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MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE

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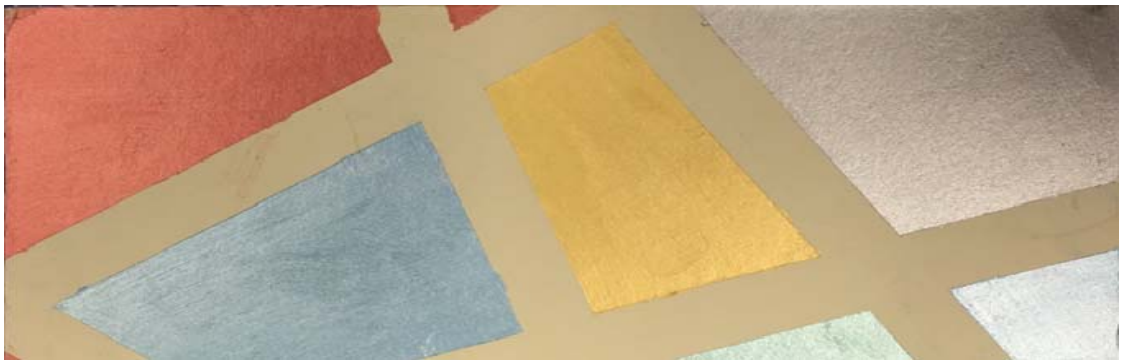

Welcome to the April 2018 Mental Capacity Report. Highlights this month include:

(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.

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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

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, [1] 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.[2]

The starting point[3] 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

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

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 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.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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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.

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Conferences

Conferences at which editors/contributors are speaking

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.

Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in London on 9 May and Manchester on 24 May.

Other conferences of interest

Towards Liberty Protection Safeguards: Implications of the 2017 Law Commission Report

This conference being held on 20 April in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, see here, quoting HCUK250dols for a discounted rate.

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 early 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.

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