cannot take into account the personal injury award.

The defendants also argued that it was an abuse or against public policy to allow what in effect would be a double recovery. The judge rejected these arguments (paragraphs 36 and 39), interpreting *Peters v E Midlands Strategic Health Authority* [2010] QB 48 as simply holding that it was no part of a deputy's duty to make all applications for state funding and not authority for the proposition that a deputy should refrain from making such applications (see paragraph 35).

Comment

In *Peters* the Court of Appeal endorsed a method of avoiding double recovery by seeking an undertaking from a deputy not to seek state funding. Later Senior Judge Lush in *Re Reeves* [2010] WTLR 509 held that in a case where there had been no *Peters* undertaking, there was no question of the Court of Protection restricting a deputy's right to apply for all statutory benefits even where P had an award of damages to cover the care.

The practice in the Queen's Bench Division now is that on a settlement that includes periodical payments, the defendant asks for and the court will approve what is known as a reverse indemnity. The deputy undertakes to inform the defendant's insurer if he gets benefits that cover an aspect of the award (for example the funding of care) and in those circumstances, the insurer is entitled to reduce the periodical payments by the amount or value of the funding. In cases where there has not been a full award (because, say, of

contributory negligence) the reduction is pro rata.

This only works where there are periodical payments and would not cover the problem that arose in this case (a shortfall because of mismanagement). Mismanagement of funds, however, is less of a danger where there are periodical payments.

Short Note: Contesting influence

A recent case (*Edkins v Hopkins* [2016] EWHC 2542 (Ch), a decision of HHJ Jarman QC sitting as a judge of the High Court) illustrates just how hard it is to get a will overturned on the basis of undue influence. The deceased was a vulnerable, ill alcoholic who had just discharged himself from hospital against medical advice. He made a will, crucially as it turns out, via an independent, experienced solicitor that left the bulk of his estate to a friend who, as the judge found, was in a position to exercise control and influence.

The judge was not, however, prepared to take the final step to holding that there had been undue influence even though it was not a far jump from his findings that the friend had a significant degree of control over the deceased and that the friend had suggested that the deceased make a new will and arranged for the solicitor to attend.

STEP guidelines for attorneys and deputies

STEP has published a very useful set of guidelines for attorneys and deputies when dealing with P's property and affairs.

They cover the scope of the order or power; the main principles of the MCA; proper administration (separate bank accounts etc); property purchase; property occupation; property improvements; making gifts; meeting needs; unauthorised gifts; expenses, accounts and investments; standards; using IFAs; discretionary fund management and other guidance.

Autumn Edition of *In Touch: the OPG's newsletter for Deputies*

This edition of the OPG's newsletter contains material that may be of interest to property and affairs deputies. It includes reminders about the OPG's guidance about family care payments and gifts as well as the new security bond provider and the requirement for annual reports from all deputies.

It also gives a nudge to anyone still holding a pre MCA short order authority or receivership order to get them up dated with a full deputyship order. You can find it here.

New guidance issued on facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings

Charles J has recently issued guidance on facilitating participation of 'P' and vulnerable persons. It is intended to allow sharing of good practice in the creative development of ways in which P can in fact be put at the heart of proceedings, and draws upon the important work done by the Advocates Gateway and also Nicola Mackintosh QC. Importantly, perhaps, it shows that there are many steps which can be which do not necessarily require the expenditure of money; instead they require thinking outside the conventional framework within which P is expected to bend to the will of the court.

Short note: protecting British nationals abroad

In *Re Clarke* [2016] EWCOP 46, Peter Jackson J has confirmed that the High Court can exercise jurisdiction over British nationals abroad who lack capacity and require protection, but who are no longer habitually resident in England and Wales and cannot therefore be subject to the jurisdiction of the Court of Protection given that its welfare jurisdiction is expressly limited to those who are habitually resident in England and Wales (or who are present here in certain defined circumstances). This judgment is not hugely surprising in light of the decision of Holman J in *Al-Jeffery [2016] EWHC 2151 (Fam)* in which this jurisdiction was identified as existing in relation to those with capacity but who were vulnerable, but this confirmation is useful in terms of maximising the powers of the courts to take effective steps where adults have been kidnapped out of the jurisdiction.

Short note: naming experts

In Re J (A Minor) [2016] EWHC 2595 (Fam), Hayden J gave a useful summary of the principles applicable to naming professionals and experts in proceedings relating to children, which is equally applicable to proceedings before the Court of Protection. The facts of the case are not relevance, save that, as is often the case, they were such that there was a risk of "jigsaw" identification. This risk was such, in this case, to lead the judge to agree that the local authority in question should not be named (although he held that the risk was not such that the CAFCASS officers or social workers should be also be anonymised).

In relation to experts, Hayden J set out the key principles thus:

> *21. In R (on the application of Guardian News and Media Ltd v City of Westminster Magistrates' Court ([2012] 3 WLR 1343; [2012] 3 All ER 551; [2012] EMLR 22) Toulson LJ made a succinct and powerful assertion of the importance of transparency in the justice system:*
>
> > *"Open Justice. The words express a principle at the heart of our system of justice and vital to the rule of law"*
>
> *22. In R (C) v the Secretary of State for Justice (supra) Lady Hale also articulates the reasoning that underpins the principle of open justice thus:*
>
> > *"The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that*

justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge. The rationale for the second rule is not quite the same as the rationale for the first, as we shall see. This case is about the second rule. There is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property. The first issue before us is whether there should be a presumption of anonymity in civil proceedings, or certain kinds of civil proceedings, in the High Court relating to a patient detained in a psychiatric hospital, or otherwise subject to compulsory powers, under the Mental Health Act 1983 ("the 1983 Act"). The second issue is whether there should be an anonymity order on the facts of this particular case."

23. In M v The Press Association (supra) I reminded myself of some of the key principles which require to be applied. They bear repetition here:

"i. Orders restricting reporting should be made only when they are necessary in the interests of the administration of justice – see Scott v Scott ([1913] AC 417);

ii. The person or body applying for the reporting restriction bears the burden of justifying it – it is not for the media to justify its wish to report on a case;

iii. Such an application must be supported by cogent and compelling evidence – see R v Jolleys, Ex Parte Press Association, ([2013] EWCA Crim 1135; [2014] 1 Cr App R 15; [2014] EMLR 16), R v Central Criminal Court ex parte W, B and C ([2001] 1 Cr App R 2) and, in civil cases, the Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1033 and Derispaska v Cherney ([2012] EWCA Civ 1235, per Lewison LJ (at paragraph 14))."

24. Applying these principles along with the President's Guidance ['Transparency in the Family Courts; Publication of Judgments'], *it seems to me to be beyond argument that those who offer expert evidence to any Court and to which the Family Court can be no exception, should do so realising that their conclusions and analysis will likely be held to public scrutiny. It is right that this should be the case in the Family Justice system, not least because those conclusions may (and I emphasise may) be relied on by Judges who are required to make some of the most draconian orders in any jurisdiction. These include the separation of families, temporarily or permanently and the revocation of parental rights and responsibilities. Not only is the probity of the process enhanced by scrutiny, so too is its efficacy. Transparency stimulates debate and in so doing provides fertile ground for the growth of knowledge and understanding.*

Competence, understanding and influence

In *W (A Child)* [2016] EWCA Civ 1051, the Court of Appeal had to grapple again with the question of

when it is appropriate for a child to part company with her guardian and instruct her own solicitor in public law proceedings. For present purposes, the facts are not relevant, save that they concerned the question of whether a child, FW, should be able to instruct her own solicitor.

The Court of Appeal took the opportunity to give guidance as to the nature of the understanding that is required of a child before her or she is able to give instructions. This will be relevant wherever the Court of Protection is considering the position of a child party to a case before it (although not where the child is "P"), as a child requires a litigation friend unless the court makes an order permitting them to conduct proceedings without a litigation friend (see COPR r.141).

After a review of the authorities (in particular *Mabon v Mabon* [2005] EWCA Civ 634, [2005] Fam 366, Black LJ noted that the question of whether a child is able, having regard to his or her understanding, to instruct a solicitor must be approached having in mind [an] acknowledgment of the autonomy of children and of the fact that it can at times be in their interests to play some direct part in the litigation about them. What is sufficient understanding in any given case will depend upon all the facts (paragraph 27).

Black LJ also emphasised the care that the court must take where it is said that the child lacks sufficient understanding because they are "aligned" with a parent or parents. As she noted:

> *32.* […]. *For a start, the fact that the child's view coincides with the parents' view does not necessarily mean that it is not her own view. Most people's views are influenced by the views of others in one way or another and it can be very difficult to decide reliably whether or not someone is simply an agent for another person. Moreover, in a case such as the present, things are likely to be complicated by the fact that someone in FW's position may well have her own entirely independent view about certain aspects of the case, such as the impact that staying in foster care is having on her ability to work for her examinations but, at the same time, be influenced by her parents in her thinking about other things, for example the past. She may be acting under the influence of her parents in bringing the litigation but also wishing to play an active part in it to put her own view across.*
>
> *33. Secondly, the fact that the child's views are considered to be misguided in some way does not necessarily mean the child does not have sufficient understanding to instruct a solicitor. Self-evidently, the question of separate representation will normally only come up if the child materially disagrees with the guardian's view about his or her welfare, but that disagreement with an independent professional assessment of what is good for him or her is not sufficient to lead to a conclusion that the child lacks sufficient understanding. In so far as a lack of understanding is perceived to arise from the child's unwillingness to accept the findings already made, it has to be remembered that adults with full understanding adopt similar positions. Mr O'Brien submitted that it is relevant in this respect that the rules about the representation of children incorporate an element of paternalism which is not present in the rules governing the litigation capacity of adults. I accept that. However, I do not think that this leads inexorably to the conclusion that a child who denies facts found by the court lacks sufficient understanding to instruct a solicitor. Accepting the risks that have been found to exist may not be the start and finish of the case. Here, as can be seen from the later material made available by Ms Donn,*

there were other matters that FW wished to set in the balance against the risks that others considered existed in the care of her parents, for example her unhappiness in foster care and the effect that her loneliness there was having on her concentration at school, which she thought the social worker had failed to take into account.

34. Thirdly, there is a danger, in my view, that if the court starts to get too embroiled in a consideration of matters such as whether the child accepts the risks and what degree of influence is being exerted by his or her parents, it will be diverted, at an early stage in the proceedings, into satellite litigation designed to ascertain the facts about these things which may, in fact, be a significant part of the contentious subject matter in the substantive proceedings. This was something to which Booth J referred in Re H (A Minor)(Role of Official Solicitor) (supra), a case in which the evidence pointed to strong influence by a particular man on the child's views but the judge was satisfied that he nonetheless had sufficient understanding to participate as a party in the proceedings. Booth J commented (at page 556) that "[t]o make a finding that H's ability to think for himself has been so far overborne by Mr R in my judgment would be to run the risk of prejudging on insufficient evidence an issue which may be crucial to the outcome of the case."

Black LJ noted that the judge took account of the risk of harm to FW from direct participation in proceedings. However, she noted that:

35. […] *some caution is required when taking feared harm of this kind into account as part of an assessment of understanding. There is a danger that, when considering the degree to which a child has been influenced in his or her thinking or otherwise manipulated, and/or when looking at the harm that may be caused by direct participation, a judge strays into a welfare assessment when the question for determination is not, in fact, governed by the child's best interests. Furthermore, as in this case, there will often be a risk of harm not only from participating in the litigation but also from not participating, as Thorpe LJ stressed in Mabon v Mabon in what the President in Re F [2016] (supra) described as his "characteristically prescient judgment" (see §36 of Re F). Judge Williams acknowledged this in general terms, saying that she accepted that the risk of harm from participating had to be "balanced against a child's need for knowing about the proceedings and participating in them". But it is important to think carefully about what not being able to instruct her own chosen solicitor actually meant for FW in practical terms. Quite apart from the danger of further disaffection being generated by the decision and the fact that she would not have her own independent voice in the proceedings, she also lost the opportunity to have a continuing dialogue, with a professional in whom she had confidence, about the risks that the social workers and the guardian considered she faced in the care of her parents, to receive advice about them, and to have a discussion about how those risks should be balanced with the risks that she perceived there to be in forcing her to return to foster care. For a girl of nearly 16 years of age, who had had past experience of her own legal representation, this would potentially have been of great benefit.*

As Black LJ concluded:

36. Sometimes there will be a clear answer to the question whether the child is able, having regard to his or her understanding, to give their own instructions to a solicitor. In cases of more difficulty, the court will have to take a

down to earth approach to determining the issue, avoiding too sophisticated an examination of the position and recognising that it is unlikely to be desirable (or even possible) to attempt to assemble definitive evidence about the matter at this stage of the proceedings. All will depend upon the individual circumstances of the case and it is impossible to provide a route map to the solution. However, it is worth noting particularly that, given the public funding problems, the judge will have to be sure to take whatever steps are possible to ensure that the child's point of view in relation to separate representation is sufficiently before the court. The judge will expect to be guided by the guardian and by those solicitors who have formed a view as to whether they could accept instructions from the child. Then it will be for the judge to form his or her own view on the material available at that stage in the proceedings, sometimes (but certainly not always) including expert opinion on the question of understanding (see Re H (A Minor)(Care Proceedings: Child's Wishes) (supra) at page 450). Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent. If the judge requires an expert report to assist in determining the question of understanding, the child should be under no illusions about the importance of keeping the appointment with the expert concerned. It is an opportunity for the child to demonstrate that he or she does have the necessary understanding and there is always a risk that a failure to attend will be taken to show a failure to understand.

Black LJ held that the judge had erred in her approach, and that FW should be allowed to instruct her own solicitor. Tomlinson LJ summarised the judge's error pithily: "*she confused welfare with understanding*" (paragraph 40).

England and Wales

Short Note: Capacity and settlement agreements

In *Glasgow City Council v Dahhan* [2016] UKEAT 0024_15_1105, the EAT has confirmed that it has jurisdiction to consider an argument that a settlement agreement should be set aside on the basis that the claimant lacked the mental capacity to enter into it. Although a Scots case (the law relating to contractual capacity being different in Scotland), as Lady Wise noted:

> *20.* […] *Once it is accepted that the analysis of Silber J in* ***Industrious Ltd*** *is correct to the extent that the obligation on the Tribunal when presented with a proposed settlement agreement is to consider whether it is valid, there is no sound basis for drawing a distinction between invalidity on the ground of, say, misrepresentation on the one hand and invalidity on the ground of lack of capacity to contract on the other. Both sides were agreed that the distinction between Scots and English law rendering contracts entered into through lack of capacity void in the former but voidable in the latter were not material to determination of this issue. It is of course the case that none of the decided cases have required to address the particular question of whether the Employment Tribunal has jurisdiction to set aside an agreement said to have been entered into where one party to the contract lacked legal capacity. However, I agree with the submission made by counsel for the respondent that it would be a strange, even illogical result if a Tribunal was required to decline to give effect to the contract entered into through misrepresentation that was otherwise valid but could not refuse to enforce a contract that was a nullity (at least in Scots law) from the outset.*

New consent guidance from the Royal College of Surgeons

The Royal College of Surgeons has recently updated its good practice guidance on consent in light of the *Montgomery* judgment. Its main messages as regards the shift in balance towards recognising doctors as the clinical experts and patients as experts in being themselves are welcome, and clearly and crisply expressed. The explanation of the meaning and the role of capacity under the MCA 2005 is also succinct and to the point. However, as is so often the case, the treatment of Scotland and NI is problematic, failing to make sufficiently clear in relation to Scotland (in particular) that the legal framework is very different.

New College of Policing mental health guidance

The College of Policing has updated its mental health authorised professional practice (APP). It is a wide-ranging set of documents, including detailed material upon mental capacity. It is important to note for social workers and healthcare professionals that this is likely to be the material that police officers will have been trained upon (if they have indeed received any training at all). Whilst the material is for the most part excellent, and lucidly clear, it is unfortunate that the section on mental capacity repeats the canard that s.4B MCA in some way provides authority to deprive a person of their liberty outside the scope of an application being made to the Court of Protection. Section 4B only applies where an application has been made; it should therefore never be relied upon by police officers to remove a person from their home absent an order having been sought from the Court of Protection.

Mental Health Act Survey

The Mental Health Alliance, a coalition of over 75 organisations united by a common interest in a fair Mental Health Act, has launched an important survey on the Act. The survey is designed to gather your views on the principles of the Mental Health Act, how people's rights are currently protected, where this is working well and what could be changed. This includes how the Act integrates with the Human Rights Act and the Mental Capacity Act. Your help is needed to ensure the survey represents a range of views, including the legal profession. Over 2,000 people have already completed the survey. This is your opportunity to help us influence the Government and other stakeholders in future reform of the Act. The survey should take around 15 minutes, and is available here.

Supported decision-making guidance

Although strictly it relates only to Scotland, our readers' attention is directed to the recent guidance on supported decision-making produced by the Mental Welfare Commission and noted in the Scotland section of this Newsletter, as its principles are equally applicable in England and Wales (and indeed further afield).

Europe

A major step forward in CRPD compliance by the German Federal Constitutional Court?

1. Introduction

Legislatures and courts worldwide, when they consider medical treatment and other measures in the context of intellectual disabilities, will require to take account of a decision dated 26th July 2016 and published 25th August 2016 by the First Senate of the German Federal Constitutional Court (Bundesverfassungsgericht). This decision by eight justices, without any dissenting opinion, has significance beyond the 80,000,000 population within the jurisdiction of that court. The impressive and careful reasoning of the court could well be referred to comparatively if similar issues were to arise in any other jurisdiction. The decision has the potential to contribute significantly to any assessment, in relation to the UN Convention on the Rights of Persons with Disabilities ("the CRPD"), of the role played by the practice of contracting states in the interpretation of international treaties, accorded by Article 31 of the Vienna Convention on the Law of Treaties; and to any assessment of the relative weight to be given to the views of committees which have competence to offer interpretations of human rights treaties, including the UN Committee on the Rights of Persons with Disabilities ("the UN Committee").

At national level, the decision remedies a lacuna in German law by permitting medical treatment of people in the situation of a woman who opposed it. At international level, it is ground-breaking in claiming that her situation fell also within a lacuna in the reports, guidelines and recommendations of the UN Committee, and that the court's decision is accordingly not inconsistent with the position of the UN Committee in terms of those documents. Those of us who have engaged with the UN Committee, and who have benefited from the willing availability of its members to discuss, cannot doubt that the UN Committee regards its published views as explicitly prohibiting an

outcome such as that in this German case. Another view, however, would be that the German court has identified and addressed a blind spot in the Committee's understanding of the realities of some intellectual disabilities. Two opposing and irreconcilable interpretations of the CRPD have now been authoritatively placed in the international public domain.

The decision also gives an insight into the role of a constitutional court in jurisdictions which have one. That insight could form an interesting footnote to the masterly and fascinating exposition by Lord Neuberger, referred to in the Scotland section of this Newsletter, of trends over the last two decades towards *de facto* requirements for the UK Supreme Court to adopt a function which, to a modest extent, could be seen as analogous to that of a formally constituted constitutional court.

The full citation of the decision is "Bundesverfassungsgericht, Beschluss (des ersten Senats) vom 26. Juli 2016 - 1 BvL 8/15". It is available in German here. A press release in English which describes the decision in a helpful degree of detail is available here[1].

One comment, however, upon the press release is that it uses "custodianship" to translate the German "Betreuung" (and "custodian" for "Betreuer"). It would be wrong to see Betreuung as implying a form of custody, and a more traditional translation would be "guardianship" and "guardian". Thus the title in English of the "Weltkongress Betreuungsrecht", reported on by Alex in the October 2016 Newsletter, was "World Congress on Adult Guardianship". However, the glossary on the Congress website offered "court-appointed legal representative", reflecting an increasing international move away from the sometimes unacceptable connotations of the traditional terminology[2]. In this report I use "Betreuung" and "Betreuer". Some case names and citations are given as they appear in the published decision of the First Senate.

The decision uses the terms "free will" and "natural will". The former is understood to mean an exercise and expression of will by a person with competence in relation to the matter in question, and thus being legally valid where it is capable of having legal significance. The latter is understood to be any wish or will that is consciously and wilfully expressed or made known to others, notwithstanding that it might lack legal validity because it was not capably formulated and communicated. The decision also refers to "original will" and "when necessary supported will". In section 6 of this report I describe further, and comment upon, aspects of the decision as to the description, use and considerable significance of these terms.

[1] In addition to the sources mentioned above, I have been much assisted by a translation of selected parts of the decision and of some other relevant material provided by Professor Sabine Michalowski of the University of Essex. She and other members of the core research group of the Essex Autonomy Three Jurisdictions Project, including Professor Wayne Martin (also of Essex University), have assisted my understanding of various matters addressed in this article. Professor Volker Lipp of Gottingen University has, not only on this occasion, assisted my understanding of German law. Alex's contribution has exceeded the normal responsibilities of an editor. I am grateful for all this generous help, but – as ever – responsibility for each item in the Newsletter, and in particular for any opinions expressed, remains with the identified author. The full report of the Three Jurisdictions Project can be found at http://autonomy.essex.ac.uk/eap-three-jurisdictions-report. The members of the core research group continue to collaborate, as many of the themes from that work continue to generate lives of their own.

[2] Thus the revised Yokohama Declaration (see [Newsletter link, please, Alex]) no longer contains those traditional terms.

2. Facts and procedural history

The woman concerned in the proceedings suffered from a "schizoaffective psychosis". In consequence, a Betreuer[3] had been appointed to her in April 2014. In September 2014 she was briefly admitted to a care facility. While there, she declined to take medications prescribed to treat an auto-immune disorder. She refused to eat. She expressed the intent to commit suicide. In accordance with various orders of the court, she was transferred to a closed dementia unit at a clinic, and treated with medication "through coercive medical measures".

Further examination showed that the woman also suffered from breast cancer. She was described as being by then severely weakened physically, and unable to walk or even to move around with a wheelchair by herself. She was described as being mentally capable of expressing her "natural will". In response to questions from the court, she repeatedly stated that she did not wish to be treated for her cancer. Her Betreuer then applied to the court to authorise extension of her placement in her current accommodation, and to approve coercive measures, particularly to treat her breast cancer.

The court refused that application. It held that the legal requirements to permit placement in accommodation "associated with the deprivation of liberty" and for coercive medical treatment were not satisfied. The Betreuer appealed unsuccessfully to the regional court, and then on points of law to the Federal Court of Justice. The Federal Court of Justice stayed the proceedings and referred to the Federal Constitutional Court the question of whether relevant legislation was compatible with the German Basic Law (Grundgesetz – "GG").

3. Issues and decision: German law

The point of law at issue was that the law of Betreuung under the German Civil Code provides that coercive medical treatment may only be given to persons who have a Betreuer if they are accommodated in a closed facility "associated with the deprivation of liberty". The First Senate described as "constitutionally unobjectionable" the intention of the legislature in establishing a legal basis for coercive medical treatment that is applicable only to persons placed by their Betreuer in a closed facility[4]. Persons, such as the woman at the centre of this case, who have a Betreuer, who are already within in-patient treatment, and who are factually not capable of physically removing themselves, cannot be placed in accommodation "associated with the deprivation of liberty". In consequence, they cannot be subjected to coercive medical treatment under the provisions described above. Accordingly, even if such persons would otherwise undoubtedly meet all of the substantive conditions for treatment, in that situation they could not be treated coercively. I refer to such persons as "persons in the woman's situation".

It was argued, successfully, that this situation contravened the state's duty of protection under the GG. The GG also contains a general equality and anti-discrimination clause, which was referred to by almost all of the interveners in the case before the First Senate: disability groups, lawyers, charities, psychiatrists and so forth. The

[3] See explanation of "Betreuer" above.

[4] Or, though not mentioned by the First Senate, persons so placed by an attorney acting under an enduring power of attorney.

Association of Psychiatry Users was an exception. It argued that the problem was that the relevant provisions permitted deprivation of liberty and compulsory medical treatment at all. The court did not address the discrimination point. It determined that there was unconstitutionality based on the state's positive obligation to protect the health of persons in the woman's situation.

The woman to whom the proceedings related was deceased by the time the decision was made. The First Senate held that the referral to the Constitutional Court was not rendered inadmissible by her death. It held that the function of judicial review, directed to clarifying the law and bringing about satisfaction, can in exceptional circumstances justify answering a referred question even after an event that would normally resolve the matter, if a sufficiently weighty and fundamental need for clarification persisted. The First Senate did however sound the warning that the question of when an interest in legal protection survived such an event would depend on the circumstances of each individual case.

The court held that it violated the state's duty of protection under the GG that persons who have a Betreuer, who are not capable of forming a "free will", should be entirely excluded from necessary medical treatment if giving that treatment should conflict with their "natural will", where they cannot be placed in accommodation "associated with the deprivation of liberty" because the requirements for placement in such accommodation are not satisfied, and where such placement is a precondition for giving treatment contrary to the "natural will" of the person. The First Senate ruled that this deficit was unconstitutional. It would be within the discretion of the legislature how to remedy the deficit, but the court ordered that it must promptly be remedied. It further ordered that in the meantime, because the current legal situation in effect entirely denied the possibility of treatment for persons in the woman's situation even in the face of the threat of serious or life-threatening damage to their health, the existing provisions permitting non-consensual treatment should apply to this group of people. "The state community cannot simply abandon helpless persons to their own devices".

In reaching this decision, the First Senate acknowledged that giving treatment against the "natural will" of a person who has a Betreuer conflicts with the person's right of self-determination, and with the fundamental right to physical integrity. Under the GG, all persons are, as a rule, free to make their own decisions regarding any interferences with their physical integrity, and how to deal with their own health. In deciding whether and to what extent to allow an illness to be diagnosed and treated, they are not required to follow a standard of objective reasonableness. However, the state's duty of protection takes on special weight in the case of a serious threat to the health of a person who is unable to protect himself or herself. The state's duty of protection outweighs the person's right to self-determination and to physical integrity, where the following criteria apply: (a) no special treatment risks are associated with the medical measure necessary to avert the threat to health, and (b) there is no viable reason to believe that the refusal of treatment reflects "the original free will" of the person who has a Betreuer (which I interpret as meaning the competent will of the person, prior to loss of relevant competence).

4. Issues and decision: international obligations

In a passage commencing at paragraph 90 of the decision, the First Senate concluded that no international obligations conflicted with the state's obligation to provide protection to a person who has a Betreuer and who is vulnerable and unable to form a "free will", in the circumstances addressed in the case. Coercive treatment in such circumstances, the court held, was consistent with the CRPD, the European Convention on Human Rights ("ECHR"), and the case-law of the European Court of Human Rights.

In Germany the CRPD has the force of law, and can be used as an interpretative aid when defining the content and scope of basic rights under the German Constitution. The Federal Constitutional court on 23rd March 2011 had held that the CRPD did not suggest a different outcome. The CRPD includes provisions (notably in Article 12) aimed at guaranteeing and strengthening the autonomy of persons with disabilities. However, in the court's understanding of these provisions, they did not impose any general prohibition of measures which are taken against the "natural will" of a person with a disability, where that is done on the basis of the person's limited ability to make decisions, and where that limitation of ability is the result of an illness.

The court had held that: "The context of Art. 12(4) CRPD, which relates to measures which limit the exercise of a person's legal capacity, shows that *the Convention does not impose a general prohibition of such measures*, but rather limits their admissibility, inter alia by requiring the contracting states to develop feasible safeguards against conflicts of interests, abuse, and to guarantee proportionality" (para 88 of the decision, again in informal translation, with emphasis added).

Since the decision of 23rd March 2011 had been issued, the UN Committee had promulgated various reports, guidelines and recommendations regarding the interpretation of the CRPD and the legal situation in Germany. As to the effect of such reports, guidelines and recommendations upon the decision of 23rd March 2011, the court opined that they "do not lead to a different conclusion". The court pointed out that the views of a committee that has competence to interpret a human rights treaty are to be given significant weight, but they are not binding on international or national courts under international law[5]. On the views under the additional protocol to the ICCPR, the court noted General Comment No 33 of the Human Rights Committee[6]. The court held that such committees do not have the competence to develop international treaties beyond the agreements and practice of the contracting states, having regard to Art. 31 of the Vienna Convention on the Law of Treaties, which codifies customary international law[7]. The court

[5] The court referred to ICJ, *Ahmadou Sadio Diallo* [Republic of Guinea v Democratic Republic of the Congo], I.C.J. Reports 2010, S. 639, <663-664>, para. 66; Supreme Court of Ireland, *Kavanagh v Governor of Mountjoy Prison and the Attorney General*, [2002] IESC 13 March, S. 14 f.; Tribunal Constitutional [Spain], STC 070/2002, recurso de amparo num. 3787-2001, Decision of 3 April 2002, II. Para. 7 a); Conseil d'état [France], Juge des référés of 11. October 2001, No. 238849, ECLI:FR:CEORD:2001:238849:20011011, S. 4.

[6] UN Doc. CCPR/C/GC/33 of 5 November 2008, para 13, which reads "The views of the [Human Rights] Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol".

[7] And ICJ, LaGrand [Germany v USA]. I.C.J. Reports 2001. S. 466 <501> para. 99; Mark Villiger, Commentary on the

conceded that it was an open question whether principles which have been developed in the context of other international treaties apply to all declarations of the UN Committee. It is however clear, the court found, that Article 34 of the CRPD does not confer on the UN Committee a mandate to provide a binding interpretation of the CRPD. When interpreting a treaty, the court held that a national court should nevertheless engage in good faith with the views of a competent international treaty body, but it is not obliged to adopt them[8].

In any event, the court held that, as regards the substance of the views of the UN Committee, those views would not exclude medical treatment without a person's consent where this is required under German constitutional law. The Committee had in its concluding observations of 13 May 2015 on the first German state report (UN Doc. CRPD/C/DEU/CO/1) criticised the provisions of the law on Betreuung in the German Civil Code, by referring to the UN Committee's General Comment No. 1. In particular, in General Comment No. 1 the Committee demanded the abolition of all substitute decision-making, and replacement with a system of supported decision-making. However, the court considered that the UN Committee's criticism "remains unspecific" with regard to the issues in this case concerning medical treatment without consent. In particular, the court considered that the UN Committee remained silent with regard to the question that was relevant in the present case, namely medical emergencies in which the "free will" of a disabled person is completely absent.

The court took the view that a corresponding approach applied to the guidelines of the Committee regarding the interpretation of Article 14 of the CRPD (of September 2015). In those guidelines the Committee had emphasised that no healthcare measures should be taken in respect of persons with disabilities that are not based on the free and informed consent of the person concerned. The Committee asserted that states should refrain from any form of compulsory treatment. However, the court held that here also the Committee had not provided an answer to the question of what, according to its understanding of the treaty provisions, should happen to persons who cannot form a "free will" and who are in a vulnerable position. The court held that, even taking into account the views of the UN Committee, there were no good reasons under the text and spirit of the CRPD to abandon such persons to their fate, and to conclude that the Convention is opposed to compulsory medical treatment where this is constitutionally required under strictly regulated circumstances. The court held that this was so, in particular, because the requirements of German constitutional law and of the law on Betreuung, in compliance with the CRPD, give precedence to the will of the disabled person, and where necessary to the will to be determined with support.

The court considered relevant provisions of the ECHR, and in particular Article 8, which, according to the jurisprudence of the European Court of Human Rights, guarantees the right to determine for oneself how to live one's life, including the possibility to engage in activities that are physically harmful or dangerous. With reference to these provisions, the court held that the

1969 Vienna Convention on the Law of Treaties, 2009, Art. 31 Rn. 37.

[8] See – though with reference to decisions of international courts – BverfGE 111, 307 <317 f.>; 128, 326 <366 ff., 370>; Christian Tomuschat, Human Rights Committee, The Max Planck Encyclopaedia of Public International Law, Bd. IV, 2012, S. 1058 <1061> Rn. 14.

medical treatment of competent adult patients against their wishes would amount to an interference with the person's physical integrity, and therefore with their Article 8 rights, even where refusal would lead to the person's death. The court referred to *Lambert v France*[9]; and *Pretty v United Kingdom*[10]. However, also by reference to *Lambert v France*, the court noted that states have a margin of appreciation in this respect.

The court held that it is a prerequisite for the obligation of the state and of society to accept a decision that is objectively unreasonable, and which could result in death, that the decision is based on the "free will" of an adult person who has mental capacity. If, on the other hand, a person does not take a decision voluntarily and with full understanding of the circumstances, the court held that the European Court of Human Rights imposes an obligation on states (under Article 2 of ECHR) to prevent the person from putting his or her life at risk[11]. Where a patient refuses a medically indicated treatment with the consequence that his or her life is put at risk, the European Court of Human Rights imposes on the state the obligation to take adequate precautions to ensure that – in cases where there is reason to believe that the person lacks "free will" – the relevant medical practitioners investigate further the capacity of the person concerned[12]. The court concluded that compulsory treatment required by the German Constitution under the conditions addressed in the decision, of persons who are vulnerable, does not conflict with obligations under Articles 2 or 8 of ECHR.

[9] [2015] ECHR 545, § 120 ff.
[10] [2002] ECHR 427, § 62 f.
[11] *Lambert v France*, § 140; *Haas v Switzerland* [2011] ECHR 2422, § 54; *Arskaya v Ukraine* [2011] ECHR 1735, § 69 f.
[12] *Arskaya v Ukraine*, §§ 62, 69, 70, 88.

5. Comment: "free and informed consent"

In a crucial sentence, the decision of 26th July 2016 describes the view of the UN Committee as to the effect of Article 14 of the CRPD thus (in informal translation): "As regards persons with disabilities, no measures for the protection of health may be undertaken unless they rest on the free and informed consent of the person concerned". That could mean two things, in relation to millions of people in the world who, because of their intellectual disabilities, are not capable of "free and informed" consent or dissent. Firstly, it could mean that those people, because they are incapable of "free and informed consent", should not be provided with any healthcare. That however would contravene the right of persons with disabilities under Article 25 of the CRPD "to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability". That cannot therefore be the correct interpretation if another interpretation not inconsistent with the provisions of the CRPD is possible. Secondly, it could mean that the requirement for "free and informed consent" applies only to people capable of giving it. If they are capable of such consent to a proposed "measure for the protection of health" (or refusing it), then that measure may not be imposed without consent. But if they are not so capable, the stipulation does not apply to them.

It is unsurprising that the German court should opt for the latter approach. It is also perhaps unsurprising that this outcome should be identified in the context of German language and usage. In English, the meaning of "free … consent" is not obvious: not "free from" something specified, simply "free". The meaning identified above (and discussed further below) of

"free will" does point to a clear meaning: "free" means competent, and legally effective. It must surely be common ground that, in the context of the CRPD of all places, a disability preventing a person from giving competent consent to healthcare treatment, or preventing exercise of legal capacity in any other way, should not disqualify that person from receiving healthcare treatment, or from the benefits and protections of any other exercise of legal capacity.

In the CRPD, "free and informed consent" appears not in Article 14, but in Article 25, part of the first sentence of which is quoted above. The particular requirements of Article 25 include that States Parties should "d. Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent …". Here again the method of reasoning of the German court is relevant. Healthcare cannot be provided "of the same quality … as to others" if people incapable of giving free and informed consent because of their disabilities should be excluded from receiving it. "Others", if taken to hospital unconscious following an accident or sudden onset of illness, receive treatment notwithstanding their inability at the time to give "free and informed consent". If that inability is the consequence of a disability, treatment should still be given.

A key word in this discussion is "include" in the second sentence of Article 1 of the CRPD: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". People with disabilities across the world still face such barriers, in various ways and degrees. The sustained energy of the UN Committee in confronting reluctance to remove those barriers – wherever it is encountered – is to be absolutely commended, driven as it is by personal experience of their own disabilities. Those are disabilities, the disadvantages of which could ultimately be removed substantially if not entirely by the elimination of such barriers. That holds good for physical, sensory and many intellectual disabilities. In the legal sphere, the support provisions of Article 12(3) of the CRPD should be applied to the maximum extent to enable as many people with intellectual disabilities, in as many matters, as possible to exercise their legal capacity themselves. There will always be people, however, for whom measures relating to the exercise of legal capacity referred to in Article 12(4), will be necessary if (in the words of the German court, translated): "helpless persons" are not to be abandoned "to their own devices".

It is here that the word "include" in Article 1 is so significant. Persons with disabilities, for the purposes of the CRPD, are not limited to those whose full and effective participation in society is limited by barriers. It also includes those, albeit a minority, who are in some respects limited by the very nature of their intellectual disabilities. That, for some, means in relation to the exercise of legal capacity. If that were not so, and if they were not included within the provisions of the CRPD, then - as the German court identified – there would be no place for the safeguards in Article 12(4).

6. Comment: The four concepts of "will"

I return to the four concepts, to be found at various points in the decision, of "free will", "natural will", "original free will" and "the when-

necessary-supported-will of the person with a disability". The decision does not set out clear definitions of any of them. It is understood that the core meanings of the first two are however well established in German law, though there is some marginal ambiguity and scope for debate. As indicated above, and put simply, free will means a competent formation and expression of will, sufficient for a legally valid action or transaction. An action could be consent to (or refusal of) healthcare treatment, or making a Will. A transaction could be entering a contract. Also as indicated above, and again put simply, natural will means any wish or will that is consciously and wilfully expressed or made known to others, notwithstanding that it might lack legal validity because it was not capably formulated and communicated. It could be expressed as an acceptance or refusal of healthcare, but might lack validity as such. Likewise, a purported Will or contract could lack validity.

With these two concepts defined with a degree of confidence, one can move forward to suggest, also with some degree of confidence, that "original free will" means a competent formation and expression of will in the past of a person who may no longer retain such competence, but which remains decisive.

Two aspects of the court's treatment and use of these three concepts are significant and fascinating. Firstly, the court appears to accept a reality which has always been readily apparent to anyone with experience of engaging with people with even some of the wide and diverse range of intellectual disabilities. The court appears to accept that humanity does not divide neatly into people capable of "free will", on the one hand, and those incapable of "free will" and able only to communicate expressions of "natural will", on the other. These concepts are at two ends of a spectrum. The formation and expression of will by different people, by the same person at different times and in different circumstances, or by the same person in relation to different matters, can all be at different points along that spectrum, as well as at one end or the other. Thus, for example, the court refers to "the quality of the natural will": a particular formation and expression of natural will may be at some point closer to, or further from, the "free will" end of the spectrum.

This leads to the even more significant aspect in the decision, which is the apparent synthesising of these different categories of "will" into a single overall concept of "will", particularly in a passage where the court elaborates how the legislature must resolve the question of proportionality and give the highest possible weight to the person's will. My interpretation of that requirement is this. The principle of proportionality must be applied to the question whether, in a particular case, the presumption in favour of a person's expressed will should be applied and should be decisive, or whether – exceptionally – a person's expressed will should be overridden. The requirement is that the legislature should provide methodologies for carefully determining whether a person's "free will" can be identified, or even constructed, so that such "free will" will be decisive.

This echoes the process of "constructing decisions" which I described in the final chapter (Chapter 15: "Constructing Decisions") of *Adult Incapacity*, W Green, 2003. That chapter offered a description of the decision-making process required by the newly enacted Adults with Incapacity (Scotland) Act 2000. I described a

hierarchy of elements ranging from, at one end, an adult's present competent decision, through past competent decisions, decisive or at least significant choices, current wishes and feelings, past wishes and feelings, information about the adult from persons closest to the adult, and widening beyond there to significant personal or professional input about the adult, the shared views and ethos of the adult's family and background, and so forth. Generally, an element earlier in that list should prevail over a later element, unless later elements strongly and persuasively indicate that it would be appropriate for them to prevail. Different aspects of a decision might be derived from different points on the hierarchy. However, while other people may play a role in this process of constructing a decision, the purpose of such a process is to construct the adult's decision in the matter, not to impose a decision made by someone else.

I write "echoes" advisedly. There is a quantum leap from a process of constructing a decision, to transferring a somewhat similar methodology to a process of identifying and perhaps constructing what is a person's will, and assessing the quality of that will, in relation to a particular purpose and at a particular time. Constructing a person's will can be equated with the recommendation in paragraph 21 of General Comment No. 1 that: "Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations". An assessment of the quality of the will thus interpreted or constructed is necessary when there is conflict among a person's rights, will and preferences in the context of the requirement of Article 12(4) of the CRPD that safeguards must "respect the rights, will and preferences of the person"[13].

On this view, one could see this decision of the German Federal Constitutional Court as a significantly progressive step in carrying forward the task of implementing and operationalising the key requirement of Article 12(4) to respect a person's rights, will and preferences. If respect for a person's will is to be elevated from "something that is good" to an element actually to be delivered in the world of hard reality, the only way of maximising that respect requires something more than defining ways to travel as far as possible in the direction of identifying or even constructing "will" that in particular circumstances can be categorised as decisive "free will". If we accept that the purpose here is to set the potential boundary of decisive "free will" as widely as possible, and if doing so is to become effective not only in theory but in day-to-day practice, it becomes all the more important that this boundary be clearly defined. It becomes essential to define the boundary up to which "will" is decisive, and beyond which, for a particular purpose and in a particular situation, that "will" is of such a quality that respect for a person's rights, or addressing a situation where there are various incompatible preferences, may require that the person's will be overridden.

It is in the context of this interplay of the flexible concepts of will, and the need to assess whether identified or even constructed will should be

[13] An exploration of how the drafting committee for the CRPD intended that "will" should be understood in this phrase would be valuable, but is beyond the scope of this report, as it would appear to require further research into the travaux préparatoires. This would appear to be a situation where resort to the travaux would be appropriate in terms of Article 32 of the Vienna Convention on the Law of Treaties (see §2 of the Essex Autonomy Three Jurisdictions Report referred to in footnote 1 above).

decisive, that the court said that the free will of the person needs to be respected even if it can only be determined by reference to previously expressed views of the person, or based on the quality of the natural will. The court went further when (in Sabine's translation – see above) it said that: "This can, *inter alia*, require differentiation as to how much weight should be given to the natural will of the person, depending on how close it comes to the person's free (or presumed free) will after providing due support".

We have only this one tantalising reference to this significant further step forward to the concept of "the when-necessary-supported-will of the person with a disability". Article 12(3) of the CRPD requires states parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". The proper route towards satisfying this requirement has been the topic of considerable discussion. The formula used by the court suggests that the route to providing the support required by Article 12(3) must include strategies for supporting the person's will. Much work remains to be done to create and operationalise such strategies.

If the above analysis is correct, then the German Federal Constitutional Court is to be congratulated for signposting this significant step forward in the task, shared by the worldwide community, of fulfilling in day-to-day practice the aspirations and promise of the CRPD.

Adrian D Ward

European Parliament Report on Protection of Vulnerable Adults

Summary

This study, produced by the European Parliamentary Research Service, supports a legislative initiative on the protection of vulnerable adults by the European Parliament.

There is currently no uniform legal framework allowing for a proper protection of vulnerable adults in cross-border situations across the European Union (EU). All EU Member States have their own legal framework, with differing tools for the protection of vulnerable adults. This increases legal uncertainties when it comes to cross-border situations.

In order to react to an increase in international mobility and to an ageing population with a growing number of age-related illnesses, such as Alzheimer's and other forms of dementia, the World Organisation for Cross-border Co-operation in Civil and Commercial Matters negotiated the Hague Convention on the International Protection of Adults 2000 ("Hague 35"), which was designed to protect vulnerable adults in cross-border situations. In essence, it addresses questions such as which law applies and who may represent a vulnerable adult, and with what power. The Hague Convention provides rules on jurisdiction, applicable law and international recognition and enforcement of protective measures. Furthermore, it establishes mechanisms for cooperation between the authorities of Contracting States. However, only seven EU Member States have ratified Hague 35 (Austria, Czech Republic, Estonia, Finland, France, Germany and the UK (in respect of Scotland only)). Another seven EU countries have signed

Hague 35 but have not yet ratified it (Cyprus, Greece, Ireland, Italy, Luxembourg, Poland and the Netherlands).

In 2008, the European Parliament passed a Resolution which encouraged those EU Member States who had not ratified H to date, to proceed with ratification. It is, of course, one of the fundamental principles of the EU that there is freedom of movement and residence for all EU citizens. The world's population is becoming increasingly mobile especially in retirement. The report identifies a growing trend for northern European wishing to retire in warmer southern European climates. However, adults may become incapacitated or vulnerable at any stage of their lives. Young adults with mental disabilities or injuries, for example, also require protection in cross-border situations whether working, living or holidaying abroad.

This study reinforces the message to all EU Member States to ratify Hague 35 as a crucial preliminary step. It then goes further by supporting legislative action at EU level aimed at improving the protection of vulnerable adults in cross-border situations (beyond Hague 35) within the EU. The authors of the report consider that, even if all Member States ratified the Hague Convention, there would still be seven weaknesses remaining:

(i) The limited geographical scope, especially with a view to recognition and enforcement. Hague 35 provides for recognition and enforcement of measures taken in Contracting States only. It does not apply to the mutual recognition and enforcement of protective measures for the protection of vulnerable adults in non-Contracting States. Only nine States have ratified Hague 35 so far (seven EU Member States plus Monaco and Switzerland).

(ii) The absence of a supranational court for solving disputes arising from different interpretations of Hague 35. This could lead to different interpretations of the Convention and inconsistent results across the Contracting States.

(iii) The poor cooperation and communication among the authorities of Contracting States. Providing for cooperation mostly channelled through central authorities designed by the Contracting States, Hague 35 makes only a timid suggestion that authorities "may" get in touch for the purpose of discharging duties under the Convention.

(iv) The difficulty in enforcing foreign protective measures. Measures for the protection of vulnerable adult adopted in one Contracting State must first be declared enforceable as a prerequisite to their enforcement in another Contracting State.

(v) The weak means by which evidence of the powers granted a representative of a vulnerable adult are to be provided abroad. Hague 35establishes a certificate designed to allow the representative of a vulnerable adult to provide their capacity as a representative in another State. According to Hague 35, the individual Contracting States are to determine the procedural rules under which a certificate is to be delivered. In practice, certificates are very rarely issued which contributes to the legal uncertainty in the representation of a vulnerable adult.

(vi)The absence of any possibility for an adult to choose in advance the State whose authorities should have jurisdiction over his or her protection.

(vii) The lack of rules providing for the "continuing jurisdiction" of the authorities of the State of former habitual residence of the adult. Normally, according to the Hague Convention, a change of an adult's habitual residence from one Contracting State to another involves a change of jurisdiction for the protection of the adult.

This study recommends five legislative measures at EU level aimed at improving the protection of vulnerable adults in cross-border situations by:

(i) Enhancing cooperation and communication among authorities of EU Member States. This should ensure frequent and systematic direct communication among the EU Member States' authorities. Prompt availability of information is likely to enhance the protection of vulnerable adults.

(ii) Abolishing the need for protective measures to be declared enforceable in an EU Member State. This could be developed with appropriate safeguards for the protection of vulnerable adults and would be based on mutual trust among EU Member States enhancing the effectiveness of protective measures taken in EU Member States.

(iii) Creating a European certificate of powers granted for the protection of an adult. Such a European document would provide a comprehensive legal framework for relevant procedures.

(iv) Enabling the adult to choose the EU Member State whose courts should have jurisdiction to take measures directed at his or her protection. This would allow the authorities of the State of an adult's former habitual residence to retain jurisdiction for some time following a change in habitual residence and to modify the existing measures.

The study concludes with a recommendation that the EU should adopt legislative measures based on Article 81 TFEU to address the problems faced by vulnerable adults in cross-border situations and to supplement the framework provided by Hague 35 which does not allow all cases to be dealt with in the best interests of the adult concerned.

Comment

The recommendations in this study are intended to enhance legal certainty and to harmonise the huge diversity of measures and instructions for the protection of vulnerable adults currently existing across the EU. In order to secure effective and consistent international cooperation, it is often preferable for States to enter into multilateral international instruments rather than individually negotiated bilateral instruments between states. However, like in many other areas of law, the future of the UK's involvement in European endeavours is looking very uncertain in the wake of Brexit. If the UK ceases to be a member of the EU then it may need to enter into bilateral treaties with each and every other EU Member State to ensure that its decisions would be recognised and enforced in each and every other EU Member State. This could lead to variations across different bilateral instruments for the protection of vulnerable adults and extremely complicated practical matters when multiple instruments apply. It is heartening to see the EU moving towards greater and more consistent protection for vulnerable adults however, quite what the UK's role will be, is yet to be seen.

In the meantime, whilst the legal implications of Brexit are still being worked out, different regimes of private international law will continue apply in the UK regarding the cross-border protection of adults. Scotland is a Contracting State to Hague 35 which is implemented by Schedule 3 to the Adults with Incapacity (Scotland) Act 2000. Although England and Wales has not ratified Hague 35, Schedule 3 to the Mental Capacity Act 2005 is built on the same principles as the Convention. There is no suggestion that these provisions will change in the foreseeable future.

Mental Welfare Commission for Scotland: Supported Decision Making: Good Practice Guide

The Mental Welfare Commission published supported decision-making guidance this month. This guidance, which is very much influenced by Article 12 CRPD and developing Article 8 ECHR jurisprudence, points out that the principles underpinning the Adults with Incapacity (Scotland) Act 2000, Mental Health (Care and Treatment) (Scotland) Act 2003 and Adult Support and Protection (Scotland) Act 2007 all seek to ensure respect for the exercise of a person's capacity and autonomy even where they have some impairment or disability. It identifies the types of support available, in the legislation and elsewhere, to ensure that when persons do have decision-making difficulties any decisions made by or about them genuinely reflect their choices.

Jill Stavert

[Editorial Note from Alex: Jill is too modest to note that she is the author of this guidance, which is both excellent and in its principles applicable far outside Scotland].

Lord Neuberger on the role of a constitutional court

This item should be read in conjunction with my report in the Capacity outside the Court of Protection section of this Newsletter on a decision of the German Federal Constitutional Court dated 26th July 2016 (and published on 25th August 2016), which is as fully relevant to readers in Scotland as to those in any other jurisdiction.

On 14th October 2016 Lord Neuberger, President of the Supreme Court of the United Kingdom, delivered the second biennial Lord Rodger Memorial Lecture to a packed and enthralled audience of members and guests of the Royal Faculty of Procurators in Glasgow. The first such lecture was given by Baroness Hale and is available here. Lord Neuberger's title was "The constitutional role of the Supreme Court in the context of devolution in the UK". The full text of his address is available here. This is not a report of that event. However, consideration of Lord Neuberger's exposition, in the context of the insight into the role of a constitutional court provided by the German decision of 26th July 2016, has potential significance for practice and pleading in the mental capacity and adult incapacity jurisdictions of the United Kingdom. Lord Neuberger described not only the developing role of the Supreme Court as a quasi-constitutional court (my term, not his), but also the extent to which any court might find itself applying the principles which the Supreme Court is developing, as described by Lord Neuberger.

Before I heard him, a draft of this report on the German decision made the obvious comment that the role played by the German Constitutional Court in its decision of 26th July 2016 was, in the case of the United Kingdom, "somewhat echoed – perhaps faintly" in the role of the courts in determining whether the legislation of a devolved legislature is within its competence (in the case of the Scottish Parliament, *inter alia* by reference to the provision that legislation is *ultra vires* if not compliant with ECHR).

This was, however, but one of the areas identified by Lord Neuberger where the UK Supreme Court is developing a role akin to that of a constitutional court. He described a modification to the application of the concept of the absolute supremacy of Parliament. Formerly, any statute

would be considered as repealed, even if not explicitly so, by a subsequent inconsistent Act of Parliament. Increasingly, the Supreme Court has recognised that some statutes have special constitutional status so that it will be more difficult to displace them. The Scotland Act is one such. Applying the principle of legality, provisions of such statutes – and rights conferred by them – may be so fundamental as not to be alterable by subsequent inconsistent legislation, unless the intention of Parliament to alter them is, in the words of Baroness Hale[14], "crystal clear".

One can compare this "two-tier" view with the treatment in the German decision of legislation incompatible with the GG. One could suggest that the principle of legality might cause the Supreme Court to echo the German Constitutional Court in declaring that an existing statute ought to be extended to fill a lacuna, pending corrective legislation.

Lord Neuberger suggested that the duty of the courts to prevent violation of the rule of law might result in outcomes unimaginable more than two decades ago. One might suggest that this could occur in relation to apparent incompatibility of UK or devolved legislation with fundamental rights enshrined not only in ECHR, but in instruments such as the CRPD. Similar issues could arise in relation to a determination as to whether legislation designed to secure compliance with such an international instrument might be within the competence of a devolved legislature. Among many examples could be a scenario considered at a seminar at Edinburgh Napier University also on 14th October 2016[15], namely legislation by the Scottish Parliament to remedy the lack of the safeguards required by Article 12(4) of the CRPD (as well as apparent violation of ECHR) in the current provisions for receipt and administration of state benefits by DWP appointees, which provisions are currently embedded in legislation in the reserved area of social security provision.

The potential impact of the developing principles described by Lord Neuberger, especially in relation to the rights and status of people with intellectual disabilities, is considerable. This could lead us more frequently into application, or at least consideration, of jurisprudence developed by constitutional courts formally established as such, as exemplified by the decision of the First Senate of the German Federal Constitutional Court in its decision of 26th July 2016.

Adrian D Ward

MHO shortages and delayed reports – again!

Over the last five years the number of applications under Part 6 of the Adults with Incapacity (Scotland) Act requiring reports from MHOs has more than doubled, legislative change has placed extra responsibilities upon MHOs, but the number of MHOs in post has not increased, and if anything has dwindled. We have already reported various aspects and consequences of this issue over the past couple of years. A further issue has emerged in relation to the renewal provisions contained in section 60 of the 2000 Act, as amended by the Adult Support and

[14] *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 159,

[15] On Graded Guardianship in Incapacity Law, the first in a major series of three law reform seminars arranged and presented by the Mental Welfare Commission and the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University.

Protection (Scotland) Act 2007. Section 60(1) of the 2000 Act provides that a renewal application may be made at any time before expiry of a guardianship order "and where such an application is so made, the order shall continue to have effect until the application is determined". Where the renewal application relates to the adult's personal welfare, a report in prescribed form from an MHO must be lodged in court with the renewal application (in cases of inability to communicate only, the report is from the social work officer). Section 60 lacks an equivalent of the requirement for new applications under section 57(4) for MHO reports to be prepared within 21 days of notice of intention to apply – though much of our previous reporting has concerned the inability of local authorities to comply with that time limit, a situation likely to continue or even worsen until Scottish Government provides adequate resources to enable sufficient numbers of MHOs to be recruited, trained and retained.

In the case of renewal procedure under section 60, if for any reason the renewal application is not lodged in court before expiry of the existing order, the existing order will lapse, an adult whose needs require guardianship will lose the guardianship, and the extra trouble and expense of a fresh application will arise. What, accordingly, should practitioners do if the expiry date is drawing close, an MHO report has been requested, but there is no sign of it appearing timeously?

The whole adults with incapacity jurisdiction remains bedevilled by inconsistencies from one sheriffdom to another. Practice in Glasgow Sheriff Court, supported by a Practice Update of June 2016, offers a solution. The Practice Note provides that: "If a renewal application requires to be returned for correction the original lodging date will be retained, provided the corrected application is resubmitted within 14 days of receipt by the agents". We have previously reported cases where first applications have been submitted without the required MHO report, and with a crave seeking production of the report. We would suggest that good practice across the country would be for renewal applications to be received where they are submitted without an MHO report and it can be shown that such a report had been requested in good time but not yet received. Provided that the court is willing to hold the application in court unrejected until the MHO report materialises, the position would be covered.

Unfortunately, we have learned that in some courts an alternative practice has been adopted, at least sometimes, of backdating the submission date of renewal applications which have in fact been lodged late, only once the necessary MHO report has arrived. That would appear to be an entirely inappropriate solution. It gives rise to grave and obvious issues about the status of both adult and guardian, and of any purported acts of the guardian, once the original order has by operation of statute expired, until any renewal application is in fact lodged in court. The application may never be lodged. How long can potential retrospectivity be extended before that potential is cut off? In the case of guardianships which include financial powers, how can it be said that the protection of caution remains available during such an indeterminate period? The simple answer is that the clear provision of section 60 cannot be avoided in this manner. If a renewal application, albeit lacking the MHO report, is not received and accepted by the court before the expiry date, the guardianship expires and that is irretrievable. Put another way, any discretion by

the court that might permit continuation of the guardianship in the absence of the required MHO report must be exercised before expiry, to have any effect. The terms of statute cannot reasonably be stretched further than that. On the other hand, it is unlikely that a sheriff would be able to do other than permit the guardianship to continue until the missing MHO report is produced and can be lodged, as the sheriff in such matters is bound by the section 1 principles of the 2000 Act and it is unlikely that there would be benefit to the adult in allowing a guardianship to expire when there is nothing to suggest that the adult does not in fact continue to require a guardian, and everything which the applicant is able to do to ensure continuation of the guardianship has been done.

Adrian D Ward

PQ as attorney of Mrs Q against Glasgow City Council [2016] CSOH 137

The decision of Lord Boyd of Duncansby in this case, dated 5th October 2016, is detailed and helpful upon the issues which it addressed. An apparent but unexpressed assumption, however, upon which the decision proceeds means that the case before the court appears to have been addressed with tunnel vision, leaving wider points of interest unexplored.

PQ brought two petitions for judicial review in his capacity as attorney to his 86-year old mother Mrs Q, against Glasgow City Council. As Lord Boyd put it: "At the heart of the dispute is whether the respondent is required to pay for 24 hour one-to-one care at home or whether Mrs Q's needs could be provided for in a nursing home."

Mrs Q had been admitted to a nursing home on 28th April 2010. She was then admitted to hospital on 17th May 2010, where in consequence of vascular problems she underwent a below-knee amputation. She returned to the nursing home on 24th June 2010. Her family were dissatisfied with the care there. She returned to her own home, ostensibly for a short break, on 25th July 2010, but did not return to the nursing home. On 11th August 2010 the director of the nursing home gave notice of termination of the contract for her placement there. Ever since, the family have arranged and provided for her a high quality of care in her home.

Glasgow City Council were the responsible social work authority. In essence, their position remained the same as in an assessment dated 19th March 2010, before Mrs Q went into the nursing home, to the effect that she: "now requires 24 hour care to reduce the risk of falling and ensure that she receives an appropriate level of care. She is currently supported overnight by care purchased privately. This cannot be sustained indefinitely due to financial implications and placement in nursing care is required urgently."

PQ disputed this. In his submission, she could only be safely cared for in her own home, under the arrangements which the family had put in place. She had no understanding of the amputation and its consequences, so that whenever she tried to stand, she was liable to fall over. She had fallen eight times during her short stay in the nursing home. The decision narrates much evidence brought by both parties in support of their respective views. *PQ* had applied for direct payments on behalf of his mother. These were made with effect from September

2010. The proceedings focused upon a support needs assessment on 5th May 2015, setting direct payments at a level (subject to deduction of client contribution) equating to the cost of caring for Mrs Q in a nursing home.

There had been two petitions, and several conclusions in the second petition. Relevant to the final decision were the first and last conclusions of the second petition. The first sought declarator that the Council, in respect of a support needs assessment of 5th May 2015, had failed to perform its statutory duty towards Mrs Q under section 12A of the Social Work (Scotland) Act 1968. The last sought declarator that the Council had failed to perform its statutory duty towards Mrs Q under sections 4 and 5 of the Social Care (Self-Directed Support) (Scotland) Act 2013. Lord Boyd refused to pronounce either declarator. As ever in such cases, he restated the position of the court in such matters. He did so helpfully in the following terms: "[16] It is worth at the outset recalling a number of fundamental principles which guide the court in the judicial review of such decisions. First it is not for the court to take a decision which Parliament has empowered to a local authority. It is only if the local authority has acted outwith its powers, failed to take into account a relevant matter, omitted to take into account a relevant matter or the decision was *Wednesbury* unreasonable that the court can intervene. Even if there has been an error in law it will be for the local authority to remake the decision, possibly under the guidance of the court, not for the court to remake it."

In a passage which will no doubt be welcomed by those in local authorities trying to meet their responsibilities in a time of economic stringency, he recognised that: "local authorities have finite resources and the court has to recognise that it is for the local authority to determine where resources should be spent and in what manner." On the distinction between the position of a local authority exercising a power, and that of an authority performing a duty, he quoted with approval Lord Nicholls of Birkenhead in *R(G) v Barnet LBC*, 2004, 2 AC 208: "As a general proposition the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area." (para 13).

At some length, Lord Boyd emphasised that assessments and care plan reviews prepared by social workers should not be addressed as if they had been prepared with legal precision, and criticised on that basis: "They are not drafted by lawyers, nor should they be. They should be construed in a practical way against the factual background in which they are written with the aim of seeking to discover the substance of their true meaning." (Lord Dyson JSC in *R (Macdonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, at paragraph 53). Later in his decision, Lord Boyd reinforced that point: "Lawyers are used to dealing with opinions from experts as evidence to be set alongside factual evidence. But this assessment was not written by a lawyer but by a social worker and as Lord Dyson said has to be construed in a practical way against the background in which they are written."

The second conclusion was based on averments that the Council had taken no steps to ascertain the cost of Mrs Q's assessed need of 24-hour

care in a nursing home, including the needs arising from her risk of falling. Lord Boyd noted that in the 2013 Act "relevant payment" is defined as "the amount the local authority considers is a reasonable estimate of the cost of securing the provision of support for the supported person". He took the view that such reasonable estimate "does not have to be a sum calculated to a degree of mathematical certainty". He accepted that the Council pays for a substantial number of its citizens in care, and would have a close and ongoing relationship with care providers. The Council would be expected to have an intimate knowledge of the cost of residential care in Glasgow. He was satisfied that there was no error of law in the way in which the Council had discharged its statutory duty under the 2013 Act.

Lord Boyd did narrate the provisions of section 12A of the 1968 Act, including the requirement upon the Council to take account "in so far as it is reasonable and practicable to do so, both of the views of the person whose needs are being assessed and of the views of the carer (provided that, in either case, there is a wish, or as the case may be a capacity, to express a view". Information about Mrs Q's own views, beyond the assertions of her attorney on her behalf, are sparse. It is narrated that she was recorded as not wishing to move from her home. As regards her capabilities, it was noted that the assessor and an occupational therapist had "noted that Mrs Q was able to read and do cross words and considered that she might well be able to understand them. They had suggested a cognitive assessment but this was rejected by the family on the basis that her cognitive ability had deteriorated since the last assessment and there was nothing to be gained from a further assessment".

It is in relation to the ascertainment of Mrs Q's views, and her own rights in the matter, that, except as quoted above, this decision is silent. That seems to be predicated upon the assumption that the care arrangements put in place by her family would continue, and that the sole issue in the case was the extent to which Glasgow City Council should contribute towards the cost. The decision, and presumably the submissions before the court, were silent on the issue of whether Mrs Q should in fact be removed from her own home against her wishes and placed in residential care. One might have expected to see an argument that as in the circumstances she could not be forcibly so removed, and as her family including her son as direct descendant did not in Scots law (in contrast to some other jurisdictions, such as Japan) have any obligation to maintain an ascendant, assessment should be on the basis that such family support could not be enforced and could be withdrawn at any time. It is difficult to conclude that Mrs Q's position under both the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities (neither mentioned in the decision) was irrelevant. Without addressing those aspects in any great detail, one would refer to the right to respect for private and family life under Article 8 of ECHR, which explicitly extends to one's home and which may be interfered with only in the limited circumstances in Article 8.2. Likewise, among several potentially relevant provisions of UN CRPD, ratified in respect of the whole United Kingdom without reservation, is the right of persons with disabilities to choose their place of residence, that they are not obliged to live in a particular living arrangement, and that they have a right to access to in-home residential and other community support services, including personal

assistance, to support living and inclusion in the community.

Adrian D Ward

New book: Mental Health, Incapacity and the Law in Scotland

Congratulations to Jill: the second edition of her work (edited by Hilary Patrick) on Mental Health, Incapacity and the Law in Scotland is now out, with full details available here.

`

Conferences at which editors/contributors are speaking

Scottish Young Lawyers Association

Adrian will be speaking on adults with incapacity at the SSC Library, Parliament House, Edinburgh on 21 November. For more details, and to book, see here.

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 mid-December. 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

CoP Cases Online

Use this QR code to take you directly to the CoP Cases Online section of our website

THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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

Alex is recommended as a 'star junior' in Chambers & Partners 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, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment 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.