39 Essex Chambers

MENTAL CAPACITY REPORT: COMPENDIUM

April 2018 | Issue 84

Welcome to the April 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Government responds to the Law Commission's *Mental Capacity and Deprivation of Liberty* report, the Joint Committee on Human Rights rolls up its sleeves, and exploring the outer limits of best interests;

(2) In the Property and Affairs Report: a guest article by Denzil Lush on statutory wills and substituted judgment and the *Dunhill v Burgin* saga concludes;

(2) In the Practice and Procedure Report: an unfortunate judicial wrong turn on 'foreign' powers of attorney, the new Equal Treatment Bench book, and robust case management gone too far;

(3) In the Wider Context Report: appointeeship under the spotlight again, a CRPD update and the Indian Supreme Court considers life-sustaining treatment;

(4) In the Scotland Report: the Mental Welfare Commission examines advocacy, a new Practice Note from the Edinburgh Sheriff Court and a Scottish perspective on the judicial wrong turn on 'foreign' powers;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY 3
The Law Commission Mental Capacity and Deprivation of Liberty Report: the Government responds 3
Joint Committee on Human Rights inquiry into DOLS reform 3
The dog that didn't bark 7
A complex and very personal cocktail of capacity and vulnerability 8
Constructing the 'responsible citizen' 9
Deception in the name of best interests 14
Short note: continuing healthcare and responsibility for community deprivation of liberty authorisations 17
Short note: fluctuating capacity – a further chapter 17
PROPERTY AND AFFAIRS 20
Substituted Judgment and Statutory Wills 20
Short Note: an end to the *Dunhill v Burgin* saga 22
PRACTICE AND PROCEDURE 24
A new home for Court of Protection forms 24
'Foreign' powers of attorney – an unfortunate judicial wrong turn 24
Equal Treatment Bench Book 28
Short Note: robust case-management and the perils of apparent bias 29
Short Note: Reconsideration and the Court of Protection as a 'best interests court' 30
Short Note: the Family Court, the Family Division and the Court of Protection 30
THE WIDER CONTEXT 32
ENGLAND AND WALES 32
Ordinary residence and incapacity 32
Appointeeship (again) – and proceedings before the FTT 33
Care home staff – their own views of care 36
Learning disability care and NICE 36
Open University course on mental capacity 36
Prader-Willi Syndrome and mental capacity 36
Domestic abuse consultation: a chance to think more widely 37
Forced marriage resources launched by the University of Nottingham 37
Mental Health Tribunal rule change consultation 38
The MHA in practice 38
INTERNATIONAL NEWS 39
How well do you know your loved ones? 39
Treatment withdrawal – the Indian Supreme Court perspective 40
CRPD updates 44
Assisted Decision-Making (Capacity) Act consultation 46
SCOTLAND 47
Mental Welfare Commission for Scotland Report: The Right to Advocacy - A Review of Advocacy Planning across Scotland 47
Edinburgh Sheriff Court – Applications under the Adults with Incapacity (Scotland) Act 2000 49
Powers of attorney – more cross-border trouble! 50

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

The Law Commission Mental Capacity and Deprivation of Liberty Report: the Government responds

The Government published on 14 March its response to the Law Commission's Mental Capacity and Deprivation of Liberty report. The headline is that the Government "*agree*[s] *in principle that the current DoLS system should be replaced as a matter of pressing urgency*," and that it will legislate in due course. Before the introduction of any new system, the Government has said that it will "*need to consider carefully the detail of these proposals carefully and ensure that the design of the new system fits with the conditions of the sector, taking into account the future direction of health and social care*."

In its detailed response, the Government has accepted, or accepted in principle, all of the recommendations except (1) the recommendation relating to a statutory codification of capacity law in relation to children; and (2) four areas which it has left for the independent Mental Health Act review to consider.

Joint Committee on Human Rights inquiry into DOLS reform

Following its open call for evidence in its inquiry: The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards, the Committee has published over 100 submissions (with more to come) written by interested parties and has heard oral evidence on the following issues:

- Whether the Law Commission's proposals for Liberty Protection Safeguards ('LPS') strike the correct balance between adequate protection for human rights with the need for a scheme which is less bureaucratic and onerous than the Deprivation of Liberty Safeguards.
- Whether the Government should proceed to implement the proposals for Liberty Protection Safeguards as a matter of urgency.
- Whether a definition of deprivation of liberty for care and treatment should be debated by Parliament and set out in statute.

In summarising the written submissions published so far, we cannot hope to do justice to their quality. If you have time to only read one, we suggest that of Caroline Docking whose daughter, Eleanor, was deprived of oxygen during birth.

The oral evidence has been fascinating to listen to, for which transcripts are available. For example, here is the link to the evidence given by Graham Enderby, Mark Neary, Dr Lucy Series and Alex. Much of the written views make unsurprisingly depressing reading and illustrate the challenges faced by individuals and organisations struggling to cope with the demand for Article 5 safeguards following *Cheshire West*. Here are some broad themes arising:

- The majority of people believed the proposals did strike the correct balance and should be implemented as a matter of urgency, although many thought it should not be rushed through (as DoLS originally was) and some considered reform should be

timed with the MHA review. There was a lack of consensus as to whether Parliament should define a deprivation of liberty.

- The adoption of safeguards for 16- and 17-year olds was welcomed. Few, if any, people suggested a role for parental consent which is interesting in light of *Re D (A Child)* [2017] EWCA Civ 1695 which allows for such a role.
- All were keen to have safeguards *before* the deprivation of liberty begins, analogous to the timing of safeguards for children coming in to local authority care.
- There was a lot of concern expressed in relation to the role of the "independent" reviewer, with rubber-stamping worries.
- Limiting access to the skills and knowledge of a professional assessor (the AMCP) to only those who object or pose a risk to others ran the risk of removing the universality of access to human rights. And it was suggested that for many people, the involvement of an independent professional with the power to achieve a speedy resolution would be more valuable than a largely theoretical right of appeal to a court.
- More detail was required in relation to how self-funders would be adequately protected in 24-hour care, and how would access to the home be secured for assessment.
- Who would authorise the deprivation of liberty for those in receipt of after-care services under s.117 of the MHA 1983 whereby there is a joint statutory duty on health and social services?

Defining a deprivation of liberty

Mostyn J tackled what he described as the elephant in the room, namely whether Cheshire West was correctly decided, stating: "*I am convinced that the decision is legally wrong and socially disastrous. It pits the state against families and costs hard-pressed public authorities vast sums, which ought to be spent on the front line.*" Drawing upon *Ferreira* at [98]-[99] – which emphasised that the lack of freedom to leave must be because of the supervision and control – his Lordship contends that Parliament should put beyond doubt that an incapacitated adult will only be deprived of liberty if:

a) she is prevented from removing herself permanently in order to live where and with whom she chooses; and
b) the dominant reason is the continuous supervision and control to which she is subjected, and not her underlying condition.

Professor Richard Jones proposed a simpler definition which would exclude those content with their living arrangements: "*a deprivation of liberty exists where a person is residing in a place where he is not free to leave and where he is consistently indicating either through words or behaviour a desire to leave*." He also proposed the replacement of DoLS with amendments to guardianship, whose advantages would include:

- The elimination of MCA/MHA interface issues.
- Locally based tribunals with non-means tested legal aid available.
- Article 5(4) compliance, noting that the functions of the "responsible body" and the "independent reviewer" under the LPS do not

do so.

- Resultant savings from dismantling DoLS which could be used to expand service delivery.
- Greater protective powers for the nearest relative.

Sir William Charles observed that the case law is in a mess which causes significant difficulties on the ground and an uncertain platform for the replacement of the DOLS. He observed that a statutory definition would be pointless because if the Supreme Court does not revisit *Cheshire West* and the Human Rights Act still applies, any legislation would have to be construed by the courts so as to comply with Article 5. Rather than using deprivation of liberty as the trigger for safeguards, "*substantive and procedural safeguards should be based on the question: Is the relevant person being provided with the least restrictive practically available option to best promote their welfare*?" Such a test would be easy to understand and apply, providing the necessary safeguards against arbitrary detention. Such an approach echoes that advanced by Dr Lucy Series who comments, "*All that is required of a statute is that it sets out where the safeguards may apply (and where they may not), what should trigger an application and what criteria must be met for an authorisation*".

In relation to the proposed amendments to the core of the MCA, Sir William stressed the importance of not overlooking the impact on the property and affairs jurisdiction: "… *the proposal to amend s. 4 of the Mental Capacity Act should not be adopted because of its lack of clarity and its potential for having a very damaging impact on the making of uncontested decisions relating to a patient's property and affairs.*" The proposal "*could well lead to unnecessary cost for thousands of patients in the ascertainment of their views on issues relating to their property and affairs*".

Age UK observed that the DoLS are most often used to protect older people and unless the current social care funding crisis is addressed, the new LPS scheme will be little more than a bureaucratic exercise. It noted a risk that this scheme could create anxiety for some older people, who may feel it allows them to be 'prisoners in their own homes'. Their families may also feel that they will be seen as the 'enforcers' of a deprivation of liberty. The CQC also has concerns about expanding the scheme to cover domestic settings "*where the proposed reform does not set out clearly an oversight mechanism*". ADASS and the LGA also noted that when examined operationally, the LPS have the potential to be as bureaucratic and onerous as the existing scheme.

Some people had concerns regarding the invention of advance consent to deprivation of liberty, it being seen as a mechanism for avoiding the administrative burdens associated with Article 5 safeguards. Others were open to the idea but, because of the seriousness of the decision, felt it should be afforded the same level of recording as an advance decision to refuse life-sustaining treatment. It was also noted that there is no consideration of the means of ensuring that any arrangements that were agreed to in advance were in accordance with the less restrictive option principle.

Unsound mind

Most people who commented on the issue were against what was seen as the stigmatising

'unsound mind' terminology, with its nineteenth century tone. Lancashire County Council said that many GPs are already refusing to use the 'outdated' term for COPDOL applications. The Royal College of Psychiatrists recommended its replacement with "any disorder or disability of mind". It noted that it is difficult to understand how those unconscious due to intoxication, with "locked-in" syndrome, or in a persistent vegetative or minimally conscious state, could be encompassed by the "unsound mind" concept but not by the "any disorder or disability of mind" concept. In any event, the College states, no-one with these conditions are deprived of liberty by the State; they are deprived by their condition and would be permitted to leave the moment they were physically able to do so. On a practical note, the College also referred to the current significant shortage of psychiatrists which "*is unlikely to change for many years, even if recruitment to the specialty markedly improves, because of the lengthy training period.*"

Advocacy and challenging detention

The growing demand for statutory advocacy was acknowledged, and how important it would be going forward for this to be adequately funded by central, rather than local, government. Many who responded to the Committee called for a detailed impact assessment to be undertaken before any legislative changes were made.

Dr Series estimates that the rate of appeal to the Court of Protection is fewer than 1% of people subject to a DoLS authorisation during 2017, and under 0.5% of DoLS applications overall. This compares with around 47% of MHA detentions being challenged in the tribunal. Professor Phil Fennell and some organisations, such as the Mental Health Tribunal Members Association and the Royal College of Psychiatrists, called for a tribunal system instead of the Court of Protection, with a role in scrutinising care and treatment planning. Dr Series suggests that a better, albeit still imperfect, alternative to what the LPS provide "*would be for the 'responsible body' to be under a clear duty to refer cases for review when either P or P's family object, or when care and treatment restrictions are particularly intrusive or invasive*", with P's relatives and advocates retaining a right to apply for a review as a fallback safeguard. Nottinghamshire County Council said it was vital that the nature of an objection is fully described in legislation, possibly through the use of 'threshold' descriptors.

Finally, Baroness Finlay observed how shocking it is to hear the low percentage of benefit from DoLS: "*A medication or an operation that had a 10% or less improvement rate would not be continued long term without extensive review to select out those who are likely to benefit, yet the DoLS process has been applied wholesale*."

The dog that didn't bark

NHS Dorset CCG v LB and SHC [2018] EWCOP 7 (Baker J)[1]

Article 5 – deprivation of liberty – costs

Summary

This judgment, which primarily concerns an application for costs, is yet further fallout from *Cheshire West*. The CCG sought to bring a number of test cases before the court, aiming to carve out further exceptions from Cheshire West. The questions posed by the CCG for determination as a preliminary issue were:

i) Whether, for the purposes of Article 5 of ECHR and s64(5) of the MCA, P is deprived of his/her liberty if s/he is not free to leave and is subject to continuous supervision and control but:

   a. the restrictions to which he/she is subject are imposed in his/her own home (whether by family members or by paid carers) and;

   b. the restrictions are necessary and proportionate for the purpose of providing P with care;

ii) in any event, whether responsibility for any deprivation of liberty in P's own home is to be imputed to the applicant solely by virtue of the fact that it provides NHS continuing care funding for P's care.

The Official Solicitor was invited to act as litigation friend for the four Ps, but refused the invitation in two cases where legal aid was not available, on the basis that it was not appropriate to use P's own funds to argue a test case. After receiving the Official Solicitor's submissions on the deprivation of liberty arguments, the CCG sought permission to withdraw its request for a preliminary hearing for three reasons:

(1) the CCG had reconsidered its position in the light of the Official Solicitor's analysis;

(2) only one of the original four test cases was now able to proceed to a hearing on the preliminary issues, due to difficulties and delays, and as a result the practical application of any decision to future cases might be very limited in scope; and

(3) the recent publication by the Law Commission of its report on Mental Capacity and Deprivation of Liberty (Law Comm 372), which included recommendations for reforms designed to obviate the need for an application to the Court of Protection in the vast majority of cases of alleged deprivation of liberty, whilst not removing entirely the need for the Court to consider the issue raised in the test cases, reduced the justification for those cases and also, it was conceded, reduced the strength of the applicant's argument that the circumstances of the four individuals did not amount to a deprivation of liberty.

The Official Solicitor sought an order that the CCG should pay all his costs in one of the proposed test cases, and half his costs in the

[1] Alex having been instructed in these cases by the Official Solicitor on behalf of the Ps, he has not contributed to this note.

other, essentially on the basis that the Official Solicitor had succeeded in his case, which was not in reality a welfare matter but more akin to a civil claim. Further, argued the Official Solicitor, the CCG should have realised at the outset that some of the cases were not suitable test cases, and should have conceded the preliminary issue more quickly after the Law Commission report was published.

Baker J declined to depart from the general rule in welfare cases, noting that the law remained in a state of uncertainty following *Cheshire West* and that it was unsurprising that the CCG had wanted further guidance from the court.

Comment

It is not surprising that statutory bodies are still seeking creative ways to avoid the effects of *Cheshire West*, and perhaps equally unsurprising that (with the exception of the hospital setting) such attempts have not led anywhere. In light of the Law Commission's proposals and the government's indication that they are, in the main, accepted, this may be the last attempt to restrict *Cheshire West* pending legislative change. On the other hand, if the JHCR comes to an entirely different conclusion about the Law Commission's proposals or the timetable for implementation stretches off into the distance once the MHA Review concludes, the courts may once again be asked to consider the issue afresh.

A complex and very personal cocktail of capacity and vulnerability

AB v HT & Ors [2018] EWCOP 2 (Baker J)

Capacity – best interests – marriage – contact

Summary

This case concerned the capacity and best interests of a 37 year old woman, M, who had suffered a difficult childhood and first marriage, and was at the time of the hearing being treated in a psychiatric hospital for a psychotic illness. She also had an acquired brain injury which affected her cognitive functioning. M had previously lived with her father, and had taken part in an Islamic marriage ceremony in 2013. Her father and partner were parties to the proceedings, as was her aunt, who had taken M away from them and cared for her for a period of time before M's admission to hospital. Unfortunately for M, her family members were all in conflict with one another, and the court had to deal with over 100 pages of fact-finding allegations from all sides, extending to both welfare and financial matters.

The hearing that gave rise to this judgment took place some 2½ years after proceedings were issued by M's father. At the time of the hearing, it was anticipated that M would remain in hospital receiving treatment for her mental disorder for at least another year if not longer. Baker J had to determine issues of capacity and best interests, as well as the status of the Islamic marriage ceremony.

Baker J concluded that there was insufficient evidence on which to conclude that M had lacked capacity to participate in the marriage ceremony, but that she presently lacked capacity to make relevant decisions, and that while it was possible she might regain capacity in future if her psychiatric treatment was successful, that was no reason not to make declarations of incapacity, in circumstances where the likelihood of an improvement in her condition

and the timescales involved were uncertain.

On the factual allegations, Baker J concluded that M's father and partner had acted contrary to her best interests, misusing her money, failing to look after her properly, and arranging the marriage ceremony for the benefit of her partner's immigration status. The court did not find, however, that there had been a forced marriage.

The court made orders confirming M's incapacity in relevant areas, and a declaration that the marriage ceremony did not confirm with the requirements of the Marriage Acts, such that M and her partner were not married under English law.

There was then a dispute about whether the proceedings should continue. The Official Solicitor and local authority sought to bring them to an end, but Baker J concluded that they should continue, for three reasons: (i) it was possible that the picture as to M's capacity would be clearer within a year; (ii) there were continuing disputes about M's long-term residence and contact with her family which would need to be resolved, most probably by the court, and (iii) despite the criticism of M's father and partner, they remained people interested in her welfare whose views should be considered pursuant to s.4 MCA. On the latter point, Baker J said:

> [The partner] *MS is not married to M as a matter of English law but is married to her according to Islamic law. It would normally be appropriate to consult the spouse or partner of the adult concerned, although not necessarily where the spouse or partner is estranged or has been abusive towards adult. In my judgment, the question whether to seek the views of MS when making future best interests decisions concerning M and, if he is consulted, the weight to be attached to his (and [the father's]) views are sensitive and difficult issues and, furthermore are issues about which the parties will almost inevitably disagree, leading to further proceedings before this court.*

Comment

Although not determining any points of principle, this judgment is of interest for its summary of the approach to evidence in fact-finding hearings, its discussion of Islamic law in relation to marriage, and in the judge's refusal to accept that despite having made serious findings against M's father and partner, it did not follow as a matter of course that they should not continue to be consulted in relation to best interests decisions about her future welfare. On the latter point, it will be interesting to see whether any subsequent judgments emerge in the proceedings analysing this difficult and contentious question of which there has, to date, been little judicial consideration.

Constructing the 'responsible citizen'

SSHD v Sergei Skripal; SSHD v Yulia Skripal [2018] EWCOP 6 (Williams J)

Best interests – P's wishes

Summary

The Court of Protection was thrust into the centre of a major international incident in these two linked cases, concerning Sergei Skripa and his daughter Yulia and, specifically, whether it was in their best interests for the Organisation

for the Prohibition of Chemical Weapons to:

(1) Collect fresh blood samples from Mr and Ms Skripal to

   a. Undertake their own analysis in relation to evidence of nerve agents,

   b. conduct DNA analysis to confirm the samples originally tested by Porton Down are from Mr and Ms Skripal,

(2) Analyse the medical records of Mr and Ms Skripal setting out their treatment since 4 March 2018,

(3) Re-test the samples already analysed by Porton Down.

As both Mr Skripal and Ms Skripal were unconscious, under heavy sedation, and neither were in a position to consent to the taking of further blood samples for these purposes or to the disclosure of their medical records Salisbury NHS Foundation Trust confirmed to the UK Government that a court order would be required to authorise (a) and (b) above. The SSHD therefore applied on an urgent basis to the Court of Protection for personal welfare orders. In his judgment, Williams J had to consider a number of discrete matters.

Public or private hearing?

Williams J gave a brief overview of Part 4 COPR and PD4C, concerning transparency. He noted that there was an apparent tension between the 'General Rule' in COPR 4.1 that proceedings will be heard in private and the effect of PD4C2.1 to the effect that the court will ordinarily make an order for the hearing to be in public unless it appears to the court there is a good reason for not making the order. However, he did not seek to resolve that apparent tension on the basis that the "unique and exceptional circumstances" of the application made it clear that the 'General Rule' should apply, noting a series of factors, in particular the sensitivity of the evidence and the matters before him. He therefore held that the urgent hearing should take place in private but his judgment would be published in accordance with COPR 4.2(2)(b).

Permission, participation and consular notification

Williams J had no hesitation in holding that permission should be granted in each case, both to be listed together, and that Mr and Ms Skripal should be joined with the Official Solicitor appointed to act as litigation friend for each of them. Perhaps betraying his background as a family practitioner with extensive experience of cross-border cases, he raised of his own motion the question of whether this rise to any notification obligation pursuant to Articles 36 and 37 of the Vienna Convention on Consular Relations of 24 April 1963 as Ms Skripal is a Russian national although Mr Skripal became a British national. The President had previously given guidance on this issue in the context of care cases in the Family Court in *Re E (A Child)* [2014] EWHC 6 (Fam). He noted that:

> *Mr Thomas QC* [for the SSHD] *submitted that as there is no domestic implementation of Art 37 no obligation arises. He also questioned whether the court could be a competent authority. He noted that the Convention is implemented by section 1 and Schedule 1 of the Consular Relations Act 1968 and that this does not include Article 37. I note that at paragraphs 41 and 44 in Re E (above) the President noted the issue in relation to the effect of Article 37 in public*

> *international and English domestic law. Mr Sachdeva QC* [for the Skripals] *drew my attention to the context in which the President offered the guidance and that it was guidance only for the purposes of care cases in the family court. Both Mr Thomas QC and Mr Sachdeva QC also submitted that even if (and it is a very big if) that guidance could be transposed into the Court of Protection there was good reason for not imposing a notification obligation still less the other obligations the President identified in paragraph 47 of Re E. I am satisfied for the reasons set out above that there is no notification obligation in law on this court. The nature and extent of any good practice which might be followed in Court of Protection cases where a foreign national is the subject of an application may require consideration in another case. In practice, the Russian consular authorities will be made aware of these proceedings because this judgment will be published. I do not consider it necessary to list the issue for the sort of further extensive argument that would be necessary to enable the court to determine if any good practice guidance should be given.*

Habitual residence

As Williams J noted, the MCA 2005 deals with the jurisdiction of the court by implementing into domestic law the jurisdictional provisions contained in the 2000 Convention on the International Protection of Adults; s.63 MCA 2005 and Sch 3. Part 2 and in particular paragraphs 7(1)(a), (c) and (d). Thus the courts of England and Wales would have jurisdiction over a person habitually resident in England and Wales or a person present in England and Wales if the measure is urgent. Where the court is unable to ascertain habitual residence the court is to treat the person as habitually resident in England and Wales.

At paragraph 20, he noted that "[t]*he evidence before me does not enable me to ascertain the habitual residence of either Mr Skripal or Ms Skripal. I am therefore to treat them as habitually resident in England and Wales and thus jurisdiction arises under Schedule 3 paragraph 7(1)(a). In any event I am satisfied that in respect of both Mr and Ms Skripal I have jurisdiction pursuant [to] Schedule 3, paragraph 7(1)(c) to make the orders sought on the basis that whatever other jurisdiction may exist they are present and the measures are urgent*."

Best interests

The unique circumstances of the case required Williams J to examine how broadly the concept of 'best interests' could stretch in circumstances where there was no evidence as to either Mr Skripal's or Ms Skripal's past or present wishes and feelings in relation to the issues at hand. As well as the 'usual suspects' in terms of case-law, Williams J also noted the statutory Code of Practice identifies at para 5.47-8 the possibility that other factors that the person lacking capacity might consider if they were able to could "*include the effect of the decision on other people….. the duties of a responsible citizen.*"

His careful analysis of how best interests was to play out on the facts of this unusual case merits reproduction in full:

> *30. There is little or no evidence to assist me in identifying any particular beliefs or values which either Mr Skripal or Ms Skripal held for the purposes of applying s.4(6)(b). The case is put both by the Secretary of State and the Official Solicitor on the basis of how the beliefs*

and values of the reasonable adult subjected to an attack of any sort, but particularly of this sort, might influence their decision. Although it would be impossible for me to be unaware of what is in the public domain about Mr Skripal and Ms Skripal that is not evidenced before me and so I am constrained to approach this decision at this moment in time on the basis of assumptions as to how a reasonable citizen would approach matters. In the absence of any evidence to show that either Mr Skripal or Ms Skripal was not a reasonable citizen that is how I will approach it. The evidence establishes that the OPCW is an independent organisation with the support of 192 nation States and one of whose primary tasks is providing technical assistance in relation to chemical weapons issues. Their procedures appear to be rigorous and robust – as would be expected given the subject matter of their work. Their enquiry can be expected to be entirely objective and independent. The results of their enquiry will likely hold very considerable weight in any forum. Their enquiry is therefore likely to produce the most robust, objective, independent and reliable material which will inform any determination of what happened to Mr Skripal and Ms Skripal. That might simply confirm the current conclusions, it might elaborate or clarify them, it might reach a different conclusion. Although the Secretary of State does not believe the latter prospect to be likely given her confidence in Porton Down's findings I do not think the possibility can be ignored – and in particular I do not think an individual faced with supporting or not supporting such an inquiry would ignore that possibility at this stage.

31. Most reasonable citizens in my experience have a quite acute sense of justice and injustice. Most want to secure the best information about what has happened when a serious crime is alleged to have been committed. I accept that such a person would believe in the rule of law; that justice requires that crime or serious allegations of crime are thoroughly investigated; that where possible answers are found as to who, how and why a crime was perpetrated, that where possible truth is spoken to power; that no-one whether an individual or a State is above or beyond the reach of the law and that in these turbulent times what can be done to support the effective operation of international conventions is done. Whilst I don't assume that the reasonable citizen would necessarily have asked himself or herself those sorts of questions in quite such detail I do believe that if those issues were put to them they would adopt them and they would influence their decision. In any event all go to the general point that the reasonable citizen, including Mr Skripal and Ms Skripal believe that justice should be done. The conduct of the investigations proposed by the OPCW will further the general aim of justice being done as well as perhaps the more precisely identified goals which Mr Eadie QC identified in the course of argument. I accept that Mr Skripal and Ms Skripal's decision would be influenced by these values and beliefs and that the influence would be in favour of consenting to the taking and testing of samples and disclosure of notes. I am satisfied that an inquiry such as the OPCW will conduct which might verify Porton Down's conclusion, might elaborate or clarify them or might reach a different conclusion is something they would wish

be conducted and they would want to assist in that by providing samples.
32. Even if I am wrong on these assumptions as to their beliefs or views I am satisfied it is in the broad parameters of their best interests for it to be known as far as may be possible what occurred to them and the OPCW enquiry will promote that aspect of their best interests.

33. Quite separately I accept that there may be some potential medical benefit in the tests being conducted by the OPCW in that they may identify some matter which sheds further light on the nature of the agent involved and thus the treatment that might be administered. I understand that the Secretary of State reposes complete confidence in the results of the tests carried out by Porton Down but I believe both that Mr Skripal and Ms Skripal would wish for the further analysis (and so s.4(6)(c) would be engaged) but that also objectively there is benefit in the expertise of the OPCW also being brought to bear even if the possibility of them uncovering something useful from a medical perspective may be slight.
34. Those matters therefore support the conclusion that it is in the best interests of Mr Skripal and Ms Skripal to have further blood samples taken and for their medical records to be disclosed.

35. On the other side of the equation what points to such steps not being in their best interests or being harmful? The taking of the modest blood samples proposed through the cannula already in situ will have very little impact. ZZ [their treating consultant] is of the opinion that it will be unlikely to adversely effect their clinical condition. The involvement of the OPCW and the use to which the results may be put in support of the pursuit of 'justice' will no doubt lead to further publicity but it seems to me to be unlikely to lead to any further intrusion than is currently the case and assuming that Mr Skripal and Ms Skripal regain consciousness so as to be aware of it. Does the authorisation of further testing create any further risk to the physical safety of Mr Skripal or Ms Skripal? I have not been addressed on this issue – theoretically I suppose it might if it were thought the death of Mr Skripal and Ms Skripal prior to the taking of samples might undermine the efficacy of the evidence gathering exercise (as opined by DD [a Porton Down Scientific Adviser]). The Secretary of State has confirmed that measures are already in place to ensure their physical safety. Does the disclosure of medical notes to the OPCW amount to an intrusion into their privacy which is not in their best interests? I accept ZZ's point that disclosure of medical records should only go so far as is necessary and this will cover disclosure from the period 4 March 2018 and for the specific information that the OPCW has sought. If it is sought I consider that it is in their best interests that OPCW is provided with copies of the relevant records not merely having sight of them. The processes which are in place for maintaining the confidentiality of such records (along with the integrity of the samples) which are evidenced satisfy me that copies could be provided subject to their destruction or return at the conclusion of the enquiry.

36. The overall balance in the evaluation of the best interests of Mr Skripal and Ms Skripal assessed on a broad spectrum and taking account of the pros and cons

> *of taking and testing the samples and disclosing the notes in my judgment falls very clearly in favour of the taking of the samples, their submission for analysis by OPCW and the disclosure of the medical notes to aid that process. In so far as it is necessary it is also lawful and in their best interests that the existing samples are provided to OPCW for further testing.*

Williams J made orders accordingly.

Comment

It is interesting that Williams J chose to go down the 'responsible citizen' route as the primary route to reach the (obviously correct) conclusion that it was in the Skripals' best interests for the relevant steps to be taken. Other judges might have placed more emphasis upon his alternative route, namely that it was equally, if not, possibly even more likely that the Skripals would have wanted to take any opportunity to explore a course of action which might give rise to even a small possibility of medical benefit to them. There is undoubtedly a place for altruism or being seen to 'do the right thing' in the conception of best interests (see, in addition to the *TJ* case cited, *Re Peter Jones* and the pre-MCA case of *Re Y (Mental Incapacity: Bone marrow transplant)* [1996] 2 FLR 787). There is, equally, clear authority for the proposition that the Court of Protection can, in some cases, be entitled to take steps in the name of a person's best interests to seek to secure even the slightest chance of a medical improvement: see, e.g. *B v D* [2017] EWCOP 15. Which route one chooses to reach the outcome in this case depends, one suspects, on one's view of human nature.

Very much as a side-note, we note that the apparent tension that Williams J notes in relation to the 'General Rule' and the Transparency Practice Direction is a side-effect of the fact that they represent the clunky but necessary work around for the fact that the MCA 2005 does not contain the automatic restrictions on the publication of specific types of information about the subject of proceedings that applies in relation to children. This means that it is necessary for an order to be made in each case to enable the proceedings to take place in public (which is intended to the default following the completion of the Transparency Pilot) but with suitable protections relating to the identities of the parties and private and sensitive information that is regularly put before it). It is very much to be hoped that when the MCA is amended in due course to implement the Law Commission's Mental Capacity (Amendment) Bill, the opportunity will be taken to introduce into primary legislation a provision which will enable this process to be streamlined.

Deception in the name of best interests

Re AB [2016] EWCOP 66 (Mostyn J)

Best interests – medical treatment – P's wishes

In this case, which was decided in December 2016, but which only appeared on Bailii in March 2018 (for reasons which will perhaps be self-evident) Mostyn J was asked to approve a treatment regime for a woman with HIV which involved the administration of medication to her on the basis of active deception.

The woman, AB, contracted HIV in 2000. At that point, her capacity to make decisions regarding medical treatment was unimpaired, and she voluntarily sought treatment and engaged fully and consensually and willingly with such

treatment until 2008. In 2008, there was a major deterioration in her mental condition, and after that her engagement with HIV treatment was interrupted. Her medical condition worsened, AB suffering from a serious psycho-affective disorder. The evidence before the court was that, although people with this disorder do, from time to time, recover, the extent of relapses in AB's case, and their scale, made it unlikely the foreseeable future she would recover from her psychiatric condition. The position agreed before the court – including by the Official Solicitor on AB's behalf [2] – was that she undoubtedly lacked capacity to decide whether to engage in anti-retroviral treatment.

Critically, AB was at the time of the judgment was, in the words of the judge:

> *16.* […] *in the grips of very powerful* delusions, which prevent her from addressing many aspects of normal life rationally. For example, she does not believe that, now, she is HIV positive. She believes that she is a participant in a film about HIV, in which she will be participating with her husband. She does not, in fact, have a husband, but she believes that she is married to a celebrity sportsman. She believes that the person who is her husband will come back for her and take her away to live in connubial bliss. She believes that when blood samples are taken from her by the hospital staff it is done by them for the purposes of drinking her blood. Above all, she is positive that she is not HIV infected, and were she to learn that she was being secretly and clandestinely administered with anti-retroviral treatment the evidence is that she would be exceedingly aggrieved.
>
> 17. If the choice were hers, and hers alone, she would not take the anti-retroviral treatment and, on the evidence, it is clear that, were that course to be followed, having regard to previous monitoring when there have been interruptions, it is foreseeable that within a relatively short period of time her immune system would be seriously compromised and she would be exposed to the risk of death.

Mostyn J therefore had to make the decision on AB's behalf as to what was in her best interests, and embarked for this purpose upon a consideration of her past and present wishes and feelings, as well as the beliefs and values that would be likely to have influenced her decision had she had capacity:

> 19. As far as her past feelings are concerned, up to 2008, which is when we know that she did have capacity, her conduct in that period demonstrates that her wishes were to receive HIV treatment.
>
> 20. As far as her present wishes are concerned, there is no dispute: they are very strongly opposed to HIV treatment.
>
> 21. Parliament has decreed that I must

[2] As a footnote, it would have been fascinating to understand the basis upon which the conversation between the Official Solicitor's staff member and AB took place – the "eloquent" attendance note clearly made an impression upon Mostyn J: "[I]*f anyone has any doubts as to the scale of the mental challenges faced by AB they only need to read that note, which I am not going to read into this judgment*."

> go on to consider not only actual wishes and feelings but hypothetical wishes and feelings, because by virtue of Section 4(6)(b) I have to consider the beliefs and values that would be likely to influence her decision if she had capacity and I am also required by virtue of paragraph (c) to consider the other factors that she would be likely to consider if she were able to do so.
>
> 22. I am perfectly satisfied, having regard to her willing and consensual participation in treatment up to 2008, that if she had capacity (and I would interpolate parenthetically that of course if she had capacity we would not be having this case), she would unquestionably enthusiastically embrace anti-retroviral treatment, which I do not shrink from describing as a miracle treatment.

In the circumstances, Mostyn J had:

> *25.* […] no hesitation in concluding that virtually no weight should be given to AB's present wishes and feelings. Instead, I should place considerable weight on her past wishes, as demonstrated by the evidence, and on her hypothetical wishes, which I have no doubt would be in favour of the treatment.
>
> 26. It is, it might seem, a strong step for the Court to take: to authorise a course of medication that involves deception, and I hesitate from saying that perhaps it is not so surprising in this post-truth world in which we now seem to live, but that would be perhaps a cynical aside. However, on the facts of this case, there can be no doubt that there has to be authorised a course of action that ensures that AB, in her best interests, receives the treatment that will likely save her. It is for this reason that I am happy to approve the order that has been put before me.
>
> 27. The order will provide, however, that if the truth emerges to AB and she moves to a position of active resistance then the matter will have to be reviewed, and the Court will have to consider, in that situation, whether to move to forced administration of these drugs, which would be a very difficult decision to make, because it would not be a one-off administration of treatment, but would be a quotidian administration of treatment, which is a very different state of affairs to that which is normally encountered in this Court.

Comment

Even more than in most cases before the Court of Protection, one is left wanting to know what happened next for AB. Moreover, and almost more than in any other case decided to date, it also brings home the potential within the MCA for stark clashes between past and present wishes and feelings.

It could also – we suggest – be used as a case-study for testing thinking about the CRPD. Is this, for instance, a case where it would be legitimate to say that AB's 'will' can be taken from her actions before the period of mental ill-health, and can legitimately be said to be different to – and of a higher order than the 'preferences' being expressed now? Is it, therefore, an exemplar of the model suggested

by George Szmukler[3]? And where does the requirement under Article 25(d) that healthcare be provided on the basis of "free and informed consent" (and/or the right under Article 17 to equal respect for physical and mental integrity) come in? It is all too easy by searching for absolutist principles here to reach a point which would seem entirely wrong – including, above all (I would very venture to suggest) to AB herself if and when her mental state recovered.

Short note: continuing healthcare and responsibility for community deprivation of liberty authorisations

The new framework for continuing healthcare ("CHC") and NHS-funded Nursing Care ("FNC") has been published, to come into force in October 2018. We highlight it because it includes a section at paragraphs 320-322 which specifically considers DOLS and clarifies the responsibilities of CCGs in authorising deprivations of liberty.

It provides at paragraph 322 that, where an individual who lacks capacity lives in their own home rather than in hospital or in a residential care home – ie a *Re X* style scenario – and is in receipt of CHC, as the primary funding authority, it is the duty of the CCG to apply to the Court of Protection to seek authorisation of the relevant deprivation of liberty.

Outside of a *Re X* scenario, however, the Framework confirms that responsibility for seeking a standard or urgent authorisation (or court authorisation) for any deprivation of liberty remains with the managing authority: the care home or hospital in which P is placed. It also reiterates that any request for authorisation should be made *before* the placement takes effect.

Short note: fluctuating capacity – a further chapter

Re MB [2017] EWCOP B27 (HHJ Parry)

Mental capacity – residence

Re MB is a case that was decided as far back as August 2017, but only recently appeared on Bailii. It is the penultimate judgment in the long running saga of MB, first heard by Mr Justice Charles as long ago as 2007; the final chapter can be found here.

The case came before the Court as a challenge to MB's standard authorisation, pursuant to section 21A of the MCA. MB has a moderate learning disability, an autism spectrum disorder and complex epilepsy. He has lived at the care home under orders of the court since 14th July 2008 following litigation in which Mr Justice Charles had concluded that he lacked capacity to make decisions about his residence and care.

The hearing before HHJ Parry was listed as a result of the parties having received an expert report on MB's capacity from the independently instructed psychiatrist, Dr Layton. Dr Layton had concluded that while MB lacked the capacity to conduct the litigation, he had capacity to make decisions about his residence and care. This was the first clinician to have come to this view since

[3] See e.g. Szmukler G. The UN Convention on the Rights of Persons with Disabilities: "rights, will and preferences" in relation to mental health disabilities. Int J Law and Psychiatry 2017. https://doi.org/10.1016/j.ijlp.2017.06.003 and his book *Men in White Coats: Treatment Under Coercion* (OUP, 2018.

the case had been before the COP.

The local authority sought permission to instruct a further expert to report on capacity as a result of the 'huge risk' to MB if he were able to choose where he could live (he had wanted for the past 10 years to move from his care home into the community). They argued that this further instruction was appropriate given the weight of clinical opinion which had always concluded that MB lacked the relevant capacity and the fact that Dr Layton could not provide an answer to why MB now had capacity "*because there is no evidence of any specific event or change in his regime to which it could be attributed*."

HHJ Parry reflected on how Dr Layton had carried out the assessment, paying particular attention to the practical steps that had to be taken to help MB to achieve capacity. As such is a useful example of a case in which s.1(3) of the MCA is applied. HHJ Parry summarised Dr Layton's views on this issue as follows:

> *One of MB's difficulties is that he cannot generalise from the past to a new situation and an overload of information can lead to him losing capacity. Therefore, he needs substantial support to deal with new situations. Dr Layton concluded that with support he would have capacity to make decisions about his residence because this is a decision made over a longer period of time and did not require the capacity to cope with a lot of information over a short period. It would also be a decision in relation to a realistic option on offer and it could be done over several weeks to several months.*

This case is of particular interest because it is one of the few cases in which fluctuating capacity is considered. The Judge summarised Dr Layton's conclusions on this as follows:

> *However, his autism predisposes him to high levels of anxiety which impairs his cognitive performance and therefore, his capacity. When he is affected by anxiety it can take between minutes and days to bring him down during which period he would lack capacity. He may not have capacity for short term decisions during the day. He could also lose capacity on any day when he would not be able to weigh matters and he is affected by unpredictable events such as interactions with others. Dr Layton accepted that it was very difficult to be sure whether MB has flashes of capacity or flashes of losing capacity. He described MB's capacity as delicate and fragile*

Dr Layton had considered that a standard authorisation should be in place for these short periods of incapacity. The Judge and the parties agreed that "*this is an impossibility legally or as part of anticipatory care planning to manage periods of apparent incapacity because MB cannot consent to it.*"

HHJ Parry ultimately granted the local authority's request for the instruction of a further expert on the basis that further expert evidence was 'reasonably required'. It seems therefore that this was not a case to which the case management pilot applied (the test for expert evidence under the pilot was of course the higher "necessity" test, the test now being applied across the board in COPR 15.3).

Comment

The question of the Court's jurisdiction in cases

of fluctuating capacity is a tricky one and is considered in our report of the last judgment here.

The lack of any detailed consideration of the jurisdictional challenges from the High Court in such cases makes it difficult for practitioners to know how best to deal with what is a relatively common scenario. We know of at least one case which has just been transferred up to the High Court for hearing in June on this issue.

PROPERTY AND AFFAIRS

Substituted Judgment and Statutory Wills

[*We are delighted to be able to publish this guest article by Denzil Lush, former Senior Judge of the Court of Protection*]

The Law Commission's consultation paper on Making a will, published on 13 July 2017, is informative, stimulating, and a pleasure to read. It was summarised briefly in the property and affairs section of 39 Essex Chambers' Mental Capacity Report Issue 79 in September 2017, which drew attention to the provisional proposals that:

(a) testamentary capacity should be governed by the capacity test in the Mental Capacity Act 2005, rather than by *Banks v Goodfellow* (1870) 5 QB 549;

(b) steps should be taken to reduce the cost and length of statutory will proceedings;

(c) a scheme of supported will-making should be introduced; and

(d) there should be a statutory doctrine of testamentary undue influence.

The consultation period ended on 10 November 2017 and I submitted my response four days before the deadline. I managed to answer only eight of the sixty-five consultation questions, but one of those I did answer was number 12, which said: "*We take the view that reform is not required of the best interests rationale that underpins the exercise of the discretion to make a statutory will. Do consultees agree?*"

No, I don't agree. I believe that substituted judgment, rather than best interests, should be the rationale that underpins the exercise of the court's discretion to make a statutory will, and I have set out my reasons in greater detail in an article entitled *Standing in the testator's shoes,* which appeared in Trusts and Estates Law & Tax Journal, March 2018, pages 4-7.

Very briefly, the difference between best interests and substituted judgment is as follows:

- best interests is derived from child care law and represents a more paternalistic and, sometimes, restrictive approach. The decision made is that which the decision-maker thinks is best for the person who lacks capacity.

- substituted judgment attempts to arrive at the choice that the person who lacks capacity would have made if he or she had capacity.

English law invented substituted judgment or, rather, Lord Chancellor Eldon did, in the case of *Ex parte Whitbread, In the Matter of Hinde, a Lunatic* (1816) 2 Mer 99, which involved an application for substantial allowances to be made from the estate of John Jacob Hinde to family members who were not legally dependent on him. Mr Hinde was a wealthy 60-year-old bachelor with an intellectual impairment, and Lord Eldon held that the court should *"act with reference to the lunatic and for his benefit as it is probable that the lunatic himself would have acted if of sound mind."* His decision became a footnote in the textbooks on lunacy law until the 1970s, when American courts began to cite it when they were developing the jurisprudence on end-of-life decision-making.

English law also created the concept of a statutory will in 1969 and substituted judgment

was adopted as the correct approach for making a will on behalf of someone who lacks testamentary capacity. In the leading case, Re D(J) [1982] Ch 237, the Vice-Chancellor, Sir Robert Megarry, said: "It is the actual patient who has to be considered and not a hypothetical patient. … The court must seek to make the will which the actual patient would have made." Substituted judgment sat comfortably within the overall framework and objectives of the Mental Health Act 1983, s. 96, and its antecedents, of doing "*all such things as appear necessary or expedient:*

(a) for the maintenance or other benefit of the patient;

(b) for the maintenance or other benefit of members of the patient's family;

(c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered, or

(d) *otherwise for administering the patient's affairs*."

However, when it reviewed the law relating to mental capacity in its report on *Mental Incapacity* (1995), the Law Commission rejected substituted judgment as the basis for making decisions on behalf of incapacitated adults for the following reason (para. 4.23):

> *The substituted judgment standard is generally thought preferable to the best interests test in principle. Attractive though it may be in theory, however, applying it in practice raises problems. It is more difficult to apply in the case of someone who has never had capacity, for example, someone suffering from severe mental handicap.*

Consequently, the Law Commission's draft Bill, which appeared in the appendix to its 1995 report, and eventually entered the statute book as the Mental Capacity Act 2005, required the best interests test to be applied to all decisions made on behalf of an incapacitated adult, including the creation of a statutory will.

The Mental Capacity Act came into force on 1 October 2007 and in the first reported decision on a statutory will, *Re P* [2009] EWHC 163 (Ch), Mr Justice Lewison, held that the earlier law regarding the making of statutory wills was no longer good law because it applied a substituted judgment test, rather than the best interests test. In the next reported decision on a statutory will, *Re M*: *ITW v Z* [2009] 1 FLR 443, Mr Justice Munby agreed with Lewison J. and declared that "*such well-known authorities [as Re D(J)] are best consigned to history*." He also commented that "*the statute lays down no hierarchy as between the various factors which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's 'best interests'*." These two decisions created a polarisation between best interests and substituted judgment, particularly in the context of statutory wills and lifetime gifts, which several other judges sought to play down; in particular, Morgan J. in *Re G(TJ)* [2010] EWHC 3005 (COP), when he considered an application for a further gift in a case he had previously dealt with under the old regime.

Since 2009 there have been three developments, which indicate that the pendulum is swinging away from best interests and back towards substituted judgment. They are as follows.

(1) The United Nations Convention on the Rights of Persons with Disabilities, which the United Kingdom ratified on 8 June 2009, requires states parties to replace the best interests paradigm with respect for the individual's rights, will and preferences (see Article 12(4) and the General Comment on Article 12 published in 2014).

(2) In *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67 - the first Court of Protection case to reach the United Kingdom Supreme Court – at paragraph 45, Baroness Hale stated that "*The purpose of the best interests test is to consider matters from the patient's point of view*."

(3) In its report on *Mental Capacity and Deprivation of Liberty*, [2017] EWLC 372, the Law Commission proposed (as Recommendation 40) that section 4(6) of the Mental Capacity Act 2005 should be amended to require the individual making the best interests determination to *"give particular weight to any wishes or feelings ascertained*." It explained that: "*Circumstances have changed greatly since the introduction of the Mental Capacity Act; much of the Act was based on the work of the Law Commission in the 1990s and predates more recent developments such as the Human Rights Act 1998 and the ratification of the UN Convention on the Rights of Persons with Disabilities. The trend in national and international developments in the context of decision-making on behalf of others is firmly towards requiring greater account to be taken of the wishes and feelings (or will and preferences) of the individual concerned. In our view these developments need to be reflected at the core of the Mental Capacity Act*."

I was the Master of the Court of Protection for eleven years before the Mental Capacity Act 2005 came into force, and I have to say that exercising my discretion by applying substituted judgment – whereby I sought to stand in the testator's shoes and authorise the execution of the will that he would make, if he had testamentary capacity - seemed a more realistic, relevant and respectful process than my experiences under the Mental Capacity Act, where I struggled to compile a balance sheet of pros and cons in order to identify one or more factors of magnetic importance that may shine a light on what would be in the testator's best interests.

As much as I welcome the Law Commission's Recommendation 40, I don't think it goes far enough as far as statutory wills are concerned, and I can't see why making a will, which speaks from death, should follow exactly the same rationale as urgent health and welfare decisions, which are qualitatively quite different. Having regard to the direction of travel since 2009, it would take an audacious judge to order the execution of a will which overrides a testator's rights, will and preferences, but such an order remains a possibility as long as best interests is still the rationale that underpins the exercise of the court's discretion to make a statutory will.

Short Note: an end to the *Dunhill v Burgin* saga

The Court of Appeal (Sir Brian Leveson PQBD, Underhill and Leggatt LLJ) has dismissed [2018] EWCA Civ 505 the claimant's appeal against the dismissal of her claim for damages against her former solicitors and counsel for under settlement of her personal injury claim.

The claimant had suffered a brain injury in a road traffic accident and at a trial on liability only and without a litigation friend having been appointed her claim was settled for £12,500. She was swiftly dissatisfied with that result and, with new legal representation and a litigation friend, sought to set aside the settlement. After a trip to the Supreme Court, she was successful and ultimately settled her claim for damages against the driver for a very substantial sum.

She brought these proceedings for damages against her first set of legal advisers claiming her unrecovered costs in the subsequent litigation and damages for the loss she suffered being untreated for so long whilst she waited for proper compensation.

Her claim was dismissed at first instance by Elizabeth Laing J. That dismissal was upheld by the Court of Appeal, essentially on the grounds that the trial judge was entitled to hold that counsel was entitled to take the view that, if the case on liability was tried, the probability was that the claimant would lose so a settlement was imperative.

At the end the President said this about capacity, in comments that we would strongly endorse:

> *I cannot leave the case without observing that those who act in the field of personal injury litigation should always be alert to potential difficulties about capacity when serious head injuries have been sustained.*

PRACTICE AND PROCEDURE

A new home for Court of Protection forms

With effect from 21 March, all CoP forms can now be found on .gov.uk here. The Rules, forms, practice directions and Practice Notes can also all be found on the Court of Protection Handbook website here.

'Foreign' powers of attorney – an unfortunate judicial wrong turn

Re JMK [2018] EWCOP 5 (SJ Hilder)

International jurisdiction of the Court of Protection – Foreign powers of attorney

Summary

In this case, SJ Hilder, faced with two litigants in person, has taken an unfortunate wrong turn as regards the basis upon which 'foreign' (i.e. non English & Welsh) powers have effect in England and Wales.

Two litigants in persons (the daughter and son-in-law of the donor) sought recognition and enforcement of a Canadian "Continuing Power of Attorney for Property" as a "protective measure" pursuant to paragraph 19 of Schedule 3 to the MCA 2005. It is not entirely clear from the judgment why they did so, although there is mention of a family legal battle, presumably in Canada. It is likely that there must have been some property in England and Wales that the holders wanted to administer and it can perhaps be assumed that they were having difficulty doing so without a court order.

Although the judgment does not say where power was made, it notes that the power was headed "[m]*ade in accordance with the Substitute Decisions Act 1992*." This suggests that the power was made in Ontario where, although it appears that this was not brought to the judge's attention, a Continuing Power of Attorney for Property does not need to be registered before it takes effect, either with a court or with an administrative body the equivalent of the Office of the Public Guardian in either England & Wales or Scotland. There was no evidence of the donor's capacity at the date the power was executed although there was evidence from the care home where she lived in Canada that she lacked capacity thereafter.

The two parties before SJ Hilder were unrepresented, and she noted that she did not have the benefit of legal submissions. The only authority that she found on Schedule 3 was the decision of Hedley J in *Re MN (Recognition & Enforcement of Foreign Protective Measures)* [2010] EWHC 1926, concerning a protective measure in the form of an order made by a California court.

SJ Hilder, upholding (on reconsideration) the refusal of the District Judge to recognise and enforce the power of attorney as a protective measure, noted that:

> 17. […] reference to 'protective measures' in Schedule 3 is intended, and generally understood, to refer to arrangements that have been made or approved by a foreign court. It may not be spelled out explicitly but the language of paragraph 19(3) in particular confirms that intention and understanding: each of the circumstances in which the mandatory requirement can be disapplied clearly envisages court proceedings. I have not found any authority which casts

> doubt on that understanding. JMK's Power of Attorney has been through no court process at all. It is not even subject to a system of registration. It therefore does not fall within the general understanding of the term 'protective measure' for the purposes of recognition by this Court pursuant to Schedule 3.
>
> 18. More widely, it seems to me that PH's understanding of the Power of Attorney at the time when it was granted (as set out in paragraph 16(a) above ["at the time of issuance, the POA was not a protective measure other than [JMK] was not used to managing household finances… we offered to help but, in order to do this properly, we needed her authority which was deemed to be a Power of Attorney"] captures a more accurate understanding of the nature of the instrument executed by JMK. If validly executed, a Power of Attorney is better characterised as an exercise of autonomy (even if it provides for a time when the donor is no longer capable of autonomous decision-making) than as a "protective measure."

SJ Hilder concluded by noting that it remained open to the applicants to apply to be appointed as property and affairs deputies in this jurisdiction.

Comment

It is very unfortunate that SJ Hilder did not have benefit of legal submissions on this important issue, or take the opportunity (for instance) of inviting the Official Solicitor to act as advocate to the court,[4] because she did not have her attention drawn to the fact that she was being asked the wrong question by the applicants, and that she should have been analysing the position not by reference to whether or not the power of attorney was a protective measure for purposes of Part 4 of Schedule 3, but rather by reference to the provisions of Part 3. We summarise these because they are likely to be unfamiliar to most practitioners.[5]

The starting point[6] is the principle that the law applicable to the existence, extent, modification or extinction of the power of representation will be that of the country of the habitual residence of the donor as at the point of granting the power.

However, and so as to give effect to the principle that adults should have the maximum autonomy to make choices as to their own futures, a donor has a limited ability to designate in writing that a law of a different country should apply to these matters.

Importantly, perhaps, whilst Part 3 would appear on its face largely to be concerned with the position whereby questions relating to 'foreign' powers fall for determination by the Court of Protection, on a proper analysis Part 3 is not so limited (and nor are the Articles of the Convention upon which Part 3 draws). Part 3 therefore sets out a position which should apply in respect of 'foreign' powers regardless of whether or not they come before the Court of

[4] As he has done previously in a case involving Schedule 3: see *Re PA & Ors* [2015] EWCOP 38.
[5] This summary is taken from the paper written by Alex available here.
[6] Which stems from Article 15 of the 2000 Hague Convention on the International Protection of Adults.

Protection.

Part 3 envisages two factual scenarios:

1. the donor was habitually resident in England and Wales at the time of making the power. In that case (and in line with the principle set out immediately above), the donor can choose to designate the law of a connected country to apply to the existence, extent, modification or extinction of the power of representation (paragraph 13(1)). For these purposes, a connected country is defined as a country: (1) of which the donor is a national; (2) in which he had previously been resident; or (3) where he has property (paragraph 13(3)). In the last of these cases, the donor can only specify that the law of that connected country apply in relation to that property (paragraph 13(4));
2. the donor was habitually resident other than in England and Wales at the time of making the power, but England and Wales is a connected country. In that case, the donor can specify that the law of England and Wales is to apply in mirror fashion to that set out above (paragraph 13(2)(b)). If the donor does not so specify, then the applicable law will be that of the foreign country (paragraph 13(2)(a)).

Paragraph 13 of Part 3 does not address two other scenarios:

1. the donor was habitually resident other than in England and Wales, has no connection with England and Wales and made no specification at all as to the law he wished to apply;
2. the donor was habitually resident other than in England and Wales and specified that the applicable law should be that of a third country.

Logic, and fidelity to the principles of the Convention, would suggest that in the first case the applicable law will be that of the habitual residence of the donor at the time of the grant of the power and that in the second, the applicable law should be that of the third country if it is a connected country (to use the language of paragraph 13). However, until and unless ratification of the Convention is extended to England and Wales (or a judicial pronouncement in a suitable case) this is a question which does not afford of a definitive answer. It may possibly have been the right question to ask on the facts of *Re JMK*, but given that JMK appears to have had property in England & Wales, England & Wales would have been a 'connected country' for purposes of paragraph 13(2)(c), such that, absent any declaration as to which law to apply, it appears that the provisions of that paragraph would have applied to make clear that the relevant law to determine validity was that of Ontario.

In the circumstances, therefore, whether or not 'foreign' powers are also capable of being protective measures for purposes of Part 4 of Schedule 3, which was the focus of SJ Hilder's analysis.

For the sake of completeness, we should perhaps also note, however, that whilst SJ Hilder was undoubtedly correct to hold that a foreign power that has not been registered with either an administrative body or a court cannot be considered a protective measure, the position in relation to administrative registration is now more nuanced than it was at the time Alex

drafted the note referred to above in 2014. In a very unusual step that we reported upon in the October 2017 Mental Capacity Report, the Explanatory Report to the 2000 Hague Convention on the International Protection of Adults (which underpins Schedule 3 to the MCA 2005) was issued in a new and revised edition, available here. In addition to the correction of a few typos, the new and revised edition includes in particular a modification to paragraph 146 made by the Rapporteur, Professor Paul Lagarde relating to the confirmation of powers of representation (powers of the attorney and the like). The new paragraph reads thus:

> The concept of the confirmation of powers must give every guarantee of reliability and be seen in the light of legal systems which make provision for this confirmation and place it in the hands of a particular authority, judicial in Quebec, administrative elsewhere. The first version of this report, which was based on a reading of the Convention text, set forth that this confirmation is not a measure of protection within the meaning of the Convention. If this indeed were the case, there would be no need to mention it alongside the measures of protection in Article 38. However, some delegations have since asserted that this analysis is not one which, according to them, flows from the discussion, difficult as it was. *[…]* According to this view, a confirmation could constitute a measure of protection within the meaning of Article 3 and it could only be given by the competent authority under the Convention. A consequence of this might be that, if the adult has, in accordance with Article 15, paragraph 2, submitted the conferred power to an applicable law other than that under which the authorities have jurisdiction under the Convention, the representative risks being deprived of the possibility of having his or her powers confirmed, for instance, by the competent authority of the State whose law is applicable to the power of representation.

In other words, the Explanatory Note makes clear that the intention underpinning the Convention – and hence Schedule 3 – is that registered power (for instance a Scottish power registered with the Office of the Public Guardian) may well be capable of an application for recognition and enforcement. That could never have benefited an attorney under an Ontario power, but the position may well be different in relation to many other types of powers.

Finally, it is equally – if not more – unfortunate that SJ Hilder did not have drawn to her attention the provisions of (at the time Part 24, but now Part 23) of the Court of Protection Rules, which provide in Rule 23.6 for a standalone application to be made in any case where there is doubt as to the basis upon which the attorney under a foreign power is operating. This is what the applicants in this case should have been seeking and the court considering, and it is the course of action we would strongly advise that any attorney under a 'foreign' power takes in future in the case of recalcitrant institutions in England and Wales. In the circumstances, therefore, we hope that:

1. It will be possible for (say) the Office of the Public Guardian to issue guidance as to the use of 'foreign' powers of attorney in England & Wales. This is of particular importance for

Scottish powers which are, for these purposes, 'foreign;'

2. A practice note could be issued by the President addressing the position in relation to Part 3 clear; and/or
3. The opportunity arises for either SJ Hilder or another judge of equivalent or greater seniority to clarify the position with the benefit of submissions based upon the matters set out above.

Equal Treatment Bench Book

A new edition has been published of this guidance for the judiciary, which aims to "*increase awareness and understanding of the different circumstances of people appearing in courts and tribunals. It helps enable effective communication and suggests steps which should increase participation by all parties.*"

There is a chapter on mental disability and a separate chapter on mental capacity summarising the MCA and addressing the appointment of litigation friends. There is one puzzling comment in the introduction – "*Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand. It has been stated (in regard to medical treatment, though the test is no doubt universal) that the individual must be able to (a) understand and retain information and (b) weigh that information in the balance to arrive at a choice*" - but the later parts of the chapter properly reflect the provisions of the MCA.

Legal practitioners (and GPs!) may be particularly interested to read the following extracts from the chapter on mental capacity:

42. Courts should always investigate the question of capacity when there is any reason to suspect that it may be absent. This is important because, if lack of capacity is not recognised, any proceedings may be of no effect, although the civil and family rules do provide some discretion in this respect – see CPR rule 21.3(2) and (4) and FPR rule15.3. Those rules assume the court knows whether a party is a protected party and do not make any specific provision as to how an issue as to capacity is to be dealt with.

43. The solicitors acting for a party may have little experience of such matters and may make false assumptions on the basis of factors that do not relate to the individual's actual understanding. Even where the issue does not seem to be contentious, a district judge who is responsible for case management may require the assistance of an expert's report. This may be a pre-existing report or one commissioned for the purpose. Whilst medical evidence has traditionally been sought from a psychiatrist, if the party has learning difficulties, a psychologist, especially if of an appropriate speciality, may be better qualified. Such opinion is merely part of the evidence and the factual evidence of a carer or social worker may also be relevant and even more persuasive. Caution should be exercised when seeking evidence from general medical practitioners as most will have little knowledge of mental capacity and the various legal tests that apply, so the appropriate test should be spelt out, and it should be explained that different tests apply to different types of decision.

55. Phrases such as 'best interests' are commonly used, with little understanding

> *of what they actually mean. It is instructive to consider the interpretation in the MCA, which includes considering the protected party's views, if ascertainable. Judges cannot simply leave an unfettered discretion to the litigation friend, and should satisfy themselves on these matters during the course of the proceedings. The need for any settlement or compromise to be judicially approved underlines this role.*

Short Note: robust case-management and the perils of apparent bias

The case of *A & B v Z, A Local Authority, & M* (*By her litigation Friend Y*) [2018] EWCOP 4 arose out of out a tragic accident which killed three members of a family: father and two elder siblings. It left only one child X living and mother, M, with head injuries resulting in a need for 24 hour care and a loss of litigation capacity.

Theis J's judgment concerns an appeal from an order made at the end of Court of Protection proceedings concerning M's best interests which in turn followed family proceedings concerning the future of her son X, both of which were heard by HHJ Roberts.

At the final Court of Protection hearing, HHJ Roberts called the advocates into court without the parties or solicitors present and advised that, having dealt with the same issues in parallel family proceedings, she was "*very unlikely to…. stand on my head*" and reach a different decision as to whether or not M should return to live with X and his paternal grandparents. The final order which provided for M to remain in her own house separately from X was appealed, inter alia, on the ground of apparent bias on the basis that the judge stated her intention in the exchange from which the parties were excluded to decide the application consistently with the decision she had reached in the separate family proceedings.

Allowing the appeal, Theis J reiterated at paragraph 24 the conclusion of Macfarlane LJ in *Re Q* [2014] EWCA Civ 918, that if a claim of apparent judicial bias is established, it would "*cut across the entirety of the process before the judge*" an appeal would have to be allowed, and a rehearing take place before a different judge.

Drawing from the judgment in *Re Q*, Theis J notes the "*line to be drawn between robust case management on the one hand and premature adjudication on the other,*" observing that where the line is crossed there would be, as per *Re Q*, "*a real possibility that the judge had formed a concluded view that was adverse…*" (paragraph 25). Despite *Re Q* being a family case, Theis J observes that "*its fairness principles are equally applicable* [in the Court of Protection]" (paragraph 26).

Theis J concluded that the advocates-only audience before HHJ Roberts meant there was a real possibility that the judge had formed a concluded view that was adverse to the case being presented by X's paternal grandparents prior to hearing their case. Noting the *Porter v Magill* [2011] UKHL 67 test for apparent bias, "*whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*", Theis J concluded that even though the grandparents had not been present to hear the comments of the judge which made to the advocates in their absence, any fair-minded and informed observer who had heard them would have concluded that there was a real possibility that the judge had formed a concluded view prior

to the parties' oral submissions. Apparent bias was accordingly made out.

This case is a salutary warning to judges and advocates in the Court of Protection. "Advocates only" appearances before the court are often used as a last-minute attempt to manage recalcitrant parties in long-running cases and can be a useful means of drawing attention to the issues that are most of interest to the court.

But given Theis J' views on where the line between "robust case management" and "premature adjudication" lies, judges should perhaps be cautious in giving too clear an indication as to the conclusions they are likely to reach in the absence of the parties and before having heard all the evidence.

Short Note: Reconsideration and the Court of Protection as a 'best interests court'

In a second judgment ([2017] EWCOP 30) in the curious SW case (the first being discussed here), and on the basis of facts sufficiently specific and unusual not to merit reproduction here, Sir James Munby P endorsed the approach to reconsideration under Rule 89 (now COPR 13.4) taken by by HHJ Hazel Marshall QC in *Re S and S (Protected Persons)* [2008] COPLR Con Vol 1074, paras 61-63, followed by Senior Judge Lush in *Re MRJ (Reconsideration of Order)* [2014] EWHC B15 (COP), [2014] EWCOP B15, i.e.

> [61] … *Such a reconsideration is not an appeal. The processes in the Court of Protection are intended to give the court wide flexibility to reach a decision quickly, conveniently and cost effectively where it can, whilst preserving a proper opportunity for those affected by its orders to have their views taken into account in full argument if necessary. To that end, on receiving an application, the court can make a decision on the papers, or direct a full hearing, or make any order as to how the application can best be dealt with. This will often lead to a speedy decision made solely on paper which everyone is content to accept, but any party still has the right to ask for a reconsideration.*
>
> *[62] If this occurs, the court should approach the matter as if making the decision afresh, not on the basis that the question is whether there is a justifiable attack on the first order. The party making the application has not had a proper opportunity to be heard, and should be allowed one without feeling that s/he suffers from the disadvantage of having been placed in the position of an appellant by an order made without full consideration of his points or his views.*

Sir James also reiterated that:

> *a 'best interests court', in which I include the Court of Protection, the Family Court and the Family Division of the High Court of Justice, has no power to regulate or adjudicate upon the decision of a public authority exercising its statutory and other powers: see, generally, A v Liverpool City Council and Another [1982] AC 363, (1981) 2 FLR 222, and, specifically in relation to the Court of Protection, Re MN (Adult) [2015] EWCA Civ 411, [2015] COPLR 505, appeal dismissed N v ACCG and Others [2017] UKSC 22, [2017] COPLR 200.*

Short Note: the Family Court, the Family Division and the Court of Protection

The President of the Family Division, Sir James Munby, has issued guidance on case allocation and the jurisdiction of the Family Court. The guidance helpfully distinguishes between the Family Court and the Family Division, the former being a creation of statute, arising out of the Crime and Courts Act 2014, while the latter refers to the Family Division of the High Court and thus to a superior court of record.

The guidance also reiterates that a judge can sit simultaneously as a judge of both the Family Division of the High Court and the Court of Protection. It also provides helpful guidance on the proper drafting of orders and accurate reference to courts when drafting.

THE WIDER CONTEXT

ENGLAND AND WALES

Ordinary residence and incapacity

The Department of Health and Social Care has published anonymised determinations from 2017 in ordinary residence disputes between health and social care authorities.

All ten determinations are by their nature very fact-specific, but can provide useful examples for practitioners generally seeking to apply the labyrinth rules on ordinary residence. The classic test in *Shah v London Borough of Barnet* [1983] 1 All ER 226 of voluntary adoption of a place of residence does not apply directly to those who lack capacity to decide where to reside. In *R (Cornwall Council) v Secretary of State for the Home Department* [2015] UKSC 46, the Supreme Court held that the question was whether the relevant person's period of actual residence was sufficiently "settled" to amount to ordinary residence.

Readers may be particularly interested in OR6, OR5, OR3, OR2 and OR1 in the 2017 determinations, concerning individuals who lacked capacity to make decisions about their residence and care:

- OR6 – Between 1997 and 2006, P lived with her mother in Council A. Between 2006 and 2009, P attended school in Council C and was later provided with accommodation in Council C. She returned to Council A briefly for a month in late 2009, pending a placement in Council B. She was placed in Council B from 2010 until she moved to a new placement in Council D as a result of Court of Protection proceedings in 2017. The Secretary of State determined that P was, and had been, ordinarily resident in Council B from around 1 January 2010 and deemed to continue to be ordinarily resident there.
- OR5 – Until July 2014, P lived at home with her husband in the area of Council A. On 7 July 2014, P went to stay at a care home located in Council B's area arranged by P's husband. P's husband intended this to be a temporary move. P appeared to settle very well and wished to remain at the care home in Council B. The Secretary of State determined that P was ordinarily resident in Council A at the relevant date in July 2014.
- OR3 – Until May 2012, P lived with his parents in the area of Council A before moving to supported living. He was detained under the Mental Health Act 1983 in March 2013 and discharged in November 2013 to live with his family. In February 2014, the Court of Protection decided that it was in P's best interests to reside at a supported living placement in Council B. P moved to Council B on 10 February 2014. The Secretary of State determined that P became ordinarily residence in Council B on 10 February 2014.
- OR2 – P had been living in the area of Council B since at least 20 April 2011. Council A were involved in arranging P's placement (described as a supported living placement) and they were responsible for his community care. However, Council A did not have responsibility for meeting P's accommodation costs. The Secretary of State determined that P was ordinarily resident in the area of Council B from 20 April 2011.

- OR1 – In October 2011, P moved to a supported living placement in the area of Council B. Prior to that, she resided in the area of Council A where she had friends and family. On 30 January 2015, a best interests' decision was taken that it was in P's best interests to remain at the placement in Council B. The Secretary of State determined that P was, and had been, ordinarily resident in Council B since October 2011.

In related news, we have updated our (free) Guidance Note on Mental Capacity and Ordinary Residence.

Appointeeship (again) – and proceedings before the FTT

RH v Secretary of State for Work and Pensions (DLA) [2018] UKUT 48 (AAC) (Upper Tribunal (AAC) (UTJ Rowland))

Other proceedings

Summary

This case concerned an appeal by the claimant's father against a decision of the First-tier Tribunal as to the claimant's entitlement to disability living allowance (DLA) during a period of time when the claimant was in hospital and then in a residential care home. The decision is of interest for its discussion about the claimant's capacity to conduct the appeal and the consequent need for a litigation friend to be appointed in the proceedings before the application for permission to appeal could be determined.

The claimant had suffered from mental illness for a long time. In 1999, the claimant's mother applied to the Secretary of State to be appointed as the claimant's appointee to manage his benefits. In late 2009, the local authority Medway Borough Council applied to become the appointee. The Secretary of State wrote to the claimant's mother asking whether she would relinquish her role as appointee but RH's mother refused. Nonetheless, the Secretary of State went on to appoint Medway Council as the claimant's appointee and ceased making payments to RH's mother but made them to Medway Council instead.

There was some discussion in the judgment as to whether Medway Council had been validly appointed given the objections of the claimant's mother and the failure of the Secretary of State to formally notify the claimant's mother that her appointment had been revoked. However, the judge ultimately concluded that it was obvious from the circumstances that the claimant's mother must have been aware that she was no longer being treated as the appointee and that Medway Council had in fact been appointed.

What was more unclear was whether the claimant had the mental capacity to conduct these proceedings and the need to resolve that issue in order to determine the application. The local authority was not aware of any capacity assessment of the claimant and offered exceptionally to pay for an assessment and for an independent mental capacity advocate to put RH's arguments to the Upper Tribunal. The local authority argued that the appeal raised important issues other than those relating to the narrow issue of the claimant's entitlement to disability living allowance which justified transferring the case to the High Court, and that, if RH lacked capacity, it would unfair that those issues should be decided without a litigation

friend being appointed to make representations on the claimant's behalf. The Secretary of State opposed the local authority's request to transfer the case to the High Court and argued that the application for permission to appeal had no merit and should be dismissed.

The judge readily acknowledged that the First-tier Tribunal had the power to appoint a litigation friend (citing *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 reported in our September 2017 report. However, whilst it remained unclear whether the claimant had capacity to conduct proceedings, the judge held that it was not necessary to resolve that issue because, even assuming the claimant lacked capacity to conduct litigation, there was no real risk of unfairness to him. As the judge explained at paragraph 39:

> *…for as long as there is an appointee, any benefit awarded as a result of the appeal will be paid to the appointee and so the claimant is protected in that way in any event. All these considerations mean that, in most cases where there is an appointee, it would simply be disproportionate to obtain the evidence necessary to make an assessment of capacity so as to be able to decide whether a person who has apparently been appointed as a litigation friend."*

The appeal had been brought by the claimant's father on the claimant's behalf and both the Secretary of State and Medway Council agreed that, if the claimant lacked capacity and his father consented to the appointment, it would have been appropriate to appoint him as the claimant's litigation friend. Thus, the judge *"would have accepted that the claimant's interests were being adequately advanced and protected by the claimant's father and the appointee between them."*

The judge gave the following general guidance at paragraphs 44-45:

> *44. In considering whether there is unfairness in proceeding without a litigation friend, the starting point must be that, as I have said above, it is generally to be presumed that a claimant who lacks capacity is adequately represented by an appointee and does not need a litigation friend unless the claimant, or a person wishing to act on the claimant's behalf, comes forward and wishes to advance an argument that the appointee is not advancing. Therefore, if a person has been acting on the claimant's behalf but no longer wishes to do so, it may be appropriate to fall back on the presumption and consider the claimant's interests adequately to be protected by the appointee together with the investigatory approach of the expert tribunal, which may enable it to determine an issue identified on behalf of the claimant without it being necessary for the claimant or a litigation friend to take any further action. However, this will depend on the circumstances. In particular, it will be relevant whether the tribunal considers that the appointee is failing to take points that ought to be taken on behalf of the claimant or that there ought to be an opportunity for further evidence to be advanced on behalf of the claimant.*
>
> *45. It is also highly relevant what decisions the tribunal is minded to make. I find it difficult to imagine lack of a litigation friend making it unfair to decide a point entirely in favour of the claimant, even though deciding the same point*

> *against the claimant without a litigation friend having been appointed might be unfair. Nor, at least in this case, can I see any unfairness in me deciding, without a litigation friend having been appointed, issues that are neutral in their effect on the substantive application for permission to appeal, including deciding that certain issues do not need to be decided. As to the substantive application itself, it is for permission to appeal on a point of law in an area of the law in which the Upper Tribunal has considerable experience and frequently raises issues of law that have not been advanced by the parties. The grounds of appeal and other documents identify the arguments that the claimant's father wished to advance. Evidence is not required. The claimant's father is no longer prepared to act on behalf of the claimant. The appointee has instructed counsel and I do not consider that there is any point that could be taken in the claimant's interests that has not been taken. In all these circumstances, I am satisfied that, even if the claimant lacks capacity, I can fairly determine this application and the issues arising in relation to it without it being necessary to appoint a litigation friend to act on behalf of the claimant."*

Counsel for Medway also sought to argue that the procedures, or lack of them, in relation to appointees, their appointment, revocation etc were incompatible with the ECHR and Article 12.4 of the United Nations Convention on the Rights of Person with Disabilities which provides that:

> *4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*

To advance those arguments, he argued, unsuccessfully, that the case should be transferred to the High Court.

In the end, the Tribunal decided the issues without a transfer and without reference to the ECHR or the UN Convention, holding that the revocation and appointment of Medway was, despite its informality and lack of notice, valid, see paragraph 28 of the judgment.

Comment

There is a strong sense of pragmatism in Judge Rowland's reasoning as regards the approach that the Tribunal should take to capacity and representation.

As with the DB case we reported upon in our March Report, this case again illustrates the unsatisfactory nature of the appointeeship regime. It is entirely in the hands of the Secretary of State, there are no procedures to be followed and no controls over appointees. If and when the ECHR and CRPD arguments advanced in the *Medway* case are given a proper outing we

suspect that whole edifice really will start to crumble.

Care home staff – their own views of care

In the largest-ever survey of care home staff, carried out by researchers at UCL and reported in the journal *PLOS ONE*: 51% reported carrying out or observing one or more potentially abusive or neglectful behaviour at least sometimes in the preceding 3 months, and some abuse was reported as happening "at least sometimes" in 91/92 care homes. Examples of positive behavior were also given, but the overall tenor of the study is not reassuring.

Learning disability care and NICE

In its new guideline *Learning disabilities and behaviour that challenges: service design and delivery*, NICE emphasises that care for those with learning disabilities should be provided close to home wherever possible.

The guideline says local authorities and CCGs should take joint responsibility and put one person, who has experience of working with people with learning disabilities and behaviour that challenges, in charge of designing services

This lead commissioner should work together with people using services and their families to develop a clear plan to support people with learning disabilities and challenging behaviour. They should base the plan on good local evidence such as local registers. Budgets and resources should be pooled across health, social care and education. This could be done across neighbouring authorities for the most specialist support services.

The guideline also emphasises the need to plan ahead to reduce the chances of a crisis arising and calls for resources to be in place to respond quickly, for example by providing an out-of-hours helpline.

NICE says adults with learning disabilities who have behaviour that challenges should be offered the option of living on their own if they prefer this and can get appropriate support to do so. As an alternative they can be offered shared housing with a small number of people.

The guideline says each person should have a singled named worker, like a social worker or community nurse, who can have regular meetings with them to discuss their needs.

The guideline emphasises the need to provide families with support as early as possible. This includes providing practical advice on how to care for their loved one, access to short breaks away from their caring duties and details of available local services.

NICE says people with a learning disability and behaviour that challenges should not be admitted to inpatient mental health units unless all other possible options have been considered and exhausted.

Open University course on mental capacity

A free online course on understanding mental capacity (across the UK) is available from the Open University here, which may well be of assistance to those who need to get an overview both of the concepts of mental capacity and the relevant legal frameworks.

Prader-Willi Syndrome and mental capacity

The Prader-Willi Society has published guidance on the application of the MCA 2005 in the

specific, and often complex, context of Prader-Willi Syndrome.

Domestic abuse consultation: a chance to think more widely

The Government launched on 8 March a consultation on the approach to take to domestic abuse, which closes on 31 May. The proposed – statutory - definition of domestic abuse, opening the way both to criminal sanctions and a new 'domestic abuse protection order,' is

> *Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexual orientation. The abuse can encompass, but is not limited to:*
> *• psychological*
> *• physical*
> *• sexual*
> *• economic*
> *• emotional*

The consultation represents a hugely important potential step forward in the domestic abuse context. Readers may also think that – given the near-impossibility of finding legislative time at present – it may also provide the only opportunity that may present itself for some considerable time to consider whether the definition should also include what might be termed 'proximity abuse.' This would capture those who appear to have mental capacity in the relevant domains but are:

1. Being controlled, coerced or abused by those in close physical proximity but where there is no family/intimate relationship: see, for instance, the multiple judgments in the *G* cases for an example where having straightforward relief would have been of very considerable assistance in terms of ensuring that there was a clear route to follow;
2. 'Groomed' or otherwise exploited by those who portray themselves as a friend or intimate of the individual, but are no such thing. The gaps in the law in this area were vividly highlighted by the report of David Spicer into the sexual exploitation of young women in Newcastle.

As readers know, this is an area which has troubled Alex greatly for some time; his attempts to persuade the Law Commission to undertake a project in the area ultimately foundered on a lack of Government commitment to take it forward. This may, though, provide an opportunity to return to the fray, and he would welcome any observations/assistance that readers would care to provide. In this context, they may also be interested to note that the Government of Singapore is moving ahead with legislation in the form of a Vulnerable Adults Bill.

Forced marriage resources launched by the University of Nottingham

'My Marriage My Choice' is a two year study, funded by the National Institute for Health Research - School of Social Care Research (NIHR-SSCR). The study is exploring forced marriage of adults with learning disabilities from a safeguarding perspective. The aim of the project is to increase professionals' recognition of forced marriages, reduce forced marriage and develop resources to support effective adult safeguarding practice in the area.

The objectives of the project are identified as being:

- to identify the individual and cultural characteristics of people with a learning disability who are at risk of or have been subjected to forced marriage;
- to generate knowledge about how key stakeholders, including people with learning disabilities, their families, community/faith leaders and professionals, understand issues of consent, capacity and forced marriage;
- to develop resources for use by lay and professional stakeholders to raise awareness of the forced marriage of people with learning disabilities and support more effective safeguarding interventions when necessary. Outputs will be produced which:
- explain forced marriage from the perspective of people with learning disabilities, family members and community/faith leaders through the use of detailed case studies thus improving understanding of social care staff
- raise awareness of family members and community/faith leaders about the consequences of forced marriage
- provide a framework for adult social care staff to support recognition of forced marriage and managing the complexities involved, including a tool for assessing capacity to consent to marriage
- provide advice to adults with learning disabilities on recognising forced marriage and where to get help (in accessible format).
- To disseminate the findings, including practice-related outputs, to service users, frontline practitioners, managers and policy-makers, and academic audiences

It is being led by Rachael Clawson, Assistant Professor in Social Work at The University of Nottingham (who wrote the multi-agency practice guidelines *Forced Marriage and Learning Disabilities* published by the Home Office/Foreign and Commonwealth Office Forced Marriage Unit in 2010), in collaboration with colleagues at University of Kent, at RESPOND and the Ann Craft Trust.

Permission was given to undertake the first ever analysis of data held by the Forced Marriage Unit (FMU) on cases involving people with learning disabilities. Further data was gathered from people with learning disabilities; family members; community/faith leaders and practitioners to gain multiple perspectives on this complex issue. If you would like to get in touch with the project, they can be contacted at mymarriagemychoice@nottingham.ac.uk, and resources produced by the project should be available shortly at the project website.

Mental Health Tribunal rule change consultation

The Tribunal Procedure Committee has launched a consultation on whether the MHT rules (in England) should be amended to (1) remove pre-hearing medical examinations; and (2) increase the number of circumstances under which paper hearings take place has opened. The consultation runs until 14 June.

The MHA in practice

Two recent reports shed important, and in some

cases disturbing, light upon how the MHA is being implemented in practice, and the pressures that are upon the professionals operating within that system.

The Parliamentary and Health Service Ombudsman reported on 20 March on an analysis of over 200 mental health complaints upheld by the Ombudsman, identifying 5 key themes:

- Failure to diagnose and/or treat the patient;
- Inappropriate hospital discharge and aftercare of the patient;
- Poor risk assessment and safety practices;
- Not treating patients with dignity and/or infringing human rights;
- Poor communication with the patient and/or their family or carers.

The CQC has published the result of a collaborative review carried out in 2017 with national partners and local Approved Mental Health Professionals (AMHPs) to identify themes that support or challenge the effective running of AMHP services. Alongside factors supporting the effective delivery of AMHP services, the CQC identified the following challenges and barriers to the AMHP role

- Acute care system capacity: AMHPs reported that a national reduction in beds affected their ability to complete assessments in a timely manner.
- Workforce: AMHPs talked about an inability to recruit and retain AMHPs.
- Variation in health and social care integration: Integration of services varied across areas and services.
- Mental health commissioning: AMHPs recognised the importance of good, integrated, local commissioning arrangements to their role.

INTERNATIONAL NEWS

How well do you know your loved ones?

An interesting paper[7] published in the British Medical Journal by Canadian researchers sought to analyse whether an advance directive was more or less effective than a proxy decision-maker (such as an attorney) in correctly reflecting the healthcare preferences of elderly people.

Competent adults aged 70 and over were invited to record their healthcare preferences. Around 3 months later, they were interviewed and placed in hypothetical situations of incapacity where a medical decision needed to be made. They were asked whether they would want to receive four medical interventions (intravenous antibiotics, gallbladder surgery for cholecystitis, permanent tube feeding and cardiopulmonary resuscitation) assuming that they had severe dementia at the time the intervention was required. Their chosen proxy (mostly their spouse and for some their child) were asked to guess the other's answers in the various

[7] Bravo G, Sene M, Arcand M: Making medical decisions for an incompetent older adult when both a proxy and an advance directive are available: which is more likely to reflect the older adult's preferences? *Journal of Medical Ethics* Published Online First: 09 March 2018. doi: 10.1136/medethics-2017-104203

scenarios.

Unsurprisingly, the answers the people gave as to their own preferences three months after completing an advance directive were more likely to be similar to their original position (and thus thought to be accurate) than were the views given by their proxies, who had attended the initial workshop with them. The degree of agreement between the person and their proxy ranged from 43% to 83% across the scenarios so the accuracy of proxy judgments is often poor. This was despite half of the participants' having discussed their preferences with their proxy prior to enrolling in the study. The findings suggest that advance preferences might provide a better insight into a person's wishes than their proxy, although neither source is perfect.

The authors conclude that "[f]*indings suggest that a directive might provide better insight into a person's wishes than the person's proxy, although neither source is perfect. A multifaceted decision-making model that includes both sources of information might better serve the interests of older adults who have lost the capacity to make decisions on their own.*"

Treatment withdrawal – the Indian Supreme Court perspective

On 9 March 2018, a five judge bench of the Indian Supreme Court handed down judgement in *A Registered Society v Union India*. The judgment runs to over 500 pages and is a determination of an application brought by a registered society for (inter alia):

- Declaratory relief that the right to die with dignity is a fundamental right within the fold of the right to live with dignity guaranteed under Article 21 of the Constitution.[8]
- To "*ensure that persons of deteriorated health or terminally ill patients should be able to execute a document titled —My Living Will and Attorney Authorisation - which can be presented to the hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of the life of the executant*." (para 6)

The motivation behind the application was stated to be that with "*the advancement of modern medical technology pertaining to medical science and respiration, a situation has been created where the dying process of the patient is unnecessarily prolonged causing distress and agony to the patient as well as to the near and dear ones and, consequently, the patient is in a persistent vegetative state thereby allowing free intrusion.*" (paragraph 8).

Four different judgments were delivered by a Bench comprising the Chief Justice of India Dipak Misra, Justice Khanwilkar (the first judgment), Justice A.K. Sikri (the second judgement), Justice Chandrachud (the third judgment) and Justice Ashok Bhushan (the fourth judgment).

Article 21 of the Indian Constitution

The leading judgment was delivered by Chief Justice Misra and Justice Khanwilkar. The Court

[8] '*No person shall be deprived of his life or personal liberty except according to procedure established by law*'

concluded at para 160 that:

> *the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying. Here, the issue of choice also comes in. Thus analysed, we are disposed to think that such a right would come within the ambit of Article 21 of the Constitution.*

This conclusion was adopted by all of the Judges, of note is the judgment of

- Justice Chandrachud who held that:

  > *'Every individual has a constitutionally protected expectation that the dignity which attaches to life must subsist even in the culminating phase of human existence. Dignity of life must encompass dignity in the stages of living which lead up to the end of life. Dignity in the process of dying is as much a part of the right to life under Article 21. To deprive an individual of dignity towards the end of life is to deprive the individual of a meaningful existence. Hence, the Constitution protects the legitimate expectation of every person to lead a life of dignity until death occurs'*

- Justice Ashok Bhushan who noted that as someone who is competent can refuse or withdraw life sustaining treatment, "*the right of a patient who is incompetent to express his view cannot be outside of fold of Article 21 of the Constitution of India*." He further held that "*in cases of incompetent patients who are unable to take an informed decision, 'the best interests principle'* [should] *be applied and such decision be taken by specified competent medical experts and be implemented after providing a cooling period to enable aggrieved person to approach the court of law.*"

Advance directives/Living wills

Again the leading judgment on this issue was delivered by Chief Justice Misra and Justice Khanwilkar.. The Court held at paragraph 188 that as there is no legal framework in India as regards the Advance Medical Directive the Court had a constitutional obligation to protect the right of the citizens as enshrined under Article 21 of the Constitution. The Court went on to conclude at para 191 that "*Advance Medical Directive would serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity*'" but held that procedural safeguards were required. These were set out as follows:

- It must be executed by an adult of sound mind.
- It must be voluntarily executed.
- It should be the result of informed consent.
- It must be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

The Court went on to detail at some considerable length when and by whom such a document can be given effect to. This is a complex scheme with a number of safeguards, and is well worth

reading in full (see paragraphs 191(d)). In summary:

(i) In the event the executor becomes terminally ill and is undergoing prolonged medical treatment with no hope of recovery and cure of the ailment, the treating physician, when made aware about the Advance Directive, must take specific steps to ascertain the genuineness and authenticity of the document before acting upon it.

(ii) The instructions in the document must be given due weight by the doctors. However, it should be given effect to only after being fully satisfied that the executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the executor is incurable or there is no hope of him/her being cured.

(iii) If the physician treating the patient (executor of the document) is satisfied that the instructions given in the document need to be acted upon, he shall inform the executor or his guardian / close relative, as the case may be, about the nature of illness, the availability of medical care and consequences of alternative forms of treatment and the consequences of remaining untreated. He must also ensure that he believes on reasonable grounds that the person in question understands the information provided, has cogitated over the options and has come to a firm view that the option of withdrawal or refusal of medical treatment is the best choice.

(iv) The physician/hospital where the executor has been admitted for medical treatment shall then constitute a Medical Board consisting of the Head of the treating Department and at least three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years who, in turn, shall visit the patient in the presence of his guardian/close relative and form an opinion whether to certify or not to certify carrying out the instructions of withdrawal or refusal of further medical treatment. This decision shall be regarded as a preliminary opinion.

(v) Thereafter the 'Jurisdictional Collector' is informed and has to form a further Medical Board comprising the Chief District Medical Officer of the concerned district as the Chairman and three expert doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care. They shall jointly visit the hospital where the patient is admitted and if they concur with the initial decision of the Medical Board of the hospital, they may endorse the certificate to carry out the instructions given in the Advance Directive.

(vi) The Board constituted by the Collector must beforehand ascertain the wishes of the executor if he is in a position to communicate and is capable of understanding the consequences of withdrawal of medical treatment. In the event the executor is incapable of taking decision or develops impaired decision making capacity, then the consent of the

guardian nominated by the executor in the Advance Directive should be obtained regarding refusal or withdrawal of medical treatment to the executor to the extent of and consistent with the clear instructions given in the Advance Directive.

(vii) The Chairman of the Medical Board nominated by the Collector, that is, the Chief District Medical Officer, shall convey the decision of the Board to the jurisdictional JMFC (the body involved in the actual execution of the document) before giving effect to the decision to withdraw the medical treatment administered to the executor. The JMFC shall visit the patient at the earliest and, after examining all aspects, authorise the implementation of the decision of the Board.

(viii) It will be open to the executor to revoke the document at any stage before it is acted upon and implemented.

In the event that permission to withdraw medical treatment is not granted by the Medical Board, an application to the Court can be made by the executor, the hospital or treating clinician, or family members. The High Court will be free to constitute an independent Committee consisting of three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care.

The Judgment also sets out provisions for withdrawing the Advance Directive, and for practitioners to establish if it is inapplicable. In the event that a Hospital Medical Board takes a decision not to follow an Advance Directive while treating a person, then it shall make an application to the Medical Board constituted by the Collector for consideration and appropriate direction on the Advance Directive.

The judgment also addresses what should be done where a patient does not have an Advance Directive. The process set out is effectively the same, however the process is started not by the fact of the Advance Directive, but because the patient is terminally ill and undergoing prolonged treatment in respect of an ailment which is incurable or where there is no hope of being cured. In such circumstances the physician may inform the hospital which, in turn, shall constitute a Hospital Medical Board as set out above.

In the event the Hospital Medical Board certifies the option of withdrawal or refusal of further medical treatment, the hospital shall immediately inform the jurisdictional Collector and the same process as set out above is invoked.

The other judges all agreed with the scheme outlined by the Chief Justice, Justice Sikri adding what he described as a 'a pious hope' that the *'legislature would step in at the earliest and enact a comprehensive law on 'living will/advance directive' so that there is a proper statutory regime to govern various aspects and nuances thereof which also take care of the apprehensions that are expressed against euthanasia[9].'*

[9] In this context this means passive euthanasia i.e. the withholding of life-prolonging measures and resources, as opposed to active steps to bring about a person's death.

Comment

The depth and breadth of this judgment is immense. The judgments traverse an enormous wealth of philosophical, moral, religious and legal material from around the globe. We hope that we may be forgiven for being a little proud that in a judgment which quotes from the most influential thinkers in world history it also includes reference to an article on the 39 Essex Chambers website by a certain A Ruck Keene!

The judgment has been provided to the UK Supreme Court who are currently deciding on the procedural requirements on clinicians to bring cases for withdrawal of CANH in PVS and MCS patients before the case (*Re Y*).

CRPD updates

In an unusual step, the Committee on the Rights of Persons with Disabilities has published a correction to General Comment 1, on Article 12 and equal recognition before the law. The original version provided, at paragraph 27, that substitute decision-making regimes, which the Committee considers are impermissible by reference to the CRPD:

> *can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.*

The corrected version reads the same, save for the replacement of a key 'and' with an 'or':

> *can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; **OR** (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.*

It will be seen that this – disjunctive – definition captures a very much wider group of legal frameworks than the General Comment as published, as any one of the circumstances outlined in the paragraph is – on the Committee's interpretation of Article 12 – impermissible. It is undoubtedly the case that this reflects the underlying intention of the Committee, so this is clearly a correction, rather than a further expansion of their interpretation.

That the Committee's interpretation of Article 12

is not shared by all states[10] was confirmed when the Republic of Ireland ratified the CRPD, to take effect on 19 April 2018. Ireland entered the following declarations and reservations:

> ***Declaration and reservation: Article 12***
> *Ireland recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Ireland declares its understanding that the Convention permits supported and substitute decision-making arrangements which provide for decisions to be made on behalf of a person, where such arrangements are necessary, in accordance with the law, and subject to appropriate and effective safeguards.*
>
> *To the extent article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards.*
>
> ***Declaration: Articles 12 and 14***
>
> *Ireland recognises that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and mental integrity on an equal basis with others. Furthermore, Ireland declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.*

Finally, it is perhaps of interest[11] to note that the Committee's Concluding Observations upon the United Kingdom as finally published 3 October 2017 contained a subtle, but important, change from the advance version commented upon in our September 2017 Mental Capacity Report. The advance version provided this:

> *Right to life (art. 10)*
>
> *26. The Committee observes with concern the substituted decision-making in matters of termination or withdrawal of life-sustaining treatment and care that is inconsistent with the right to life of persons with disabilities as equal and contributing members of society.*
>
> *27. The Committee recalls that the right to life is absolute from which no derogations are permitted and recommends that the State party adopt a plan of action aimed at eliminating perceptions towards persons with disabilities as not having "a good and decent life", but rather recognising persons with disabilities as equal persons and part of the diversity of humankind, and ensure access to life-sustaining treatment and/or care.*

The final version reads:

> *26. The Committee notes with concern that the substituted decision-making applied in matters of termination or withdrawal of life-sustaining treatment and care is inconsistent with the right to life of persons with disabilities as equal and contributing members of society.*

[10] See in this regard, for instance, the work of the Essex Autonomy Project.

[11] With due credit to Professor Wayne Martin of the EAP for spotting this.

> *27. The Committee recommends that the State party adopt a plan of action aimed at eliminating perceptions towards persons with disabilities as not having "a good and decent life" and recognizing persons with disabilities as equal to others and part of the diversity of humankind. It also recommends that the State party ensure access to life-sustaining treatment and/or care.*

As explained in the September 2017 Mental Capacity Report, the underlined part of the first sentence in the original version of paragraph 27 took us into very strange and difficult territory in a case such as that of Mr Briggs; its removal (whether or not this has anything to do with the commentary we gave) undoubtedly allows the correct focus to be placed on the real issues raised by the Committee in this part of its Observations, and is therefore to be welcomed.

Assisted Decision-Making (Capacity) Act consultation

In other news from the Republic of Ireland, the consultation on the Draft Codes of Practice for Advance Healthcare Directives to accompany Part 8 of the Assisted Decision Making (Capacity) Act 2015 is now open. Details of the consultation process and the draft codes are available here, and the consultation runs until 4 May 2018.

SCOTLAND

Mental Welfare Commission for Scotland Report: The Right to Advocacy - A Review of Advocacy Planning across Scotland

In March the Mental Welfare Commission for Scotland published a report on the provision and planning of advocacy services across Scotland.

Advocacy is an important form of support for persons with cognitive, intellectual or psychosocial disabilities in terms of ensuring full and non-discriminatory respect for rights including facilitating participation in decisions and enabling autonomy, not least the exercise of legal capacity. This importance and the need to make adequate provision for good quality service was recognised by both the Millan Review[12] (which led to the enactment of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act)) and the later McManus Review on aspects of the 2003 Act.[13] Indeed, the Millan recommendations were reflected in section 259 of the 2003 Act which gives a right to anyone with mental disorder, whether or not they are subject to compulsion under the Act, to independent advocacy and a corresponding duty on health boards and local authorities to provide this. This right was further reinforced by the insertion by the Mental Health (Scotland) Act 2015 of section 259A in the 2003 Act which places an additional duty on local authorities and health boards to inform the Mental Welfare Commission about how they have ensured access to advocacy services as well as how they plan provision for these in the future.

Whilst there is no specific right to independent advocacy in the Adults with Incapacity (Scotland) Act 2000 (AWIA) section 3(5A) does provide that sheriffs must take account of the wishes and feelings of the adult insofar as they are expressed by a person providing independent advocacy services. Section 6 of the Adult Support and Protection (Scotland) Act 2007 also requires that where a council decides to intervene in order to protect an adult at risk from harm then it must have regard to the importance of the provision of appropriate services which includes, in particular, independent advocacy.

Even outside of such legislative requirement to provide, or recognition of, advocacy the role that advocacy can play in terms of supporting the exercise of an individual's rights, not least those persons with cognitive, intellectual and psychosocial disabilities, is indisputable.

The significance of advocacy is also on the radar of the Committee on the Rights of Persons with Disabilities which it notes in its General Comment No 1 interpreting the right to equal recognition before the law identified in Article 12 Convention on the Rights of Persons with Disabilities (CRPD) as being an integral support for the exercise of legal capacity.[14] Further, the

[12] Scottish Government, *New Directions: Report on the review of the Mental Health (Scotland) Act 1984* (January 2001), pp xv and xvi, paras 1.13, 8.20, 11.90 and 12.19, Chapter 14 and Recommendations 14.1-14.7.

[13] Scottish Government, *Limited Review of the Mental Health (Carer and Treatment)(Scotland) Act 2003; Report* (March 2009) Chapter 3 and Recommendations 3.1-3.6

[14] Committee on the Rights of Persons with Disabilities, *General Comment No.1 (2014): Article 12 – equal recognition before the law*, CRPD/C/GC/1, paras 17 and 29. The fact that the 2003 Act and AWIA associate the existence of mental disorder and/or mental incapacity with the provision of advocacy may mean that such

European Court of Human Rights, in its Articles 5 and 8 ECHR jurisprudence,[15] has increasingly expansively interpreted autonomy, including the exercise of legal capacity, and the requirement for meaningful effect to be given to European Convention on Human Rights (ECHR) rights for persons with mental disorder. This arguably infers the importance of support which would logically include advocacy.

The Scottish Independent Advocacy Alliance (SIAA) 2015-2016 *Map of Advocacy across Scotland*[16] noted a steady increase in people accessing advocacy since 2011/12 to 30,500 in 2015/2016.[17] However, at the same time, a continued overall trend in reducing resourcing (statutory and otherwise) for advocacy was identified[18] with consequent gaps in provision in relation to, amongst others, children and young persons, dementia, learning disabilities, autism, mentally ill persons in prison and collective advocacy[19] and prioritisation of referrals (often in favour of those facing compulsory measures).[20] This is clearly of concern and, of course, the numbers given for those accessing advocacy does not necessarily reflect all persons who actually require advocacy.

The Mental Welfare Commission report essentially reinforces this picture of planning and provision of advocacy services across Scotland. Like the SIAA map, it highlights significant gaps in service provision for children and young people, with services for adults facing compulsion often being prioritised. Strategies for monitoring and reviewing services are also found to be variable together with there being a lack of clarity about which organisation, be it health boards or the new health and social care partnerships, is actually responsible for co-ordinating the preparation of strategic advocacy plans and the involvement of advocacy providers and people using advocacy services in planning.

Alongside statutory provisions relating to advocacy ECHR rights have direct legal purchase in Scotland.[21] The CRPD does not have the same legal weight but is nevertheless influential[22] and the Scottish Government specifically refers to advocacy in its CRPD delivery plan.[23] Moreover, support for the exercise of legal capacity is also included in the Scottish Government's most recent AWIA reform consultation.[24] If Scotland is to deliver

legislative provision does not entirely meet the Committee's requirements.

[15] For example, *Shtukaturov v Russia* (2008) (Application No. 44009/05) ECHR 223; paras 87-89, *Sykora v Czech Republic* (23419/07/07) (2012) ECHR 1960,paras 101-103; *X v Finland* (34806/040 (2012) ECHR 1371, para 220; *A-MV v Finland* (Application no. 53251/13, decision of 23 March 2017).

[16] Scottish Independent Advocacy Alliance *Map of Advocacy across Scotland 2015/2016*

[17] *Map of Advocacy across Scotland* 2015/2016 edition, p9

[18] Ibid, pp2-8 and 15.

[19] Ibid, pp11-12.

[20] Ibid, p15.

[21] ss 29(2) and 57(2) Scotland Act 1998; ss 2, 3 and 6 Human Rights Act 1998.

[22] Noting the UK's obligations, as a CRPD state party, under international to give effect to its rights and the fact that proposed devolved legislation and Ministerial actions in Scotland can be prevented for non-compliance (ss 35(1)(a) and 58(1) Scotland Act 1998).

[23] Scottish Government, *A Fairer Scotland for Disabled People: Our Delivery Plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities* (December 2016) although its *Mental Health Strategy 2017-2027* does not specifically mention advocacy.

[24] Scottish Government, *Adults with Incapacity (Scotland) Act 2000: Proposals for reform* (January 2018).

under all these heads then clearly serious and urgent action needs to be taken regarding the adequacy of provision of advocacy.

Jill Stavert

Edinburgh Sheriff Court – Applications under the Adults with Incapacity (Scotland) Act 2000

The Sheriff Principal has issued a Practice Note (No.1 of 2018) in relation to applications under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). It applies to all applications lodged at Edinburgh Sheriff Court on or after 9 April 2018.

The Practice Note does not alter the practice for most applications; its main focus is to update practice in light of *Aberdeenshire Council v JM* [2017] CSIH 65 when there is a counter-crave for appointment as guardian.

Paragraphs 2 and 3(v) of the Practice Note deal with the *Aberdeenshire Council* case. The wording of what is now paragraph 3(o) has been amended to emphasise the need to lodge material to enable the sheriff to be satisfied about the suitability of a person for appointment and paragraph 3(w) deals with applications for variation under sections 74(4) and 57.

There have otherwise also been some alterations and/or additions to the wording of what are now paragraphs 1, 3(a), 3(b), 3(c), 3(d), 3(k), 3(l), 3(m), 3(p), 3(q), 3R), 3(s), 3(t), 3(z) and 4(g) of the Practice Note as compared with the previous Practice Note, No 1 of 2016.

Copies of the Practice Note are available on the Scottish Courts website at and from the webpage for the Guardianship Court at Edinburgh Sheriff Court. An electronic version of the practice note may also be obtained by email application to the AWI mailbox at Edinburgh Sheriff Court at edinburghawi@scotcourts.gov.uk

Commentary

We are grateful to Edinburgh Sheriff Court for preparing the above notice, specifically for inclusion in this Report. This latest Practice Note is of course essential reading for practitioners in that court. We commend it to practitioners everywhere as a helpful checklist of the minimum requirements for applications, minutes and appeals within the scope of paragraphs 1 and 2 of the Practice Note. It is helpful that the precise scope of the Practice Note is defined. As we have observed, some Practice Notes purport to apply to all applications under the Adults with Incapacity (Scotland) Act 2000, but have content apparently directed exclusively to proceedings under Part 6 of that Act. Broadly, the latter is the scope defined in paragraphs 1 and 2 of this latest Edinburgh Practice Note.

As is highlighted above, the Note takes account of the helpful guidance given by the Inner House in *Aberdeenshire Council v JM*, on which we reported in our November 2017 Report. The Note helpfully avoids undefined, and apparently irrelevant, references such as to "next of kin" that have appeared in equivalent Notes in other sheriffdoms, and is specific about matters such as specification of nearest relative, primary carer, and so forth. Of course, such points ought to have been standard practice ever since Part 6 of the Act, the relevant court rules and

amendments to both, came into force. It is helpful to have a checklist of such points, though perhaps unfortunate that it should still be necessary. Subject to subsequent changes and developments in practice, the basic requirements all appear in the styles which I offered in Appendix 6 to *Adult Incapacity*, published a year after Part 6 of the Act came into force. If this latest Note should however be approached with the eye of a reviewer, then one might query whether the requirement in paragraph 3(c) of the Note for a statement of the circumstances in which the appointment of a substitute guardian would be triggered is either necessary, or indeed competent, given that the circumstances are defined in section 63(1) of the Act; and whether the requirements of paragraph 3(p) for a letter from each proposed guardian might not usefully also include a requirement for an explicit statement of that person's willingness to be appointed and to act, coupled with statements about the extent to which that person has been informed about the role, requirements and responsibilities of a guardian, and a statement of the source of such information.

I describe the contents of the Note as minimum necessary requirements because they do not, for example, extend to information necessary to demonstrate compliance with the UN Convention on the Rights of Persons with Disabilities, even as far as the limited proposals contained in the current Scottish Government consultation document, on which we reported in our March 2018 report. The consultation document suggests just one new principle, in the following terms: "*There shall be no intervention in the affairs of an adult unless it can be demonstrated that all practical help and support to help the adult make a decision about the matter requiring intervention has been given without success.*" It would now be good practice to demonstrate, and of assistance to the court in discharging the court's responsibilities, at least that much in applications under Part 6 of the Act.

It is helpful that the Note draws attention to the need to separate clearly matters of powers relating to property and financial affairs, on the one hand, and those relating to personal welfare, on the other, coupled with drawing attention specifically to section 74(4) of the Act, under which an application for variation to introduce personal welfare powers where previously only powers in relation to property and finances are held, or vice versa, in effect seek creation of a new guardianship.

Adrian D Ward

Powers of attorney – more cross-border trouble!

It is sadly necessary to draw the attention of Scottish readers to the English case of *Re JMK* [2018] EWCOP 5, and the report of it by Alex in the Practice and Procedure section of this Report under the mild heading "Foreign powers of attorney – an unfortunate judicial wrong turn". With a degree of generosity, Alex commences by pointing out that both parties in this case were litigants in person. The first wider lesson from the case is that, even before specialist judges, the penalties for lack of expert representation in adult incapacity cases can be high. The time and trouble at public expense that can result from "unfortunate" outcomes, including the results of inexpertly prepared powers of attorney or court applications, will often far outstrip any savings to

the public purse resulting from inappropriate restrictions on availability of Legal Aid; quite apart from the human cost in terms of human rights violations.

As is narrated in the item cross-referred to, the *JMK* case appears to have concerned a Canadian power of attorney by a granter habitually resident at time of granting in Canada, but relevant considerations could be equally applicable to a Scottish power of attorney by a granter habitually resident in Scotland. The judge in *JMK* was asked the wrong question, did not identify what should have been the right question, and in consequence gave the wrong answer. One difference with Scotland is that the Canadian power of attorney (specifically, a power of attorney granted in Ontario) could not have been a "protective measure", even under the revised paragraph 146 of the Explanatory Memorandum to the 2000 Hague Convention on the International Protection of Adults ("Hague 35"), because under the procedure in Ontario it was not approved or registered by a court or other authority. It always was arguable, and that argument is strengthened by the crucial amendments to paragraph 146, that a power of attorney registered, as for example in Scotland by a public authority, is a protective measure under Hague 35, thus attracting automatic recognition and enforceability.

In case of doubt or dispute in England and Wales, a "foreign" power of attorney can now be the subject of an application under Rule 23.6 of the Court of Protection Rules.

The converse position in Scotland is that English powers of attorney have the same status here as do Scottish powers of attorney, on the authority of *C, Applicant*, Airdrie Sheriff Court, 2nd April 2013. While that case remains unreported, it may now be cited by reference to my description of it in a case commentary at 2018 SLT (News) 26. That commentary was principally upon the case of *Darlington Borough Council, Applicants*, described in January 2018 Report, and now reported at 2018 SLT (Sh Ct) 53.

Please see the article by Alex cross-referred to for a full description of relevant features of the *JMK* case, and a link to it.

Adrian D Ward

Editors and Contributors

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

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. 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 has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

Editors and Contributors

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. 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 recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law 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.

Conferences

Conferences at which editors/contributors are speaking

Conferences at which editors/contributors are speaking

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see here.

Central Law Training Elder Client Conference

Adrian is speaking at this conference in Glasgow on 20 March. For details, and to book see here.

Royal Faculty of Procurators in Glasgow Private Client Conference

Adrian is speaking at this half-day conference on 21 March. For details, and to book, see here.

Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see here.

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

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

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

International Arbitration Chambers of the Year 2014
Legal 500

Environment & Planning Chambers of the Year 2015

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

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

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.