Mental Capacity Law Newsletter November 2016: Issue 70

# Court of Protection: Health, Welfare and Deprivation of Liberty

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.

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For all our mental capacity resources, click here.

## 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!

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## 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.


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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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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.

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

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

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

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