Mental Capacity Law Newsletter November 2016: Issue 70

Court of Protection: Practice and Procedure

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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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).

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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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