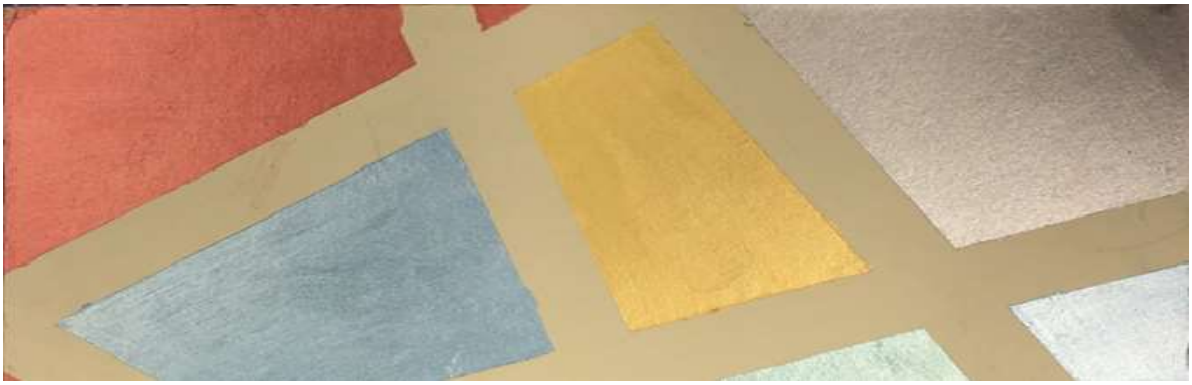
Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

April 2020 | Issue 103



Welcome to the April 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the DHSC emergency guidance on MCA and DoLS, the Court of Protection on contact and COVID-19, treatment escalation and best interests, and capacity under the microscope in three complex cases;

(2) In the Property and Affairs Report: the Golden Rule in (in)action and the OPG's 'rapid response' search facility for NHS and social care staff to access the register of deputies / attorneys;

(3) In the Practice and Procedure Report: the Court of Protection adapting to COVID-19 and an important decision on the s.48 threshold;

(4) In the Wider Context Report: COVID-19 and the MCA capacity resources, guidance on SEND, social care and the MHA 1983 post the Coronavirus Act 2020, dialysis at the intersection between the MHA and the MCA and an important report on the international protection of adults;

(5) In the Scotland Report: the response of the legal community to AWI law and practice under COVID-19, and an update from the Mental Health Law Review.

You can find our past issues, our case summaries, and more on our dedicated sub-site here. Chambers has also created a dedicated COVID-19 page with resources, seminars, and more, here.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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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

The Court of Protection and COVID-19

The Court of Protection, along with wider society, is going through an extraordinarily rapid transformation to address the consequences of the pandemic.

A useful set of resources relating to the wider operation of courts (including legal aid) can be found on the Mental Health Law Online website here); the Judiciary website has also collated advice and guidance here. Key resources relating to the Court of Protection are the guidance letters from the Vice-President, Hayden J, as follows (in reverse chronological order):

- 31 March 2020: Guidance on remote access to the Court of Protection, including a detailed protocol for remote hearings and draft order.
- 24 March 2020 Further Guidance for Judges and Practitioners in the Court of Protection arising from Covid-19
- 18 March 2020: Additional Guidance for Judges and Practitioners arising from Covid-19
- 13 March 2020: Visits to P by Judges and Legal Advisers

The Court of Protection Bar Association issued guidance (approved by Hayden J) on 7 April 2020 as to effective conduct of remote hearings in the Court of Protection, available here. The experience of Rosie Scott, one of the members of the Court of Protection team, with remote hearings can be found here.

Further guidance is likely to be forthcoming, and Hayden J has formed the HIVE group to meet (remotely) at regular intervals throughout the present public health crisis. The objective will be to continue to refine the approach to dealing with the Court's business and to seek to ensure that it runs as smoothly as possible. The members of the group are:

- Hayden J
- HHJ Carolyn Hilder
- Sarah Castle (the Official Solicitor)
- Vikram Sachdeva QC, Vikram.SachdevaQC@39essex.com
- Lorraine Cavanagh QC, Lorraine.Cavanagh@stjohnsbuildings.co.uk
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- Joan Goulbourn (Ministry of Justice)
- Mary MacGregor (Office of Public Guardian)
- Kate Edwards, kate.edwards@wrigleys.co.uk

Questions for consideration by the HIVE group should be directed in the first instance to one of the members of HIVE whose email addresses are listed above.

Separately, HMCTS has issued its family business priorities for April 2020, i.e. what work must be done, what work will be done, and what work HMCTS will do its best to do. In relation to the Court of Protection, they are divided as follows:

Must be done

- Urgent applications
- Applications under Mental Capacity Act 2005, s 16A and s 21A
- Serious medical treatment cases
- Deprivation of Liberty
- Form COP1 Statutory Wills – where person is near end of life.
- Safeguarding applications via the Office of the Public Guardians

Work that will be done

- Gatekeeping and allocation referrals –care
- Gatekeeping and allocation referrals – private
- Other family care orders/documents/emails
- Court of Protection – welfare cases

Work that "we will do our best to do"

- Court of Protection –property and affairs

The s.48 threshold recalibrated

DA v DJ [2017] EWHC 3904 (Fam) (Parker J)

Practice and Procedure (Court of Protection) – other

Summary

In this case, decided in 2017, but which only appeared on Bailii in March 2020, Parker J considered in considerable detail the operation of s.48 MCA 2005: i.e. the jurisdiction of the Court of Protection to make interim declarations and decisions.

The case concerned a wealthy woman, about whom her children were concerned, and in respect of whom they wished to bring an application to the Court of Protection. The dilemma they – and the court – faced was neatly summarised in these two paragraphs:

> *10. As part of the preparation for this case, the applicant and his siblings have instructed a consultant psychiatrist, a Dr Glover, who has provided a report based on the statements to which I have referred and the text messages. He has not met or even seen DJ. I recognise, as indeed does Sir Robert, the limitations of this approach. Nonetheless, in my assessment, it is not one that can be wholly discounted or disregarded. The children have taken the view that it would be impossible, ineffective, and counterproductive to ask their mother to be assessed. She expresses herself to be wholly sane and rational.*

[…]

> *12. The proposal which is made on behalf of the applicant is, in my view, a moderate and tempered one. It is intended with the support of the Official Solicitor through his representative, Ms Hobey-Hamsher, to introduce psychiatric expertise in the form of a psychiatrist to DJ at her home in pursuit of an assessment. In order so to do, an order is sought, after the necessary interim declaration, without which the court can make no order, and after case management directions, for disclosure to be sought from the borough in which DJ lives and from medical attendants who may have assisted her in the past.*

In order to proceed, Parker J had to resolve the conflict between the decisions of HHJ Marshall in *Re F* [2009] EWHC B30 (Fam) and that of Hayden J in *Wandsworth LBC v A McC* [2017] EWHC 2435 (Fam) as to the threshold for engaging the jurisdiction. HHJ Marshall had held that what was required was "*sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard*." Hayden J had rejected HHJ Marshall's approach, on the basis that *"…the presumption of capacity is omnipresent in the framework of this legislation and there must be reason to believe that it has been rebutted, even at the interim stage. I do not consider, as the authors of the 'Mental Capacity Assessment' did that a 'possibility', even a 'serious one' that P might lack capacity does justification to the rigour of the interim test. Neither do I consider 'an unclear situation' which might be thought to 'suggest a serious possibility that P lacks capacity' meets that which is contemplated either by Section 48 itself or the underpinning philosophy of the Act*." Hayden J held that an interim declaration had to be founded upon a "*solid and well-reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves*."

Parker J observed that:

> *65. It is uncomfortable, even invidious, to be asked to disagree with the decision of another judge of equivalent status. However, I am invited to approach this case by both counsel on the basis that Judge Marshall's reasoning should be preferred to that of Mr Justice Hayden. Both Sir Robert and Mr Rees submit that the stark and restrictive interpretation by Hayden J, with its requirement of explanation to the asserted incapacitous person and ability for his/her voice to be heard, makes the Act unworkable in practice and runs a high risk of imperilling the safety and wellbeing of those persons whom the Act and the judges are charged with protecting. Reliance is placed upon Judge Marshall's words which I have quoted at length and I am asked to approve them.*
>
> *66. I regard her approach as consistent with the policy of the Act, one which makes sense on the basis of common sense and practicality as she observed. I agree that were it necessary in every case, as opposed to preferable, to defer assessment of capacity until there has been either a formal psychiatric assessment and/or engagement of P undermines the Act's purpose and unsupported, indeed is positively contradicted, by the Law Commission report and the explanatory notes after the Royal Assent which I have cited, I am satisfied that I can take into account such materials which are plainly to be regarded*

> *as travaux préparatoires and which are, in any event, consistent with a purposive construction of the Act.*
>
> *67. Furthermore, to require the "voice" of P to be heard before reaching a decision as to whether the s.48 gateway is passed is not to be found within the structure of the Act itself but is, adopting the approach of Judge Marshall, one of the matters to be taken into account when considering the case in the round. I note also that on the facts of the decision in respect of J in the Wandsworth case, the only material upon which the local authority appear to have relied was what J said himself. In contrast to the case before me, there appears to have been no other extraneous observation of behaviour, of attitude, examination of written material, and so on.*
>
> *68. I can see that there may be cases in these highly fact-specific areas where to hear the voice of P explaining a comment or account may be an important part of the assessment process, particularly at the final stage. I disagree that there is any compulsion for such view to be expressed. In practice whether an explanation is required will mostly be where silence in the face of something calls for an answer.*

Parker J went on to:

> *70.* […] *disagree also with Hayden J that "a possibility" and particularly "a serious one" does not fulfil the test set out in s.43. Furthermore, an "unclear situation" which might "suggest a serious possibility P lacks capacity" in my view also falls within the criteria to be considered or the circumstances to be considered under s.38.*
>
> *71. I have been urged not to seek to recast the clear words of s.48 in any different language which might further confuse the law in this area. It is obvious to me that the word "reason" in s.48 means that there must be evidence upon which a belief is formed. It probably needs to be prima facie credible, not in the sense that it is believed but in the sense that it is capable of belief (for instance, something which is plainly fanciful or impossible might be capable of being disregarded), and I see no reason, indeed it seems to me axiomatic in the phraseology of s.48(a) that the court is entitled to draw inferences from the prima facie facts which are sought to be established.*

On the facts of the case, and applying the "simple test in the Act," Parker J took the view that the s.48 threshold was crossed, and made an order (the precise terms of which were not set out in the judgment) to move the case forward. She had, earlier (and importantly) noted that, if the woman was "unwilling to see the experts instructed, or the medical professionals instructed; and/or the assessment is not concluded; it is agreed that a report should be written having regard to the written material alone."

Comment

As we noted at the time that the *Wandsworth* judgment was handed down, it was a problematic decision (in which it appeared not to have been brought to Hayden J's attention that Charles J, his predecessor as Vice-President of the Court of Protection, had expressly endorsed HHJ Marshall's position). With respect, we entirely agree with the approach adopted by Parker J, which avoids some of the real

difficulties that the *Wandsworth* judgment caused, in particular where it has not been possible to gain access to the person to carry out a proper capacity assessment.

Short note: habitual residence and jurisdictional deadlock

In *QD (Habitual Residence) (No.2)* [2020] EWCOP 14, Cobb J gave a follow up judgment to that delivered in December 2019. In that judgment, Cobb J decided that the move of QD from Spain to England had been a wrongful act perpetrated by his children, that he remained habitually resident in Spain, and that the Court of Protection should decline primary jurisdiction in accordance with the provisions of Schedule 3 of the MCA 2005, and should yield to the jurisdiction of the Spanish Court. Cobb J had agreed that he could exercise the limited jurisdiction available to him pursuant to Schedule 3, paragraph 7(1)(d), to make a 'protective measures' order which provided for QD to remain at and be cared for at the care home which he was living and to continue the authorisation of the deprivation of his liberty there only until such time as the national authorities in Spain have determined what should happen next. Cobb J held that it was "*for the Spanish administrative or judicial authorities to determine the next step, which may of course be to confer jurisdiction on the English courts to make the relevant decision(s)*"

Following that decision, a Spanish lawyer (was instructed to advise on the process by which the Spanish Court could accept jurisdiction. She made clear that the Spanish proceedings could not progress whilst QD remained in England. As Cobb J noted, this gave rise to:

> *something of a legal 'deadlock' has arisen; I have found that the English Court does not have primary jurisdiction in respect of QD, as he is not habitually resident here; this does not of itself give rise to an immediate obligation to return QD to Spain. There is, currently, no order of the Spanish Court directing the return of QD which is capable of recognition and enforcement by the Court of Protection under MCA 2005 Schedule 3, paras 19 and 22. It appears that the Spanish Court will not be able to exercise its primary jurisdiction to decide where QD should live (and whether he should return to Spain) unless QD is returned to Spain; the decision of* whether *he should be returned,* how *he should be returned, and* when *he should be returned, would primarily fall (unless it comes within Schedule 3*, para.7(1)*) to be to be considered by the Spanish Court.*

Cobb J had started to take steps to seek to break the deadlock when the COVID-19 pandemic swept Europe, such that, even if it were theoretically possible to order a return at the present time, to implement would be impractical, and to do so would clearly expose QD to an unacceptable risk of infection.

The Official Solicitor invited the court to make an 'in principle' best interest decision that he be urgently returned to Spain. She was concerned that unless QD is returned to Spain, to enable the Spanish court to make the decision about QD's long-term residence, the Applicants' wrongful act would *de facto* be regularised by default. She further accepts that the direction should be stayed pending the conclusion of the pandemic.

Cobb J held as follows:

> *17. In spite of its limited practical effect at this stage, I felt that I should pause to reflect on the decision, particularly given the quality of the submissions made on all sides. While tempted to try to break the jurisdictional 'deadlock' at the moment, by making an 'in principle' best interests' decision, I have (somewhat reluctantly) reached the conclusion that I should simply adjourn the decision, and re-list this application for further review in three or four months' time. I have so decided for the following reasons:*
>
> *i) I cannot in all conscience exercise a jurisdiction ("exercise its functions under this Act": Schedule 3 MCA 2005) based on 'urgency' under Schedule 3 para.7(1)(c), while at the same time adjourning the implementation of the order for an indefinite period, which is likely to be many months; I have already decided (see [4](iv) above) that 'urgency' means "an immediate need" for the substantive order; there would be an unacceptable dissonance between these outcomes;*
>
> *ii) point which did not arise at the hearing, but which has occurred to me while considering this judgment: I would like the parties to consider whether they feel that* [the Spanish lawyer] *has sufficiently covered the provision raised in Schedule 3, para.11 MCA 2005: "In exercising jurisdiction under this Schedule, the court may, if it thinks that the matter has a substantial connection with a country other than England and Wales, apply the law of that other country" (my emphasis by underlining); in this regard, while I am advised that the Spanish Court would generally deploy its comprehensive legal framework with clearly prescribed 'best interests' criteria, specifically, how would the Spanish Court consider the issue of whether QD should return? If the parties, or any of them, considers that Ms Garcia has not addressed this specific question, she should/could be asked a supplementary question focused on this point;*
>
> *iii) Even if I were to make an 'in principle' decision now, such a decision would have to be subject to a further welfare review/enquiry of some kind as/when the pandemic has passed, in order that I could then be satisfied that QD remains fit for travel abroad, and that this would not be contrary to his best interests; this approach corresponds with that taken by Hedley J in relation to a related point arising under MCA 2005 Sch. 3 para 12 in the case of Re MN [2010] EWHC 1926 (Fam) at paras [35] to [36] ("It has to be said, however, that were the current stay to remain in place for an appreciable period, this court may well need an updated assessment from [the expert advising on welfare]");*
>
> *iv) It is agreed that there is, in any event, a need for some further evidence from KD about the arrangements for QD in Spain; there is no confirmed space for QD at Vista Al Mar; it is not confirmed that the staff there will cater for the needs of a person with dementia. She has agreed to furnish this further information in writing. Even if this information were available now (which it is not), given the likely delay in resolving this issue, it is likely that updated/contemporary evidence on*

> *these points would have been required in any event;*
>
> *v) The Applicants have conceded that they cannot and will not take advantage of QD's continued presence here in this country to mount a case down the line that his habitual residence is changing or has changed; I would not in any event be minded to reach such a conclusion on the facts given the extraordinary prevailing circumstances.*

Looking beyond the facts of QD's case, it is unfortunate that Cobb J was not in a position to find a way through the deadlock with which he was presented. This is not the first time that the Court of Protection has encountered the problem that a foreign court may not exercise jurisdiction over a person until physically present upon their soil – even where it is clear that they are habitually resident there. Similar problems have been encountered rather closer to home with Sheriffs' courts in Scotland, which have led to complex, and not entirely satisfactory, steps to be taken to make urgent applications upon the person reaching Gretna Green whilst travelling under cover of an English order.

Short note: placement in England for purposes of psychiatric treatment

In *The Health Service Executive of Ireland v Moorgate* [2020] EWCOP 12, Hayden J considered in some detail the operation of the regime under Schedule 3 MCA 2005 for recognition and enforcement, in the context of a placement of a young Irish woman at an English psychiatric facility for treatment of anorexia nervosa. The placement took place under cover of an order of the Irish High Court, put forward for recognition and enforcement by the Court of Protection.

Baker J had previously had to address the complex questions of law to which this gave rise in 2015 (*The Health Service Executive of Ireland v PA & Ors* [2015] EWCOP 38). This was the first time the current Vice-President of the Court of Protection had had to consider them. His judgment provides an updated route-map for navigating the complexities, and also (as an appendix) an endorsed and detailed comparison of the domestic regimes (MHA and MCA) that would apply were a person placed under a foreign order were, in fact, to be treated under the frameworks that would apply if they were habitually resident in England & Wales.

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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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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), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. To view full CV click here.

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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. To view full CV click here.

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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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

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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. To view full CV click here.

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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.

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Adrian is a recognised national and international expert in adult incapacity law. 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; honorary membership of the Law Society of 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

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

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 edition 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.

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