Mental Capacity Law Newsletter October 2016: Issue 69

Compendium

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: getting tangled up in ineligibility, survey and statistical data relating to DOLS and news of a new COPDOL10 form;

(2) In the Property and Affairs Newsletter: deputies and remuneration, capacity and influence, and updates from the OPG;

(3) In the Practice and Procedure Newsletter: participation of P, extending the great safety net abroad, the limits of the coercive power of the inherent jurisdiction, and an expert beyond bounds;

(4) In the Capacity outside the COP Newsletter: a report from the World Guardianship Congress, a new Jersey capacity law and a report on what Singapore can teach us about the MCA 2005;

(5) In the Scotland Newsletter: case notes shedding light on practice in relation to adults with incapacity, new MWC reports and new supervision practices by the OPG.

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

Tangled up in ineligibility 2
BIA survey 3
"Unnecessary" inquests – the Chief Coroner's view 3
LGA MCA/DOLS resources 4
2015-2016 DOLS statistics 4
New COPDOL10 form 4
Deputies and remuneration 5
Capacity and influence 6
Samples of deputy orders and EPA 7
Security bond provider changed 7
OPG proposal for new procedures for to allow variation of security 7
Participation of P in proceedings before the Court of Protection 8
Extending the great safety net abroad 12
Short Note: service on litigants in person 15
Short Note: no power of arrest under the inherent jurisdiction 16
Short Note: indemnity costs and the litigant in person 16
Short note – out of hours medical treatment 16
COP statistics 17
Experts out of bounds 17
"Transforming our justice system"; summary of reforms and consultation 20
Care Act for Carers: One Year On: Report by Carers Trust 21
World Guardianship Congress report 22
New capacity legislation in Jersey 24
The Singapore case of *Re TQR*: Safeguards & Principles Pertaining to a Deputy's Investment Powers 25
Edinburgh Sheriff Court – Applications under the Adults with Incapacity (Scotland) Act 2000 – Guardianship Court and AWI User Group 29
Public Guardian: new arrangement for supervision of professional guardians 29
J's Parent and Guardian v M & D (Leisure) Ltd, 2016 SLT (Sh Ct) 185 29
Argyll and Bute Council v Gordon, 2016 SLT (Sh Ct) 196 31
New offence of wilful neglect or ill-treatment in Scotland 31
Mental Welfare Commission for Scotland AWI and 2003 Act Monitoring Reports 33
Conferences at which editors/contributors are speaking 35

Tangled up in ineligibility

BHCC v KD [2016] EWCOP B2 (HHJ Farquhar)

Article 5 ECHR – DOLS ineligibility

Summary

KD was an 80-year-old lady with a long history of schizophrenia, slowly progressive dementia and a Parkinsonian syndrome. Previously detained under s.3 MHA 1983, she was now deprived of her liberty in a care home under a standard authorisation. The issue was whether she was ineligible.

The independent psychiatric expert who reported expressed disquiet over the comparative lack of statutory safeguards for someone lacking capacity receiving clozapine with regular blood tests due to side-effect risk of bone marrow suppression under the MCA when compared to a community treatment order under the MHA. He noted, in particular, the absence of an independent second opinion appointed doctor. But no-one was advocating for her detention in hospital and, pursuant to *AG v BMBC and SNH* [2016] EWCOP 37, the medication could be given covertly.

In relation to eligibility, the Official Solicitor submitted that Case E in MCA Schedule 1A was not limited to those cases where hospital treatment was required. After much analysis, the court disagreed. So she was not ineligible for the standard authorisation.

Comment

A "mental health patient", for the purposes of Case E, refers to a person accommodated in a hospital, not a care home. This is clear from the legislation and *W Primary Care Trust v TB & Ors* [2009] EWHC 1737 (Fam) (a case not apparently cited to HHJ Farquhar). There may be more to this case than is apparent from the judgment but, on its face, there was in fact no eligibility issue as KD did not fall within Case E (nor were any of Cases A-D relevant)

But the case does illustrate the well-known reality that there are less treatment safeguards under the MCA when compared with the MHA. If KD were unbefriended and if clozapine constituted "serious medical treatment", she would of course be entitled to an independent mental capacity advocate. It will also be interesting to see whether the Law Commission proposes additional safeguards for these types of treatments to equalise the informal MCA framework with the SOAD system under the MHA.

BIA survey

Edge Training has recently conducted a national survey of 92 best interests' assessors (BIAs), triggered by the publication of the Law Commission's interim statement which reported that most consultees perceived DOLS to have failed to deliver improved outcomes for people. The survey of BIA assessors showed that, on many occasions, the assessment procedure had led to a positive outcome for many vulnerable people that had been missed by other professionals. In particular, the most commonly reported 'positive outcome' from BIA input was the reversal of incorrect decisions that people lacked capacity to make decisions about their care. There were also a number of welcome examples where DOLS assessments had led to people being supported to return home from sometimes inappropriate care home placements or led to improved social activities and access to the community on a regular basis.

"Unnecessary" inquests – the Chief Coroner's view

In his 2015-2016 annual report, the Chief Coroner in England and Wales, His Honour Judge Peter Thornton QC pulled no punches in relation to DOLS. He reported a substantial increase in the caseload of all coroners "for no good purpose" as an "unanticipated and unwanted" consequence of the Supreme Court decision in *Cheshire West*. For the first time, the report reveals the number of inquests held for people who died while under a DOLS authorisation which was 7,183 in 2015. As a consequence, bereaved families have been caused considerable distress. The Chief Coroner has called for the Coroners and Justice Act 2009 to be amended so that those who die while subject to a DOLS authorisation should not be subject to a coroner's investigation unless there is a specific reason for referral to the coroner.

Readers may well be aware not just that this was an issue addressed in the Law Commission's Interim Statement on its Mental Capacity and Deprivation of Liberty project, but that Ann Coffey MP sought to move a probing amendment to this end to the Police and Crime Bill in the House of Commons. She did not press it, but the

Minister for Policing, Mike Penning noted that it was "probing in exactly the right direction," and it may well be that this matter is revisited when the matter reaches the House of Lords.

LGA MCA/DOLS resources

The Local Government Association MCA/DOLS resources page has been updated recently to include a number of very useful guides, including:

- "Your Rights" Sheet: a summary of statement of rights for those deprived of liberty;
- A Best Practice Guide to Form 3;
- A Guide to Recognising and Reducing Restrictions.

A list of Independent BIAs (as of April 2016) is also available.

2015-2016 DOLS statistics

The DOLS statistics for England during the period of 1 April 2015 to 31 March 2016 have been published. Here are the main headlines:

- This period saw the greatest number of DOLS applications ever: 195,840.
- 105,055 applications were completed.
- Around half of applications (55,320) were completed within 35 days.
- The average (mean) duration for completion was 83 days.
- 4% (4,335) took 365 days or more to be completed
- Half (51,330) of those not yet signed off had been awaiting completion for up to 188 days (of which 21,370 originated as urgent authorisations).
- Regional variation: for example, North East had three times as many applications compared to London. And 86% of applications granted in North East compared to 44% in South West.
- The highest proportion of applications originating as urgent authorisations was 70% in the East Midlands.
- 3240 Part 8 reviews were completed.
- 84% of standard authorisations were for less than 6 months.

A table demonstrating the effect of *Cheshire West* may be found in the screen-friendly version of the Newsletter.

New COPDOL10 form

As we went to press, we learnt a new COPDOL10 form has been approved which incorporates the additional questions posed by Charles J in *Re NRA* and set out in our Guidance Note on Judicial Authorisation of Deprivation of Liberty. It is available here, but we do not yet know when it will come into force. We will provide a full update in the next edition.

Deputies and remuneration

The Friendly Trust's Bulk Application [2016] EWCOP 40 (District Judge Eldergill)

Deputies – Property and Financial Affairs

Summary

In this case the District Judge had to consider a "bulk application" for approval (retrospective and prospective) of its charges for deputyship functions.

The long and impressively detailed judgment reveals a muddle. The Friendly Trust ('TFT') is a charity that, amongst other functions, takes on the role of deputy of small estates especially where the relevant local authority wants to outsource such work.

It seems, though much judicial digging was needed to establish this, that TFT had been charging at least in some cases the fixed charges that solicitors can charge under PD19B rather than the lower fixed charges allowed to local authority deputies. It also seems that officers in the OPG may have allowed that practice to persist.

Section 19(7) MCA provides for a deputy's remuneration. He is allowed reimbursement of reasonable expenses and, *if the court so directs*, remuneration out of P's estate for carrying out deputy functions.

Rules 167 and 168 make further provision. The court can fix an amount (rare), allow a specified rate, fix fees according to a schedule in a practice direction or order a detailed assessment (usually reserved for larger or more complex estates).

PD19B makes yet further provision. It provides for fixed fees for solicitors and lower fixed fees for public authority deputies. It also provides that solicitors have no right to a detailed assessment unless the court so orders and public authorities have none unless the estate is worth over £16,000. From February 2011 the PD included a paragraph that specifically dealt with not for profit deputies and other professionals, stating that the court could apply its provisions to them.

Thus, if the order appointing the deputy is silent as to remuneration, the deputy is entitled to none. Some of the orders in this case were in this form.

Some of the orders simply provided for fixed costs. The District Judge stated that orders should specify the rate (solicitor's or public authority's), see 93 (e) unless the appointee is a solicitor or a public authority.

Where the order is silent or in relation to new orders and the appointee is not a solicitor but is taking over public authority work (as here) the starting point is that the rate is that allowed to public authorities, see 94 (a) to (c) as P should not put at a disadvantage because of a local authority decision to outsource work, but the appointee can apply for a higher rate with suitable justification, see 93 (d).

The District Judge also considered the question of accountants, saying that where they are appointed, the appropriate fixed fees are likely to be those of a solicitor with the right to seek an assessment. It is interesting to note at this point that in the SCCO report it was revealed that accountants' bills were usually lower than solicitors' because of lower charging rates and a greater propensity to delegate.

The District Judge then considered individual cases. In relation to prospective charging in new cases, he ordered fixed fees on public authority rates with, in a few cases, the right to seek a detailed assessment.

In relation to existing cases, he made preliminary orders. Where there had been no provision for remuneration, he proposed an amendment to allow remuneration at public authority fixed rates. Where the appointing order allowed fixed fees but did not specify which, he proposed an amendment to clarify that the rate was that of a public authority. In such cases, if that meant there had been an overcharge, he directed TFT to quantify the excess and state why the excess should not be repaid.

In some cases, the appointing order allowed a detailed assessment. The District Judge expressed the view that such a provision may or may not be appropriate.

Finally, at 132, the District Judge emphasised that the original *"bulk application"* which envisaged a paper disposal by an authorised court officer without individual notification was inappropriate (although this had been at the OPG's suggestion and the ACO had also acceded to the view that notification was unnecessary). He considered that as the Ps' estates stood to be affected, it was necessary that each affected P be notified to comply with section 4 MCA and the rules of natural justice.

Comment

This case underlines the need for the appointing order to be clear about remuneration and the approach that the court is likely to take to cases where remuneration is sought above public authority rates in out sourced cases, namely that P should be at no disadvantage. It also presages an amendment to PD19B which will expressly state that in respect of out sourced deputyships, it is expected that no more will be charged than if the public authority had carried out the work.

In the case of professional guardians holding five or more financial guardianships, in future the Office of the Public Guardian will no longer undertake a full annual account review in every case. Instead, random samples will be selected. If the outcome of the audits of these is satisfactory, for all other guardianships and other years the Office of the Public Guardian will accept a covering one-page summary sheet only.

Capacity and influence

Poole v Everall [2016] EWHC 2126 (Ch) (Chancery Division (HHJ David Cooke))

Mental Capacity – Testamentary Capacity

Summary

In this case the court had to consider 2 wills, one made in February 2012 and the other made in December 2012. The testator had suffered serious brain injury in a road traffic accident and for a long time had been looked after by Mr Everall, acting as carer. T had received a substantial damages award and the Public Guardian had been appointed receiver and subsequently a solicitor (Mr Lloyd) was appointed deputy.

A medical assessment in February 2012 stated that T had capacity to make a will and that will was drawn up by Mr Lloyd who had the issue of capacity very much in mind.

Mr Everall drew up the December will. Mr Lloyd was not involved. The only other person involved

was Mr Everall's partner. The will left 95% of T's estate to Mr Everall.

Not without hesitation (as there had been contradictory statements), the judge held that the December will had been duly executed. He also held that though there had been no medical assessment in December, the one in February still was sufficient to establish capacity.

He held, however, that Mr Everall fell far short of being able to establish that T knew and approved of the will's contents. At 120-121, the judge referred to the heightened vigilance that the court will employ where the will is drawn and elicited by the main beneficiary especially where T is vulnerable and suggestible and dependent on that person.

The December will was also attacked on the grounds of undue influence. The judge held that in effect, this was excluded by the finding that T had not known and approved of the contents as T could only have been coerced into doing something he did not want to do if he knew what he was doing. See 137.

The result was that the February will was proved in solemn form.

Comment

This case underlines the need for anyone making a will for a person with capacity issues to seek independent advice. More interestingly, it provides a good illustration of the shifting and different burdens of proof and the overlaps and boundaries between capacity, knowledge and approval and undue influence.

Samples of deputy orders and EPA

The OPG has published two sample documents to help people check whether a document purporting to be a deputy court order or an enduring power of attorney is in fact valid.

Security bond provider changed

From 1 October 2016, the OPG and the Court of Protection will only direct deputies to Howden Group UK Ltd for any new security bonds. Those who hold existing bonds with any previously approved suppliers, such as Deputy Bond Services (DBS), do not have to transfer these to Howden UK Ltd. These suppliers will continue to honour and manage all bonds that have been taken out with them after their contract with OPG has ended.

For more details, and for the OPG's (updated) surety bond Practice Note, see here.

OPG proposal for new procedures for to allow variation of security

As set out in this note (reproduced from the STEP website), the OPG is considering whether it should be able to vary the amount of security following a review of the annual report of a property and affairs deputy.

Participation of P in proceedings before the Court of Protection

A County Council v (1) AB (2) JB (3) SB [2016] EWCOP 41 (HHJ Mark Rogers)

Practice and procedure – other

Summary

In the course of welfare proceedings involving a young man, AB, a fact-finding hearing was listed to determine serious allegations against his parents, and the question arose of whether, and how, he was to participate in the hearing. The key issues for HHJ Mark Rogers to determine were framed by Counsel for AB thus:

(a) whether the decision as to whether P in proceedings in the Court of Protection should attend Court is a decision for the Litigation Friend as part of the conduct of proceedings or a best interest determination for the Court;

(b) whether the decision as to whether P in such proceedings gives evidence is a decision for the Litigation Friend as part of his conduct of the proceedings or a best interest determination of the Court;

(c) what the test of competence in Court of Protection proceedings is;

(d) whether AB is competent to give evidence according to that test;

(e) if the answer to (a) is 'the Court' whether it is in AB's best interests to attend Court and meet the Judge, although it seems to be agreed that such a meeting would be appropriate;

(f) if the answer to (b) is 'the Court' whether it is in AB's best interests to give evidence.

The Official Solicitor, on behalf of AB, contended that the key decision-maker in respect of P's active participation in the case is the Litigation Friend, with the Court having no or only a residual duty to overrule.

A further question arose as to whether or how AB should be allowed to participate, whether by attendance or by meeting the Judge, by presence in the court room or via a link, or offering direct oral input into the proceedings. As the judge noted, the use of the term "oral input" as there was an issue to whether what AB says is truly evidence. The Local Authority and the parents all opposed AB giving evidence or addressing the Court other than in an informal meeting with the judge. The parents opposed AB's attendance at Court and the Local Authority had some reservations although would support practical arrangements so long as they did not draw upon Local Authority funding or resources to any significant extent.

As regards the question of who should decide whether P should attend court, HHJ Rogers was clear (at para 49) that:

> *(1) the Litigation Friend has a pivotal role in the conduct of the litigation and should not be supervised or micro-managed by the Court;*
>
> *(2) the Court nevertheless retains the ultimate power to dismiss a Litigation Friend;*
>
> *(3) it follows in principle that a Litigation Friend can decide whether P attends a hearing and tries to participate;*

> *(4) the Court has no general power under the Rules or case management powers to exclude P. Good practice suggests that a constructive dialogue between the Litigation Friend and the Court will be helpful and almost always will achieve practical consensus;*

As regards the question of the test for competence to give evidence in the Court of Protection, HHJ Mark Rogers held that:

> *(5) the Court of Protection is governed by civil rules of procedure and evidence albeit that specific Rules in the Court of Protection have been made. As it is a dynamic jurisdiction it has immense flexibility. Whilst there are helpful parallels to be drawn between the approach in Children Act proceedings and Criminal proceedings I am not prepared to import Section 53* [*Youth Justice and Criminal Evidence Act 1999*] *into this jurisdiction; that is in the end a matter for Parliament;*
>
> *(6) the key provision however remains there already, namely, Rule 95(e), and the Court's ability to have information provided by P is wide and flexible*

Importantly, although HHJ Mark Rogers accepted:

> 46. […] *the reality is that AB has severe disadvantages and his ability to give clear and reliable answers is limited in the view of the experts although it could be said that Ms Dart is more nuanced. However, I do not accept that I am bound to accept the expert view at this stage and in effect abdicate the judicial role or at least subjugate it. It is highly likely that the expert view will prevail, but not even to attempt to give AB an opportunity to contribute even to the fact finding phase is in my judgment too restrictive. The fact that he is almost certainly not competent to give evidence is no reason not to seek with appropriate help to elicit 'information' from him via a skilled intermediary. It may well be that the net result will quickly be apparent that his information is too unclear or lacks probative value and so the exercise can gently be curtailed. In other words, using Rule 95(e) the Court may admit the information but there is no guarantee that it would accept or act upon it. If the Official Solicitor tenders AB to give 'information' I do not accept I have a general power to stop him or that a specific permission arises; it is in my judgment simply an application of Rule 95(e). Of course even if this exercise proves fruitless the position may be different at the best interests stage because it is certainly clear that AB has communicated his views as to the future.*
>
> *47. Accordingly, on the question of his attendance and the provision of evidence or information, I take the view that the Litigation Friend has generally an unrestricted power to conduct the proceedings albeit subject to the Rules and that the Court's powers to intervene or overrule the Litigation Friend are limited to extremities. Rather than create a general case management power, I prefer to characterise the Court's role as dealing with specific best interests decisions as they arise, and they* do *arise in many different circumstances.*

On the facts of the case, HHJ Mark Rogers held that there was no best interest declaration that needs to be made to prevent P's participation; that P should attend and should attempt to participate; and that he can be tendered for questioning, very probably in the context of a Rule 95(e) exercise, which can be curtailed if necessary, even at an early stage. As he noted "[s]*imply to regard AB's contribution as forensically worthless without even hearing him is not something I can contemplate.*"

HHJ Mark Rogers concluded by noting recent case-law from both the Court of Protection and care proceedings such as the *Wye Valley* case and *Re E* [2016] EWCA Civ 473 as exemplifying the modern approach to the issue of participation in its most broad sense.

Comment

[*By way of guest commentary upon the case and as a case study as to how to facilitate the participation of P in proceedings, we reproduce below, with permission, a modified version of the guest post that recently appeared on the Court of Protection Handbook website by Nicola Mackintosh QC (Hon) who acted for P by his litigation friend the Official Solicitor.*[1]]

There are a number of ways in which ways in which practice needs to change within the Court of Protection to ensure that the court and representation process is looked at through P's eyes, rather than just adding P as an afterthought. Whilst the COPR and accompanying Practice Directions may well need to be amended in due course to secure this goal, creative steps are already possible within the framework of the COPR as they stand. As a case study, we set out here those which were implemented to facilitate P's participation in a fact-finding hearing listed to determine allegations of abuse at the hands of his parents.

In the light of the judgment set out above the practical arrangements which had already been made were implemented. These steps show clearly how vital it is when securing and enhancing P's participation that each and every detail of the arrangements is planned from P's perspective and not simply limited to a meeting with the judge (important as that is). This involved the following:

1. P's lawyers meeting with P and securing appropriate Speech and Language Therapy support to prepare for the hearing by exploring concepts such as the following:

   (a) 'what is happening in court, what is a case, why is your case in court, what is the case about'?

   (b) 'what is a judge, what will the judge be deciding, why is it important to you'?

   (c) 'what will happen at the hearing, who will speak when, how long will it take etc.'?

   (d) 'how can I tell my story'?

2. Considering which court location would best meet the needs of the case, taking into account all physical facilities, travel time for P and others etc.

3. As the court's video facilities did not allow for P to be in an adjacent room viewing the proceedings from a distance so as to minimise distress, an alternative facility was found nearby which could provide a video link to the court. Arrangements were made for this between the IT specialists of the court and the other facility, and for the video link to be tested in advance to ensure it was working. In the event this facility was not used as P remained in court throughout the proceedings.

[1] It will also appear in the second edition of the Court of Protection Handbook, due out in November. Recognising the importance of this area, members of the Court of Protection team in Chambers have also recently had specialist training in arrangements for vulnerable witnesses giving evidence.

4. (With consent) taking photographs of the judge, the courtroom and all the lawyers involved in the proceedings to explain to P the physical location and the identity of all involved in advance of the hearing.

5. Before the hearing arranging a visit by P to the courtroom when the court was not sitting to see the layout, and also to meet the court clerk who was to be allocated to the hearing days.

6. Deciding where it was best for P to sit in his wheelchair in the courtroom to listen to the proceedings, taking into account the position of other parties and 'lines of sight' with others.

7. Arranging for P to be supported by staff regarding personal care, and ensuring mobile hoists were provided for P in both locations for care.

8. Ensuring that there was enough physical space in the court complex so that P had a separate room just next to the courtroom, with a fan (P being a wheelchair user had reduced temperature control).

The first day of the hearing was listed as a Ground Rules Hearing, as provided for in the Advocates' Gateway. On the first day, as planned, the judge met with P in a side room next to the courtroom. P's solicitor was present, and P's SALT also assisted by explaining to the judge that P was able to respond 'yes, no, happy and sad' through different Makaton signs. P showed the judge how he communicated each of these expressions, enabling the judge better to understand how to interpret P's wishes and reactions.

Although the fact finding hearing was listed for 9 days, after the initial part of the first day of the hearing (P being present in court with his carers and intermediary) the parties set out their updated positions which then resulted in negotiations to see if a settlement could be reached without the need for the fact finding process. This lasted the first day and the terms of an order were agreed on the second day of the hearing. P was present during all discussions between lawyers and the court, and communicated his wish to continue to be involved and to listen to the proceedings. Between updates to the court he was permitted by the judge to remain in the courtroom with his support workers, watching a DVD. This reduced the need for him to be taken in and out of the courtroom, waiting for long periods in a small stuffy side room, and was invaluable. This could not have been arranged without the court's co-operation and flexibility of the court staff.

Once agreement had been reached in principle between the parties as to the core issues in the case, it was considered vital for P's wish to 'tell his story' to be facilitated. A very careful consideration of the issues raised, and the broad themes set out in the fact finding schedule was undertaken. Questions of P were drafted by P's legal representatives with the assistance of P's SALT and intermediary. As P's communication was limited to responses such as 'yes, no' etc, it was necessary for leading questions to be posed however these were broken down into questions so that the leading element was minimised. Examples of questions included 'Do you want to talk about when you were living at home?', 'How did you feel when you were living at home?', When you were living at home did anyone do X to you?', and if the answer was affirmative, 'How did it make you feel?' These questions were devised to ensure that P's broad wishes were

communicated to the court notwithstanding the agreement between the parties, so that P felt that he had been listened to by the parties and the judge, but avoiding detailed questioning on the fact finding schedule which eventually proved to be unnecessary.

The question and answer sessions were broken down into more than one session to allow P to rest and refocus. With agreement they were filmed on a mobile phone and then played to the judge in his chambers. They were then also played to the other parties. This flexibility avoided all the delays and organisational problems associated with using the court video facilities.

By the end of the second day, agreement had been reached in the form of a detailed order. The judge held a further short hearing and again explained the outcome to P, coming into the courtroom and sitting by P to confirm what was going to happen. P was repositioned in his wheelchair to be solely in the line of sight of the judge and not the other parties.

Although this case required considerable practical arrangements to be made, forward planning was vital in ensuring that all elements of P's participation was effective in meeting the goal of P's enhanced involvement in the proceedings. Each case will be as different as each P is different. The more that proceedings in the Court of Protection are attended by P, or P's participation is secured by other creative means, the more the judiciary, Court staff, lawyers and all the parties will become accustomed to putting P at the centre of the process, and making appropriate arrangements. This is the beginning of a new era in the Court of Protection. This is only right given the role of the Court in making decisions which are of such fundamental importance to P's life.

Extending the great safety net abroad

Al-Jeffery v Al-Jeffery [2016] EWHC 2151 (Fam) (Family Division (Holman J))

Other proceedings – Family (public law)

Summary

In this case, Holman J confirmed for the first time that the High Court can exercise its inherent protective jurisdiction over a vulnerable British adult on the basis of their nationality, even if they are not habitually resident in England and Wales.

The case, which was the subject of considerable media attention whilst it was ongoing, concerned a 21 year old dual British-Saudi woman who was born and lived in Wales until just before she turned 17, at which point she travelled (in 2012) to Saudi Arabia at the insistence of her Saudi father. She had remained there thereafter and alleged in proceedings brought under the inherent jurisdiction that she was being seriously ill-treated by him, including by being kept in caged conditions in his flat, and that she was prevented from leaving Saudi Arabia and returning to Wales or England. She also sought a forced marriage protection order, although this application was ultimately abandoned during the course of a hearing listed before Holman J to consider what, if any, jurisdiction he had to make orders in relation to Ms Al-Jeffery (in respect of whom it is important to note that there was no suggestion that she was of anything other than unimpaired mental capacity). The father's refusal to comply with earlier orders (made without formal determination of jurisdiction) to

return his daughter to England and Wales or to allow her to speak privately to her instructing solicitor without fetter or fear of fetter had meant that it was not possible to proceed with a fact-finding hearing, such that Holman J proceeded in his consideration of whether he had jurisdiction on the basis of *prima facie*, rather than judicially determined facts.

It was agreed before the court by counsel for both daughter and father that the inherent jurisdiction existed and would apply if the facts alleged by the daughter were true and she were physically present in England and Wales. Holman J, relying (in particular) on *DL v A Local Authority* [2012] EWCA Civ 253, endorsed this proposition, noting that he had no doubt at all that "if all the facts were the same but occurring here in Wales or England, the inherent jurisdiction for the protection of vulnerable adults is engaged and I have a very wide range of powers" (para 42). Importantly, Holman J also noted (relying on *Re SA* [2005] EWHC 2942 (Fam)) that the trigger for this jurisdiction being engaged was that there was a reasonable belief that the person was for some reason in need of the protection of the court, such that it would be "*intolerable*" (para 41) were a failure by one party (here the father) to enable a fact-finding hearing to proceed so as to enable the court to proceed on the basis of established, rather than *prima facie* facts.

The complicating factor in the instant case was that Ms Al-Jeffery had not resided or being present anywhere in the UK since 2012, and her counsel conceded that she could no longer be considered habitually resident in England and Wales (although he did not concede that she was now to be considered habitually resident in Saudi Arabia). Holman J expressed the view that she was, in fact, in fact habitually resident there and had been so since April 2013, but that in any event he would proceed on that assumption.

The only basis for exercising jurisdiction, Holman J held, was therefore that she had British citizenship or nationality. He noted that "[i]*n the recent cases of Re A (Jurisdiction: return of child) [2013] UKSC 60 and Re B (A child)(Habitual residence: inherent jurisdiction) [2016] UKSC 4 the Supreme Court has twice reaffirmed that the British nationality alone of a child is a sufficient basis for exercising the inherent or parens patriae jurisdiction in relation to children*" (para 44), that "*the jurisdiction based on nationality alone should only be exercised with extreme circumspection or great caution and where the circumstances clearly warrant it*" (para 46), that "*the jurisdiction should only be exercised with great caution and circumspection, and particular care must be taken not to cut across any relevant statutory scheme, but that does not limit it to cases "at the extreme end of the spectrum*" (para 48), concluding that:

> *It seems to me that at para.60 of Re B Lady Hale and Lord Toulson do helpfully indicate a test when they said "the real question is whether the circumstances are such that this British child requires that protection". That has an echo in the words of Lord Sumption at para.87 where he referred to "… a peril from which the courts should 'rescue' the child …*

Holman J then turned to the question of whether that jurisdiction could be exercised in relation to an adult, and had little hesitation in concluding that it could:

> *50. The courts having clearly held that the vulnerable adult jurisdiction is indistinguishable from the parens patriae jurisdiction in relation to children, it seems to me that exactly the same approach as that analysed and discussed by the Supreme Court in Re A and Re B should inform my approach*

to the present case. The jurisdiction based on nationality must apply no less to an adult than to a child. As Bennett J asked rhetorically in Re G (an adult) (mental capacity: court's jurisdiction) [2004] EWHC 2222 (Fam) at para.111 (quoted with obvious approbation by Munby J in Re SA at para.65):

"Why then should G, now an adult, be worse off than she would have been had the matters arisen if she was a child?"

51. If it is appropriate to extend the protection of this court to a British citizen abroad when that person is 17, it cannot be less appropriate to do so just because he attains 18 or 21 or, indeed, any other age. The focus must be upon whether the citizen requires that protection and upon the peril from which he may need to be rescued; not upon whether he happens to be above or below the age of 18. Further, although there is a statutory framework (including the provisions of EU Council Regulations) which regulates the exercise of jurisdiction in relation to children, there is none in relation to adults. I do not suggest that for that reason the court should be any less cautious or circumspect in relation to its exercise of the jurisdiction to protect adults rather than children, but there is no obvious reason why it should be even more so. Mr. Scott-Manderson suggested in his final written schedule of balancing factors that the required caution is even greater in the case of an adult than of a child. When I asked why, he said because the use of the inherent jurisdiction based on nationality in the case of adults is very rare. It is; but just because it is very rare does not seem to me to require that even greater caution is required. "Great caution" or "extreme circumspection" means what it says, whether the person concerned is a child or an adult. To exhort even greater or more extreme caution or circumspection is, frankly, to succumb to hyperbole.

He therefore concluded that "*there is an inherent jurisdiction to protect vulnerable adults who are habitually resident abroad, but are British citizens; and that on the facts alleged by Amina, which include constraint and ill-treatment, that jurisdiction is engaged by this case*" (para 51).

Having held that there was a jurisdiction, Holman J had then to consider the second question – namely whether he should exercise his discretion to do so. His discussion balancing the factors for and against (the fact of her dual nationality being a particularly weighty one against) is lengthy, but he proceeded in particular by reference to the three main reasons identified by Lady Hale and Lord Toulson in *Re B* for caution: namely (1) the risk of conflict with the jurisdictional scheme between the applicable countries (there being no such scheme in place here; (2) the potential for conflicting decisions between the two countries (there being no such risk here); and (3) the risk that the orders made might be unenforceable (a real risk in the instant case, but where Holman J considered that the court had considerable moral and practical "hold" over the father). Whilst noting that there were dicta in both *Re A* and *Re B* to the effect that an assessment "in country" should take place before the jurisdiction were exercised, Holman J noted that these were in a different context, and the instant case concerned an adult aged 21 who subject to the constraints allegedly placed on her by father, could and indeed sought to speak for herself.

Holman J had then to consider what order he should actually make. On the facts of the case before him, he concluded that the appropriate order to make was one directed against the father himself personally "*that he must permit and facilitate the return of Amina, if she so wishes, to Wales or England and pay the air fare* [and that] [h]*e must at once make freely available*

to her both her British and her Saudi Arabian passports." He specified that Ms Al-Jaffery had to be enabled to return to England and Wales by 11 September 2016, and at the time of writing it is not known whether or not the father will comply. Holman J further provided for a hearing before him shortly thereafter, emphasising at paragraph 66 that he wished to make:

> *crystal clear that, apart from requiring her attendance before me at that hearing, if she has indeed voluntarily returned to Wales and England, I do not make any order whatsoever against Amina herself. The purpose is not to order her to do anything at all. Rather, it is to create conditions in which she, as an adult of full capacity, can exercise and implement her own independent free will and freedom of choice. To that end, I will give further consideration with counsel after this judgment to what mechanism can now be established to enable her freely to state, if that be her own free decision and choice, that she does not now wish to avail herself of the opportunity provided by my decision and this order to return to Wales or England.*

This is a very significant case because no previous reported judgment had explored the extent to which the nationality-based inherent jurisdiction could be exercised in relation to those over 18 (the closest of which we are aware being that of *O v P* [2015] EWHC 935 (Fam), concerning the extension beyond the age of 18 of orders made in wardship proceedings). Whilst – in this case – the 'nationality' inherent jurisdiction was deployed to protect a person falling outside the scope of the MCA, we would suggest that it would be equally possible to deploy the jurisdiction in respect of an adult who lacks capacity but who is no longer habitually resident in England and Wales. In such circumstances (and as discussed further in Alex's recent article in the Elder Law Journal *Getting Granny Back: International Adult Abduction and the courts* [2016] ELJ 152), the Court of Protection no longer has jurisdiction over the person's welfare because its jurisdiction is based upon the statutory provisions of Schedule 3 to the MCA 2005 and the limitation thereto to habitual residence (in the case of decisions relating to the welfare of the individual). However, and in line with the approach taken elsewhere by the judges where there is a statutory lacuna in relation to those lacking capacity (see, for instance, *Dr A*'s case), we would suggest that it is equally appropriate for a judge of the High Court to have recourse to the inherent jurisdiction if the circumstances warrant it. This is particularly important given that: (1) (unlike in relation to children) habitual residence is not 'frozen' in relation to adults lacking capacity by the issue of proceedings and can change even whilst they are ongoing; (2) the potential that even where removal has taken place from the jurisdiction in doubtful or outright wrongful circumstances, habitual residence can still change. Enabling the court (albeit in a different guise) to continue to exercise a protective jurisdiction over a British national in such circumstances is therefore important so as to prevent the court's ability to take measures from being stymied by an abductor simply failing to bring the person back to England and Wales for a sufficiently long period of time.

Short Note: service on litigants in person

In the Family Division case of *Re B (Litigants in Person: Timely Service of Documents)* [2016] EWHC 2365 (Fam), Peter Jackson J (with the approval of Sir James Munby, as President of the Family Division) has held that, where one party is represented and the other is a litigant in person ('LIP') the court should normally direct as a matter of course that the Practice Direction

documents under PD27A are to be served on the LIP at least three days before the final hearing, especially where the LIP is not fluent in English. The method of service, usually email, should be specified. Where time permits, the court should consider directing that the key documents are served with a translation. In cases where late service on a LIP may cause genuine unfairness, the court should consider whether an adjournment of the hearing should be allowed until the position has been corrected.

We suggest that a similar practice both should and is likely to be adopted in the Court of Protection in relation to the key documents identified in Practice Direction 13B so as to avoid the intrinsic unfairness to LIPs that may arise from late service. As Peter Jackson J noted, this will place further obligations on advocates and those who instruct them.

Short Note: no power of arrest under the inherent jurisdiction

In further confirmation that the inherent jurisdiction is both complex and an uncertain tool for the protection of those who fall outside the scope of the MCA 2005 but are vulnerable, HHJ Clifford Bellamy has recently confirmed in *Re FD (Inherent Jurisdiction: Power of Arrest)* [2016] EWHC 2358 (Fam) that – contrary to the understanding of many – that the High Court cannot attach a power of arrest to an order made under the inherent jurisdiction in respect of such a vulnerable adult.

Those who are concerned about the complexity and uncertainty of the law in this area might (we venture) consider drawing to the attention to the Law Commission that they may wish to consider as part of their 13th programme of Law Reform a codification of the inherent jurisdiction (or even a wider Vulnerable Adults Act) to bring clarity to the measures that can be taken to safeguard those who fall outside the scope of the MCA 2005. If you do, the deadline for responses to the Commission is 31 October, and the details can be found here.

Short Note: indemnity costs and the litigant in person

In *Re A*[2016] EWCOP 38, Sir James Munby took the unusual – but on the facts of the case – entirely warranted step of ordering a litigant in person to pay indemnity costs, where his "*unrelentingly pertinac*[ity] *in pursuit of what he believes to be his aunt's best interests… has become obsessive and his desire to litigate (most of the time as a litigant in person) and to correspond with all and sundry has become compulsive*." This is the first reported case of which we are aware where a litigant in person has been ordered to pay indemnity costs in the Court of Protection (and indeed, an individual as opposed to a local authority). The individual was also made the subject of an extended civil restraint order for two years.

Short note – out of hours medical treatment

In *An NHS Trust v HN* [2016] EWCOP 43, Peter Jackson J was called upon to determine an urgent serious medical treatment case out of hours in circumstances. We note the case not because of its outcome but because of the fact that it serves as a reminder that the Official Solicitor does not offer an out of hours service, and was therefore not in a position to represent P. The case should therefore serve as a reminder both to bring medical treatment cases within office hours if possible, and also to ensure that the Official Solicitor is served with papers as early as possible

to offer such assistance as he can during office hours.

COP statistics

The most recent COP statistics have now been published by the MOJ, covering the period April to June 2016.

In April to June 2016, there were 7,616 applications made under the Mental Capacity Act 2005, up 13% on the equivalent quarter in 2015. The majority of these (54%) related to applications for appointment of a property and affairs deputy. Following the introduction of new forms in July 2015, applicants must make separate applications for 'property and affairs' and 'personal welfare'. This is why there have been almost no 'hybrid deputy' applications in 2016. There were 6,700 orders made, 13% lower than the same quarter in 2015. Most (53%) of the orders related to the appointment of a deputy for property and affairs. The trend in orders made mirrors that of applications and has been steadily increasing since 2010.

Applications relating to deprivation of liberty increased from 109 in 2013 to 525 in 2014 to 1,497 in 2015. There were 743 applications made in the most recent quarter, double the number made in April to June 2015. Of the 743 applications made in April to June 2016, 528 (71%) came from a Local Authority, 179 (24%) from solicitors and 36 (5%) from others including clinical commission groups, other professionals or applicants in person. Over half (55%) of applications for deprivation of liberty were made under the *Re X* process.

Experts out of bounds

In the matter of Re F (a minor) [2016] EWHC 2149 (Fam) (Family Division (Hayden J))

Practice and procedure – other

Summary

This is an unusual case in which a high court judge was asked to make findings on the probity and reliability of a Consultant Clinical Psychologist (Dr Ben Harper) who had been instructed in public law care proceedings being heard by HHJ Wright in the Family Court in Sheffield. The mother in those proceedings had covertly recorded assessment sessions with Dr Harper and her legal team sought to use the recordings to challenge the psychologist's court report in respect of the mother.

Hayden J ordered a verbatim transcript of the recordings to be filed at court and directed that a Schedule of Findings should be prepared by the mother's legal team.

The mother's legal team prepared a 'very extensive' schedule which was summarised by Hayden J as alleging: "*false reporting*," "*inaccurate quoting*," being designed to present the mother in a "*negative light*," "*fabrication of conversations*" and "*deliberate misrepresentation*." In cross examination, leading counsel for the mother accused Dr Harper of "*lying*."

The judge first turned his mind to the standard of proof, given that the discrete issue before him involved an imputation on the reputation of a professional man which would require tight procedural compliance if brought in disciplinary proceedings. Hayden J held (following agreement from the parties) that the Civil Standard of proof applied: "*the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the*

facts" (Baroness Hale in *Re B (Care Proceedings): Standard of Proof* [2008] UKHL 35).

Hayden J did not address what he described as the "*minute allegations*" in the schedule prepared by the mother's legal team, describing them as "*of varying cogency and forensic weight*." Instead he analysed those allegations which it was necessary for him to determine in order properly to resolve the issues in the care proceedings. He then considered a further "*important question*," namely whether the findings made out against Dr Harper were sufficiently serious so as to render his evidence in these proceedings unreliable.

Hayden J held that several of the allegations made against Dr Harper were well founded and that they were sufficiently serious so as to render his evidence in the proceedings unreliable.

The first allegation that Hayden J considered was in respect of distorted reporting. In response to the mother's Schedule, Dr Harper made the following concession: "*12. There are a number of occasions where I have referred to Mother as having said something by way of italicised text within double quotes. It is quite clear to me that anyone reading my report would have interpreted these as suggesting they were verbatim quotes. I did not, however, take verbatim notes and a number of sentences attributed to Mother are inaccurate*."

Hayden J described that paragraph in damning terms as seeming designed to minimise the extent of the "*very significant failing it* [represented]." It seems that in cross examination Dr Harper accepted that the phrases in quotation marks are "*a collection of recollections and impressions compressed into phrases created by Dr Harper and attributed to the Mother.*" Hayden J was unsurprisingly highly critical of this practice and concluded: "[t]*he report is heavy with apparent reference to direct speech when, in truth, almost none of it is. Thus the material supporting the ultimate conclusion appears much stronger than it actually is. Given the forensic experience of Dr Harper and this extremely impressive academic background I cannot accept that he would have failed to appreciate the profound consequences of such distorted reporting.*" Dr Harper had adopted a similar approach when reporting to the court on the children involved in proceedings which was a cause of concern to the children's Guardian.

The second allegation considered was that (as framed by counsel for the mother) Dr Harper had "*lied*" about the content of a discussion which took place on 6 April 2016. This conversation (unlike others) had not been subject to covert recording. The judge accepted Dr Harper's account of that meeting in part (he accepted that he intended to look at the inconsistencies in the mother's various narrative accounts) but did not accept that Dr Harper had dealt with between 13 and 20 significant points of assessment in what both parties agreed was about a 15 minute meeting.

The judge concluded that "*the overall impression is of an expert who is overreaching his material, in the sense that whilst much of it is rooted in genuine reliable secure evidence, it is represented in such a way that it is designed to give its maximum forensic impact. That involves a manipulation of material which is wholly unacceptable and, at very least, falls far below the standard that any Court is entitled to expect of any expert witness*." He held it to be manifestly unfair to the mother who was battling to achieve the care of her children whilst trying to manage life with diagnosed PTSD. Dr Harper's professional failure had compromised the fairness of the process for both the mother and the children

(see *Re B-S* [2013] EWCA (Civ) 1146 and *Re A* [2015] EWFC 11).

The judge noted that the local authority had submitted that Dr Harper's central thesis was probably correct and that the report should therefore be allowed to stand with the judge hearing the case attributing weight as he saw fit. Hayden J acknowledged that the central thesis may well be right but disagreed that the report should be allowed to stand, considering that there were such fundamental failures of methodology that no judge could fairly rely on the conclusion.

The judge agreed with counsel for Dr Harper that the issue in relation to the mother's evidence was 'reliability' not 'credibility' and noted that he had found himself unable to place a great deal of weight on her evidence even where his findings were essentially in her favour.

In concluding the judge cited the observations of Dame Elizabeth Butler-Sloss P in *Re U: Re B (serious injury; standard of proof)* [2004] 2 FLR 263 at 23iv: "*The court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour-propre is at stake, or the expert who has developed a scientific prejudice.*" Hayden J did not consider that Dr Harper had developed a scientific prejudice nor that he was jealous to guard his amour-propre but he did consider that "*his disregard for the conventional principles of professional method and analysis* [displayed] *a zealotry which he should recognise as a danger to him as a professional and, more importantly, to those who I believe he is otherwise genuinely motivated to help and whom he plainly has much to offer*."

Comment

This case plainly turns on its own facts in that distorted reporting is not a usual feature of expert reports in the COP or elsewhere. Nevertheless, it contains a useful reminder of the depth and quality of scrutiny of expert reports in the High Court: a depth and quality which should be the starting point for consideration of all expert reports in the COP. In a forum where people's liberty is at stake or where decisions are being taken about a person's capacity or best interests, their medical treatment or their financial welfare we should all take heed of the caution of Dame Elizabeth Butler-Sloss P and be on guard against the over-dogmatic expert.

"Transforming our justice system"; summary of reforms and consultation

On September 15 the Ministry of Justice published a statement jointly with The Lord Chancellor, Lord Chief Justice, and the Senior President of Tribunals setting out their shared vision for the future of Her Majesty's Courts & Tribunal Service. It also issued a consultation paper outlining what the Ministry of Justice is doing to achieve reform of the justice system and inviting the public and interested stakeholders to give their views on certain specific measures.

Two of the proposals in particular raise specific concerns for vulnerable clients: the proposals for increased assisted digital facilities and the proposed changes in panel composition for mental health tribunals.

The paper recognises that not everyone will be able to engage with digitised processes, and sets out proposals to support people who need it to interact with the new system namely:

- Face-to-face assistance – for example, aiding completion of an online form and proposes that his type of service may be supplied by a third party organisations in some cases.

- A telephone help service offering similar advice, which the government would expect to be staffed by Her Majesty's Court and Tribunal System (HMCTS).

- Web chat to guide people through online processes.

- Access to paper channels for those who require it

Consultees are asked for their view on whether these proposals are the right ones to enable people to interact with HMCTS in a meaningful and effective manner

The government has returned again to its proposals to fully digitise applications for Lasting Powers of Attorney. Applications have been partially digitised since 2014, which the government states has resulted in fewer application forms being returned because of errors. The proposal to digitise lasting powers of attorney was strongly resisted by the legal profession when first proposed in July 2012.

The government also proposes to amend the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 to give the Senior President of Tribunals (STP) greater freedom to adopt a 'more proportionate and flexible approach' to panel composition, by:

- Providing that a tribunal panel in the First-tier Tribunal is to consist of a single member unless otherwise determined by the SPT; and

- Removing the existing requirement to consider the arrangements that were in place before the tribunal transferred into the unified system.

Currently a decision that disposes of proceedings or determines a preliminary issue made at, or following, a hearing at a Mental Health Tribunal must be made by a judge sitting with another member who is a registered medical practitioner, and one other member who has substantial experience of health or social care matters.

The paper proposes that where specialist expertise or knowledge is required, it will still be

provided but the SPT will be able to consider more flexible allocation of the specialist resource provided by non-legal members. For example, the paper suggest, they could be used as a pool of specialist experts who could be deployed across various Chambers and jurisdictions who would benefit from their expertise, answering specific queries from judges or helping people work through the process by sharing their skills and knowledge.

Consultees are asked for their views on which factors should be considered by the SPT to determine whether multiple specialist are needed to hear individual cases and requests that consultees state their reasons and specify the jurisdictions and/or types of cases to which these factors refer.

The consultation closes at 11.45 p.m. on the 27 October 2016. Responses should be made online at: https://consult.justice.gov.uk.

Beverley Taylor

Care Act for Carers: One Year On: Report by Carers Trust

The Care Act came into force in England on April 1 2015. It replaced the 1948 National Assistance Act and 60 years of piecemeal amending legislation that both consolidated and simplified care law in England. It set in place a new organising principle for decision makers, the promotion of individual wellbeing, and placed the rights of informal carers on an equal footing to those with care needs.

One year after the Act's implementation former Minister of State for Care and Support, Rt Hon Prof Paul Burstow, was asked by the Carers Trust to chair a review Commission to find out how the Care Act was working for carers. The results of the inquiry were published in the House of Commons on 4 July 2016, and available here.

During the course of the 6 month enquiry the review Commission conducted an online and offline survey, took written submissions and held three oral evidence days in Birmingham, Leeds and London.

The results showed that although the Care Act had been widely welcomed, implementation of the Act was far from complete. 69% of carers responding to the survey had not noticed any difference since the Act's introduction and many expressed frustration and anger at the lack of support they received in their caring role. The survey of carers found that too many carers were unaware of their rights and 65% of the carers surveyed had not received assessments under the Act. 35% of those that had received assessments had not found them helpful.

The Care Act and statutory Guidance accompanying the Act make clear that carers' eligibility for support is independent of the person they care for. The review found evidence to suggest that practitioners are not always clear on this point. It also appears that not all local authorities are complying with the letter of the law in the way they assess and respond to carers' needs. The review recommended further study in relation to this. Many carers continue to find engagement with health services problematic for them and the person they care for, the report noted that there were many opportunities for the NHS to support carers, particularly with identification. The Commission welcomed the new NHS Carers Toolkit introduced in May 2016

There was little evidence that the Act's market-shaping duty has benefited carers and promoted

innovation and the report suggested that local authorities could do more to develop their offer to carers.

In all the report makes 22 recommendations including the following key recommendations

- It recommended that national and local Government, together with the NHS, urgently invest in the support needed to ensure that the new legal rights for carers are fully introduced in all areas, so that carers receive the assessment, support and breaks they need to be able to choose how and when they care.

- Local authorities ensure that all social workers and assessors are appropriately trained, and are able to reflect the wellbeing principle in assessment and care and support planning.

- Local authorities, with the Local Government Association (LGA) and the Association of Directors of Adult Social Services (ADASS), review their systems for monitoring progress in implementing the Act. The Short- and Long-Term (SALT) return should be reviewed, so that it captures all assessment and support activity for carers, including prevention.

The report concluded that there was still good reason to be optimistic about the transformative potential of the Care Act. However implementation support is still required, and it recommended that further study and evaluation should be put in place.

The report can usefully be read alongside:

- ADASS's *Making Safeguarding Personal Temperature Check 2016*, a report commissioned to review how the Making Safeguarding Personal approach has fared (and been improved) in light of the introduction of the Care Act;

- NHS Digital's most recent safeguarding statistics, showing that between April 2015 and March 2016 there were 102,970 individuals subject to enquiries under *section* 42 Care Act 2014, 930 fewer than in 2014-15. Amongst other data, it shows that 27% of adults subject to an enquiry lacked the capacity to make decisions about their protection, including their ability to participate in the investigation and their capacity at the time the incident that triggered the enquiry took place.

Beverley Taylor

World Guardianship Congress report

The 4th World Congress on Adult Guardianship was held at the end of September in Erkner, Germany. Two of your editors attended: one, Alex, as participant, and one, Adrian, as speaker. The congress was attended by many professional guardians from around the world (most, very crudely, discharging functions akin to those of deputies under the MCA 2005), academics, lawyers and judges. The single biggest national contingent – understandably – came from Germany, but delegates attended from every inhabited continent. In both plenary sessions and parallel workshops, a multitude of issues were addressed – a flavour being found from the abstracts and working papers to be found on the Congress website here.

From Alex's perspective perhaps the most fruitful debates arose in consequence of the search to

explain across and between jurisdictions the principles underlying the relevant national legislation (and its operation in practice). In this regard, Adrian set the ball rolling in expert fashion with a wide-ranging and very well-received comparative review of international protection of adults, which is available here (together with a continuation piece from a subsequent session on decision makers within formal support mechanisms). Both of these will be reworked and revisited in due course for publication.

A particular theme – at least from Alex's perspective – was the extent to which current regimes comply with the CRPD; a theme given particular emphasis given the presence of and contributions from Professor Theresia Degener, Vice-Chairperson of the Committee on the Rights of Persons and Disabilities, and also the discussions throughout of the implications of the very recent German Constitutional Court decision in 1 BvL 8/15 relating to forced medical treatment (a detailed article on this will be contained in the next Newsletter). The discussions around this theme at the conference felt, in many ways, much like a continuation of the intensive discussions which went into the EAP 3 Jurisdiction report relating to compatibility of (in)capacity legislation in the UK with the CRPD, and – like those discussions - revealed new areas for investigation and work as much as they did give answers and solutions.

The Congress had a very important practical outcome in the shape of the adoption of the revised Yokohama Declaration, setting out principles for the development of regimes for the legal support and protection of adults. The process of revision had begun in advance of the Congress, coordinated by the International Guardianship Network and the organisers of the Congress, with a working group chaired by Prof Dr Volker Lipp and Prof Dr Dagmar Brosey, of which both Adrian Ward and former Senior Judge of the Court of Protection Denzil Lush were members. Further input was provided by members of the International Advisory Board. The outcome of this process was a Declaration (which, importantly, contains within it a recommendation that it is kept under review) which both stylistically and substantively rather different to the original declaration.

How far the CRPD has already produced movement towards systems which are centred around the adult in question since the original Declaration was adopted in 2010 can be seen not just in the removal of the term "guardianship" from all substantive parts of the declaration, but also in comparing the first key declarations from the two documents. In the original declaration, the first declaration read:

> ***WE DECLARE*** *that in the context of adult guardianship:*
>
> *(1) a person must be assumed to have the mental capacity to make a particular decision unless it is established that he or she lacks capacity;*
>
> *(2) a person is not to be treated as unable to make a decision unless all practicable steps to help him or her do so have been taken without success;*
>
> *(3) legislation should recognize, as far as possible, that capacity is both "issue specific" and "time specific" and can vary according to the nature and effect of the decision to be made, and can fluctuate in an individual from time to time; and*
>
> *(4) measures of protection should not be all-embracing and result in the deprivation*

of capacity in all areas of decision-making, and any restriction on an adult's capacity to make decisions should only be imposed where it is shown to be necessary for his or her own protection, or in order to protect third parties.

(5) measures of protection should be subject to periodic and regular review by an independent authority wherever appropriate.

By contrast, in the revised document, the first declaration reads:

***WE DECLARE** that in the context of the legal support and protection of adults:*

(1) all adults must be assumed to have the capability to exercise their legal capacity without support unless it is established that they require support or need protection in relation to a particular act or decision;
(2) support and protection includes taking all practicable steps to enable the adult to exercise his or her legal capacity.

(3) law and practice should recognize that requirements for support and protection are both "issue specific" and "time specific", that they can vary in intensity and can vary according to the nature and effect of the particular act or the decision to be made, and that they can fluctuate in an individual from time to time.

(4) measures established autonomously by an adult should have precedence over other measures relating to the exercise of legal capacity.

(5) the imposition in any individual case of any measure of support and protection should be limited to the minimum necessary intervention to achieve the purpose of that measure.

(6) measures of support and protection should be subject to periodic and regular review by an independent authority. The adult should have an effective right to institute such a review irrespective of his/her legal capacity.

(7) measures in relation to the exercise of legal capacity should only be imposed where it is established that they are necessary and in accordance with international human rights law. They should not be applied in order to protect third parties.

(8) all forms of incapacitation which restrict legal capacity irrespective of the existing capabilities of the adult should be abolished.

These revised principles certainly do not represent an end-point in our journey towards regimes that properly comply with the CRPD. However, it is suggested that they represent a model of best (current) practice that should serve both as a yardstick to test current national legislation against and as a goad to further action. For bringing about the adoption of the revised Declaration alone – but indeed for very much more – the organisers of the Congress are very much to be congratulated.

New capacity legislation in Jersey

The Capacity and Self-Determination (Jersey) Law 2016 was passed by the States Assembly in September 2016, with Royal Assent expected in November. It includes provisions relating to deprivation of liberty which – interestingly – are predicated upon a statutory definition of

"significant restriction upon liberty," and which are anticipated to come into force in 2018.

The Singapore case of *Re TQR*: Safeguards & Principles Pertaining to a Deputy's Investment Powers

[Editorial Note: this guest article by Yue-En Chong[2] uses a recent decision in Singapore to highlight some of the key similarities and differences between the MCA 2005 and the Singapore MCA]

Introduction

The Singapore Mental Capacity Act ('SinMCA2010') (which can be found at statutes.agc.gov.sg) came into force in 2010. As it was the Singapore Parliament's intention to model SinMCA2010 after the England and Wales Mental Capacity Act 2005 ('MCA 2005'), key sections in the SinMCA 2010 were replicated from the MCA 2005 (see comparative table available here). As such, with the great similarities between both MCAs, cases from the Court of Protection ('COP') have, thus far, been an excellent resource to both Singaporeans MCA Practitioners and the Singapore's Family Justice Court ('FJC') in interpreting and applying key principles in the SinMCA2010.

Re TQR [2016] SGFC 98 is an example of a novel FJC case where the basis of its decision was formulated with reference to the similarly novel case of *Re Buckley: The Public Guardian v C* [2013] EWHC 2965 (COP). *Re TQR*, like *Re Buckley*, focused on laying out guidelines governing the deputy's investments of P's monies and it is suggested that such close referencing was possible considering Section 24(9)(b), SinMCA2010 and Section 19(8)(b), MCA2005 are identical where both the COP and the FJC may,

> *…confer on a deputy powers to exercise all or any specified powers in respect of it, including such powers of investment as the court may determine.*

Facts

P had assets amounting to over SGD $6 million and P's Deputies were seeking to be given powers to make investment decisions in respect of P's assets. The FJC had to decide if such powers should be given and if so, the extent of such powers.

Decision: Investment Principles and Guidelines

The FJC adopted a similar approach to that of Senior Judge Lush in *Re Buckley*:

- Making reference to the MCA principles (Sections 3(4) & 3(5) SinMCA 2010, identical to Sections 1(4) & 1(5) MCA 2005), the FJC concluded that unlike a person with mental capacity who is free to make any investment decision he wishes, a Deputy who makes an investment decision for P does not have the luxury of making unwise decisions but is required to make decisions that are in P's best interest (at [8] & [9], see *Re Buckley* at [23] & [24]).

- Making reference to Section 6(7) SinMCA 2010 (identical to Section 4(6) MCA 2005), while a Deputy making an investment decision for P must consider what P would have done in the same circumstances (e.g. P was a reckless high-risk investor and would risk all his assets on some high risk

[2] Advocate & Solicitor (Singapore) LLB, National University of Singapore, *Candidate* LLM (Social Care Law) Cardiff University; Counsel in *Re TQR*. Email: yue_en@yahoo.com.sg.

investment), as P has lost mental capacity and even though P could and would have made such a decision if he had mental capacity, the Deputy does not have the same right to make such a decision and have to consider whether the proposed course of action is in P's best interest. (see [11] to [17] and *Re Buckley* at [20] – [21]).

- The FJC stating at [34] that relationship between a Deputy and P is akin to the fiduciary relationship between a trustee and a beneficiary (see *Re Buckley* at [25]).

The FJC adopted a different approach, however, to that adopted in England and Wales in the following key respects (a full comparison is not possible in this limited space):

- Powers of investments should not be routinely granted to Deputies but should only be granted when necessary and appropriate in the circumstances of the case (at [4]). In contrast, 'powers of investments' are included in the standard COP order given to Property and Affairs Deputies.

- That in the determining of P's 'best interest', section 6(6), SinMCA 2010, is an important factor and the Singaporean Deputy has an obligation to ensure that P's property is preserved towards the costs of P's maintenance during his life at [10]. (There is no similar provision in MCA 2005) This means that while a person with mental capacity is fully entitled to disregard the issue of preservation of his assets while making decisions on his assets, his Deputy cannot disregard this and must always consider the issues of preserving P's assets for his maintenance (at [18] & [23]). This means that the Singaporean Deputy is obliged to adopt a financially more conservative position than an English or Welsh Deputy.

- The FJC stated at [24] that it has to consider the following steps when deciding on investment powers:

  (a) whether P has enough assets to permit ***some of them*** to be used for investment;

  (b) the relationship between P and the Deputy; and

  (c) the safeguards that should be put in place to protect P's assets from bad investment decisions.

- This need to preserve P's assets means that the FJC may only permit investments if P has significant assets that are more than sufficient for his needs and future maintenance, such that his maintenance would not be affected in the event that the investments resulted in significant losses (at [23] & [30]). It is important to mininise the risk of loss to P and to limit the extent of possible loss in addition to ensure that there is a reserve of funds or assets for P's use no matter what happens to the investments (at [37]).

- It is noted that the FJC agreed with the Deputy's proposed safeguards to maintain a sum of $200,000 as a reserve fund which would not under any circumstances be invested. The Deputies also agreed to be personally responsible to P for losses in the event that P's investments fall in value by more than 30% and would reimburse P for the loss sustained. [See [40]]. However, it is noted that these safeguards may not be necessary in England & Wales, due to the COP routinely ordering Security Bonds when

granting powers to Property and Affairs Deputies. The ability for the COP to enforce the bond means that P's capital is secured and any investment losses would be restituted to P's estate almost immediately with the Deputies liable for such amount restitttuted.

It is suggested that the probable reason for the FJC adopting the position that only P's excess funds may be invested is perhaps linked to Singapore's recent memory of the 2008 global financial crisis where it was reported that many elderly investors lost their life-savings through junk 'mini-bonds' offered by Lehman Brothers.[3] The FJC concluded that 'no investment is safe from risk and even if the investment itself carries minimal risk, no investment is safe from risks arising from the global economy as seen during the global financial crisis of 2008' (at [27]). It also expressed concerns that if P has very little assets, that there would be very little buffer 'if anything goes wrong' (at [28]).

At the same time, the FJC made an interesting observation as to the Singapore context and came to three further conclusions:

1. It is not uncommon for people [in Singapore] to make investment decisions with a view towards increasing their asset pool for the eventual benefit of their future beneficiaries of their estates (at [20]). (Before stating that a Deputy cannot base his decision solely, or even mainly on how this would impact P's heirs in the future' at [22].)

2. If the Deputy is the future beneficiary of P's estate, it is possible that the Deputy would subconsciously be thinking about his future inheritance when making investment decisions which also means that the Deputy is less likely to engage in risky behaviour since such behaviour is likely to impact on his future inheritance (at [32]).

3. The Deputy is more likely to be concerned about P's interest if he/she is a close relative of P (although the FJC did concede this is certainly not always true) and the court may be more willing to entrust the Deputy with the power to invest P's money (at [31]).

While it may be true that a risk-adverse beneficiary might be incline to adopt a conservative approach towards investing P's monies, the converse could also be true. Additionally, considering the increasing number of reports in the England & Wales on Deputies and Attorneys financially abusing P's monies, it would regrettably seem that often, it is those who are the closest related to P that ends up being hauled to court to have their Attorneyship/Deputyship revoked.

Absent a crystal ball for predicting if a Deputy would end up abusing P, the better way to minimise abuse would be ensure that the safeguards put in place for each case are suitably tailored to each unique set of facts to best discourage that particular Deputy from villainously exploiting the person whom he is supposed to protect. It is suggested that currently, the ordering and enforcing of Security Bonds provide the best safeguard against exploitative behaviour.

Conclusion

It is still early years in the development of the jurisprudence concerning MCA 2005 and SinMCA 2010 and the writer hopes that as 'iron sharpens iron', that the concurrent developments and

[3] Melanie Lee, 'Financial Crisis Politically Awakens Singapore Investors' (*Reuters*, 2016).

clarifications in both MCAs will allow P to be supported to the greatest extent in making his or her own decisions and if he or she is not able to, to ensure that decisions on his welfare, property and affairs would continue to be in clean, honest hands.

Edinburgh Sheriff Court – Applications under the Adults with Incapacity (Scotland) Act 2000 – Guardianship Court and AWI User Group

The Guardianship Court at Edinburgh Sheriff Court (and the associated AWI User Group) now has a dedicated web page for applications lodged at that court under the Adults with Incapacity (Scotland) Act 2000. It can be accessed via the Scottish Courts website. Once you have reached the Edinburgh Sheriff Court homepage a link to the Guardianship Court hub can be found on the top right side of the screen.

For any enquiries please contact edinburghawi@scotcourts.gov.uk.

Public Guardian: new arrangement for supervision of professional guardians

The Public Guardian is launching new arrangements for the supervision of professional guardians who have five or more property and financial guardianships. It is hoped that the new scheme will bring time savings and cost benefits. One would anticipate that it will bring savings and benefits not only for the Public Guardian's Office, but for qualifying professional guardians and the estates under their care. At present there is no differentiation between professional guardians holding multiple guardianships, and other guardians holding a single guardianship. The requirements for full annual account review apply to every guardianship.

In the case of professional guardians holding five or more financial guardianships, in future the Office of the Public Guardian will no longer undertake a full annual account review in every case. Instead, random samples will be selected. If the outcome of the audits of these is satisfactory, for all other guardianships and other years the Office of the Public Guardian will accept a covering one-page summary sheet only.

Adrian D Ward

J's Parent and Guardian v M & D (Leisure) Ltd, 2016 SLT (Sh Ct) 185

Sitting in the All Scotland Sheriff Court at Edinburgh on 17th March 2016, Sheriff P J Braid considered a contested motion for sanction of employment of junior counsel, for the purpose of computing the expenses payable by a defender following upon settlement of a personal injuries action. The injured party was a boy aged 11. The *ratio* of Sheriff Braid's decision would appear to be equally relevant to some adults with intellectual disabilities.

The boy slipped on wooden steps at a "crazy golf" course. He was holding a club. Part of the rubber grip was missing from the top of the club, exposing the metal shaft, which had ragged sharp edges. He struck his face against this, suffering a nasty injury and permanent disfigurement. He was very sensitive about the disfigurement.

The action was raised in October 2015. In their defences, the defenders contested liability. On 29th December 2015 the pursuers' agents instructed junior counsel, who met the boy at consultation and then drafted substantial adjustments, a specification for recovery of documents, and a statement of valuation of the claim. On 21st January 2016 a tender was lodged. Following a further consultation and negotiation, the action was settled at a somewhat higher sum, plus expenses.

The relevant provisions regarding sanction for counsel in the sheriff court (and Sheriff Appeal Court) are now contained in section 108 of the Courts Reform (Scotland) Act 2014. That section contains no explicit reference to the age or vulnerability of the party seeking such sanction. The relevant provisions of section 108 are these:

> *(2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.*
>
> *(3) In considering that matter, the court must have regard to – (a) whether the proceedings are such as to merit the employment of counsel, having particular regard to – (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings, (ii) the importance or value of any claim in the proceedings, and (b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.*
>
> *(4) The court may have regard to such other matters as it considers appropriate.*

Sheriff Braid concluded that the proceedings were not especially difficult or complex, and had no greater importance to the pursuer than to any other pursuer. There was no suggestion that an unfair advantage was gained by the employment of counsel. However, as liability was disputed it was necessary for the pursuer to approach the matter on the assumption that the case would go to proof on both liability and quantum. The boy would require to give evidence. Given the permanent and obvious nature of his injury, special skill would be required in taking his evidence effectively. It was therefore reasonable to have any proof conducted by counsel. Moreover, it would have been unreasonable to have introduced into the case, at a late stage, counsel whom the boy had not previously met. It was therefore reasonable to sanction the employment of counsel for all the work which counsel had been instructed to do, at the time when he had been instructed to do it. The motion for employment of counsel was granted.

Experience of acting for people with many categories of intellectual disability indicates that it is of vital importance that there be consistency as to the person acting, gradually building trust and confidence. That applies even where there is no expectation that the person will have to undergo the stress of examination and cross-examination as a witness in court proceedings. It is all the more important where there is indeed a prospect, or even a risk, of the person having to give evidence in court. One would suggest that there could be a question as to whether a solicitor was failing to give an adequate professional service, if the solicitor did not take reasonable steps to ensure the likelihood that the person ultimately conducting such proceedings should – barring the unforeseen – be the person who builds up that relationship of trust over the course of the matter. In such cases, one would suggest that if it was anticipated that it would be appropriate to instruct counsel for any proof, then counsel should be instructed, and should be present at relevant meetings with the person, at latest at the point of proceedings where the possibility of the person requiring to give evidence, failing earlier resolution, is foreseeable. There will be cases where it will be appropriate for intended counsel to meet a vulnerable pursuer before proceedings are commenced, to help counsel assess the ability of a vulnerable pursuer to give evidence to the standard likely to be required.

Adrian D Ward

Argyll and Bute Council v Gordon, 2016 SLT (Sh Ct) 196

This decision, also by Sheriff P J Braid at Edinburgh, did not involve any disclosed element of intellectual disability, but did concern a situation not uncommon in relation to people with disabilities, generally those whose disabilities are increasing. Argyll and Bute Council sought to recover costs of the provision of care to an elderly lady, since deceased. She had gratuitously alienated her dwellinghouse to the defender. The Council argued that their determination that the alienation had been made knowingly with the intention of avoiding the accommodation charges could only be challenged by way of judicial review in the Court of Session.

The Council raised the action, seeking to recover the care costs, under section 21 of the Health and Social Services and Social Security Adjudications Act 1983. Section 22 of the National Assistance Act 1948, along with the National Assistance (Assessment of Resources) Regulations 1992, empowered the Council to treat a resident as possessing actual capital of which the resident had deprived herself for the purpose of decreasing the amount that she might be liable to pay for the accommodation. Sheriff Braid held that as between the Council and the resident, any such determination under section 22 of the 1948 Act was challengeable only by judicial review, since the local authority was exercising the function conferred upon it by the 1948 Act. He held, however, that it was not anomalous that the Council could make a decision which was binding in relation to the service user but not binding in relation to the transferee. Even if that was anomalous, it would be a matter for Parliament to resolve. The defender, as transferee, was entitled to defend the action on the basis that the conditions in section 21 had not been satisfied, and that she accordingly had no liability thereunder. Unlike the position of the service user, this was not a matter which the defender could challenge only by judicial review. Sheriff Braid allowed a proof.

Adrian D Ward

New offence of wilful neglect or ill-treatment in Scotland

The Health (Tobacco, Nicotine, etc. and Care) (Scotland) Act 2016 received Royal Assent back in April 2016 and is yet to come into force. However, it is worthy of note at this stage and in the context of this newsletter given that its Part 3[4] introduces new offences of wilful neglect or ill-treatment in Scotland for adults receiving health care or social care.[5] These consist of two offences, one applying to care workers[6] and the other applying to care providers.[7]

A 'care worker' is defined[8] as care workers (employees and volunteers), their managers and supervisors, and directors or similar officers of organisations and the offence is committed where a care worker is providing care for another person and ill-treats or wilfully neglects that person. A 'care provider' is defined[9] as a body corporate, a partnership or an unincorporated association which provides or arranges for the provision of adult health or social care or an individual who provides that care and employs, or has otherwise made arrangements with, other persons to assist with the provision of that care.

[4] ss 26-32.
[5] Largely mirroring that already in force in England and Wales under in ss20-25 Criminal Justice and Courts Act 2015.
[6] ss 26.
[7] ss 27.
[8] ss 28(1).
[9] ss 28(3).

Care that is only incidental to the care worker's or provider's other activities would not fall within either of these definitions.[10]

A care worker will commit the offence if they have the care of another individual by virtue of being a care worker and ill-treats or wilfully neglects that individual. A care provider will, on the other hand, commit the offence if (a) they provide care, under care arrangements, for another individual and ill-treat or wilfully neglect that individual; (b) the care provider's activities are managed or organised in a way which amounts to a gross breach of a relevant duty of care[11] owed by the care provider to the individual who is ill-treated or neglected; and (c) in the absence of the breach, the ill-treatment or wilful neglect would not have occurred or would have been less likely to occur. The Mental Health and Disability Committee of the Law Society of Scotland had argued strongly for the inclusion of the care provider offence (as appears in the English legislation, see footnote 2) on the basis that it would enable liability to be fixed upon those responsible for situations in which the real issues are those of management and training.

If convicted a care worker is liable, on summary conviction, to imprisonment for a term not exceeding 12 months, a fine not exceeding the maximum limit (currently £10,000) or both and, on conviction on indictment, to imprisonment for a term not exceeding five years, an unlimited fine or both. Care providers are, on the other hand, only liable to a fine on both summary and indictment conviction.

The intention apparently is that the offences will cover the relatively few deliberate acts or omissions and will not include situations where mistakes have simply been made. This extends the criminal offence that has been around since 1913 but is now contained in the Mental Health (Care and Treatment)(Scotland) Act 2003[12]of wilful neglect or ill treatment of patients in mental health care to all health or social care settings.[13]

There was some argument at the time of the passage of the Health (Tobacco, Nicotine, etc. and Care)(Scotland) Bill through the Scottish Parliament that such offences were superfluous and unnecessary in light of existing protection of common law assault, the Protection of Vulnerable Groups (Scotland) Act 2007, mental health legislation and professional body disciplinary procedures. However, it could equally be argued that they in fact reinforce and compliment the protection offered by these, and the Adult Support and Protection (Scotland) Act 2007, to vulnerable persons. It could also be seen to reinforce the state's positive obligation to ensure respect for the prohibition against inhuman or degrading treatment identified in Article 3 ECHR14 and also in Article 15 CRPD.

The Act does not provide a definition of 'wilful neglect and ill-treatment' and concerns about this were expressed during the passage of the

[10] ss 28(4).

[11] A 'relevant duty of care' is stated as meaning a duty owed in connection with providing, or arranging for the provision of, adult health care or adult social care and a breach of such duty occurs where there is a 'gross' breach meaning that the alleged conduct falls far below what can reasonably be expected of the care provider in the circumstances (ss 27(3) (a) and (b)).

[12] s 315.

[13] Scottish Parliament, *Official Report*, Session 4, 1 December 2015. s 83 Adults with Incapacity (Scotland0 Act 2000 also creates an offence of ill-treatment and wilful neglect in relation to anyone exercising powers under the Act that relates to the person welfare of the adult.

[14] *A v United Kingdom* [1998] 2 F.L.R. 959 (ECHR), 23 September 1998.

Bill, notably that such definition might potentially capture non-intentional errors that could, if necessary, be adequately dealt with by disciplinary measures. However, the Scottish Parliament seems to have been persuaded that wilful neglect and ill-treatment offences are intended to cover intentional acts or omissions and not mere mistakes.[15]

Part 2[16] of the Act also introduces a duty of candour in health and social care settings. This creates a requirement for health and social care organisations to inform people and their families when they have been physically or psychologically harmed as a result of the care or treatment that they have received, together with a requirement for such organisations to prepare and publish reports in relation to this duty of candour. There was some disquiet during the passage of the Bill that the creation of an offence of wilful neglect or ill-treatment might be counter-productive to such a duty of candour owing to fear of criminal prosecution. However, it would seem that the purpose of such duty is to enhance transparency in situations when the unintentional and unexpected, as opposed to deliberate, occurs.

As already mentioned, the provisions are not yet in force and, in any event, it would appear that as distressing and wholly unacceptable as any deliberate act of abuse in health and social care settings is they are, thankfully, rare. However, we can only hope that when in force such legislative provisions are used effectively to provide justice for the victims of any such abuse.

Jill Stavert

[15] It should also be noted that neither the Mental Health (Care and Treatment)(Scotland) Act 2003 (S 315) nor Adults with Incapacity (Scotland) Act 2000 (s 83) define these terms.

[16] ss 21-24.

Mental Welfare Commission for Scotland AWI and 2003 Act Monitoring Reports

During September, the Mental Welfare Commission published its 2015/16 monitoring reports for the Adults with Incapacity (Scotland) Act 2000(AWI) and Mental Health (Care and Treatment) (Scotland) Act 2003 (2003 Act).

Readers are referred to the reports themselves for more detail. However, the Commission has flagged certain areas of concern which I will very briefly summarise and comment on below.

AWI: Increase in guardianship applications and orders

The Commission has noted a continued increase in guardianship applications and orders with the highest proportion of welfare guardianships being sought for people with dementia (45%) or learning disability (41%).

It is not entirely clear why this is the case although it would appear – and this is arguably rather self-defeating - that guardianship is being required in some situations in order to access self-directed support. Concern, following the *Bournewood* and, more specially, the *Cheshire West* rulings, that potential deprivations of liberty in social care settings are made lawful in terms of Article 5 ECHR may also be prompting the increase. Indeed, certain Scottish rulings[17] have indicated that guardianship will effectively render a deprivation of liberty of an incapable adult lawful in terms of Article 5 ECHR. However, this is by no means certain given the very limited ability

[17] *Muldoon, Applicant* 2005 SLT (Sh Ct) 52 at 58K,59B, *Doherty* (unreported), Glasgow Sheriff Court, 8 February 2005, *M, Applicant* 2009 SLT (Sh Ct) 185 at 84 and 87 and *Application in respect of R* 2013 GWD 13-293.

to challenge the lawfulness of such deprivation of liberty through the courts.[18] Certainly, the fact that the highest proportion of welfare guardianships being sought is for people with dementia or learning disability begs the question as to how effectively the principles in section 1 of the AWI are being applied and the extent to which such persons are being properly supported to exercise their legal capacity as required by Article 12 CRPD and Article 8 ECHR.

It is hoped that such issues will be addressed in any legislative changes that result from the current Scottish Government review of the AWI.

2003 Act: Emergency detentions and community-based CTOs

The Commission notes that emergency detentions are increasing with only 56% having the consent of a mental health officer. In the July 2016 issue of this newsletter I have already referred to an earlier report of the Commission *Emergency detention certificates without mental health officer consent* and mentioned the Article 5 ECHR issues that potentially arise in such situations.

Community-based Compulsory Treatment Orders (CTOs) are up and during 2015/16 40% of people on CTOs were being treated in the community. Whilst the value of such orders cannot be ignored it is important to ensure that compulsion of this nature is appropriate and, as such, in accordance with the principles[19] that underpin the 2003 Act, particularly in terms of respect for patient autonomy and choice, and being the minimum necessary restriction of freedom and of maximum benefit to the patient.[20] Moreover, as it has previously commented in its December 2015 *Visits to people on longer term community-based compulsory treatment orders* report,[21] the Commission comments that more needs to be done in terms of supporting recovery plans for people who are subject to compulsion.

Jill Stavert

[18] See Scottish Law Commission, *Report on Adults with Incapacity* (2014) and Mental Welfare Commission, *Deprivation of Liberty (update)* (2015).
[19] Notable those in ss1 and 64.
[20] See also Articles 8 ECHR and 12 CRPD.
[21] Mental Welfare Commission for Scotland, *Visits to people on longer term community-based compulsory treatment orders*, December 2015 See also 'The Mental Welfare Commission for Scotland Report; *Visits to people on longer term community-based compulsory treatment orders' Mental Capacity Law Newsletter* (February 2016 issue).

`

Conferences at which editors/contributors are speaking

Switalskis' Annual Review of the Mental Capacity Act

Neil and Annabel will be speaking at the Annual Review of the Mental Capacity Act in York on 13 October 2016. For more details, and to book, see here.

Taking Stock

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

Human Rights and Humanity

Jill is a keynote speaker at the SASW MHO Forum Annual Study Conference in Perth on 29 October, talking on "Supporting and extending the exercise of legal capacity." For more details, see here.

Law (and the Place of Law) at the End of Life

Alex will be speaking alongside Sir Mark Hedley at this free seminar organised by the Royal College of Nursing on 1 November. For more details, see here.

Alzheimer Europe Conference

Adrian will be speaking at the 26th Annual Conference of Alzheimer Europe which takes place in Copenhagen, Denmark from 31 October–2 November 2016, which has the theme "Excellence in dementia research and care." For more details, see here.

Jordans Court of Protection Conference

Simon will be speaking on the law and practice relating to property and affairs deputies at the Jordans annual COP Practice and Procedure conference on 3 November. For more details and to book see here.

Advertising conferences and training events

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

Chambers Details

Our next Newsletter will be out in early November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

Editors

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

Scottish contributors

Adrian Ward
Jill Stavert

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 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, 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.