MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY
February 2020 | Issue 101

Welcome to the February 2020 Mental Capacity Report, which is, even by our standards, a bumper one. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a tribute to Mr E; fluctuating capacity; improperly resisting a deputy appointment; DoLS, BIAs and RPRs, and finding the right balance with constrained resources;

(2) In the Property and Affairs Report: the OPG, investigations and costs; e-filing for professional deputies, and a guest article about the National Will Register;

(3) In the Practice and Procedure Report: the Vice-President issues guidance on serious medical treatment; an important judgment on contingent declarations; the permission threshold; and disclosure to a non-party;

(4) In the Wider Context Report: brain death and the courts; deprivation of liberty and young people;

(5) In the Scotland Report: supplemental reports from the Independent Review of Learning Disability and Autism; the Scott review consults; and relevant cases and guidance.

You can find all our past issues, our case summaries, and more on our dedicated sub-site 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.

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Mr E

We were really saddened to hear of the death in January of Mr E. Mr E was, with his wife, both the foster carer of HL, and HL's unstinting champion in the fight to bring him home from Bournewood hospital, and thereafter. Mr E was also an unstinting champion of the rights of others with impaired capacity, as well as a splendid gadfly, provoking bureaucracy where it might be found.

We hope that, in due course, it will be possible to give Mr E his real name (many, of course, know it, and knew him). In the meantime we send our very best wishes to Mrs E and to HL.

Refusing food, (in)capacity and coming to court

QJ v A Local Authority [2020] EWCOP 3 and [2020] EWCOP 7 (Hayden J)

Article 5 ECHR – DoLS authorisations – mental capacity – medical treatment

Summary[1]

In *QJ v A Local Authority* Hayden J was considering the situation of an 87 year old man with vascular dementia challenging a DoLS authorisation under s.21A. The man was, in the run up to the first hearing (reported at [2020] EWCOP 3), on hunger strike, but things changed on the morning of the hearing so that it appeared that he might have changed his mind (whether capacitously or not). Hayden J therefore directed a further assessment of P's capacity.

By the time of the second hearing (reported at [2020] EWCOP 7), the plan was (1) administering of Fortisip three times per day, with 750 to 1,000 calories per day, which would still be sub-optimal but not immediately life-threatening; (2) weighing of QJ twice a week; (3) discussing again with QJ, within a week, his present situation and a plan to discharge him back to the nursing home; (4) no readmission of QJ to

[1] Tor having been involved in the case, she has not contributed to this case report.

hospital, once discharged back to the care home, if there he refuses to accept food or water.

There was also further evidence as to QJ's capacity from his treating physician, Dr B, whose conclusion was that:

> *He did not seem to understand the gravity of what might happen to him if he did not eat and would barely talk although he was capable of speaking. It may be that he simply did not want to talk to me but my judgment was that he did not really understand the consequences of his action and could not communicate any view other than by occasionally shaking his head. I did not feel that he had any real depth of understanding of his situation. I could not get him to describe why he was in hospital, nor could I get him to even repeat minimally what the concerns about him were. I did not sense any evidence of him being able to weigh up or retain the information given to him.*

Hayden J noted that:

> *20. Dr B was entirely aware that others had regarded QJ's response and resistance to eating and drinking as a form of "silent protest", but he commented that a refusal to accept food and drink is "a common feature of the sort of illness that QJ suffers from" and is one that he had encountered many times in the course of his work.*
>
> *21. I have struggled to understand those conclusions, not only in the light of the totality of the available evidence, but also in the context of Dr B's own observations. It is undoubtedly a difficult situation when an individual suffering from dementia chooses not to respond to certain questions. However, we do know that QJ has chosen not to eat for many weeks. We know that prior to that there had been a significant decline in his food consumption and we know that presently, at hospital, he is taking miniscule amounts of food and Fortisips as well as water.*

Hayden J recognised:

> *23.* […] *Dr B's experience and expertise, and entirely accept his view that a refusal to accept food and drink might well be a common feature of the sort of illness that QJ suffers from, I am required to evaluate QJ's capacity in relation to these specific issues, and I do so. I am highly conscious that the presumption of capacity is a fundamental safeguard of human autonomy. It requires cogent, clear and carefully analysed information before it can be rebutted.*
>
> *24. It is important to emphasise that lack of capacity cannot be established merely by reference to a person's condition or an aspect of his behaviour which might lead others to make unjustified assumptions about capacity (s.2(3) MCA). An aspect of QJ's behaviour included his reluctance to answer certain questions. It should not be construed from this that he is unable to. There is a good deal of evidence which suggests that this is a choice.*
>
> *25. All parties in this case agree that evaluating capacity on this specific issue is finely and delicately balanced. But ultimately, I have to be satisfied, on the balance of probabilities (s. 2(4) MCA), that the presumption has been rebutted. I am unable to reach that conclusion.*

Hayden J observed that "[i]*t is potentially significant, and certainly interesting, that the agreed*

medical consensus as to the way forward accords exactly with what QJ himself expresses." Whilst it was unnecessary for him to evaluate QJ's best interests because QJ should be regarded as capacitous, he considered it was right that he acknowledged that "*QJ, in conjunction with the doctors, has been able to put together a plan which both respects his autonomy and has regard to his dignity.*"

Comment

Such cases as QJ's are very fact specific, but Hayden J's observations about the need to distinguish between a reluctance to answer questions and an inability to do so are of wider importance. Similarly, of wider import are Hayden J's observations in the first judgment that:

> *16.* [...] *If it were determined that QJ had capacity to decide whether to receive nutrition, irrespective of which decision he made (i.e. either to take nutrition or to refuse it), does the case, in those circumstances, need to come back before the Court? Ms Butler-Cole took me to the Guidance of this Court: 'Applications relating to medical treatment' issued 20th January 2020 and in particular to paragraph 8 which is headed 'Situations where consideration should be given to bringing an application to court'. In that paragraph, the following is stated:*
>
>> *"If, at the conclusion of the medical decision-making process, there remain concerns that the way forward in any case is:*
>>
>> ***finely balanced**,* [...]
>>
>> *Then it is highly probable that an application to the Court of Protection is appropriate. In such an event consideration **must** always be given as to whether an application to the Court of Protection is required."*
>
> *17. Ms Butler-Cole considers that this may very well be a "finely balanced decision" which in and of itself might well have required an application to the court. But she submits, and I agree, that where there is already an extant application in relation to the central issue, then the matter should only be concluded within the proceedings of the Court and not subsequently left to clinical decisions. As I have said, I agree with that submission.* (emphasis in original)

In other words, [2] if a case about medical treatment is **already** before the court, then decisions relating to that treatment should be taken by the court, rather than by the clinicians.

Fluctuating capacity – another judicial take

Cheshire West And Chester Council v PWK [2019] EWCOP 57 (Sir Mark Hedley)

Mental capacity – fluctuating capacity

Summary

In this case, Sir Mark Hedley had to consider (in

[2] And as presaged in the BMA/RCP guidance as to CANH decision-making, which had noted (page 11, para. 46 that "[i]*f an immediate decision is needed about whether or not to re-start CANH, if the feeding tube becomes blocked or dislodged, whilst a case is under consideration by the court, an urgent application should be made to the court, out of hours if necessary.*"

the context of a s.21A challenge) whether a young man, PWK, had capacity to make decisions in relation to residence; care and support needs; contact with others; social media and the internet; financial and property affairs; and lastly, use or possession of his car provided by the Motability scheme. Until the involvement of Dr Lisa Rippon, a consultant psychiatrist, it had always been the common view of those involved that PWK lacked capacity in each relevant area. Dr Rippon then challenged this view. However, having had the opportunity to consider all the information in the case, in her third report, she revised her views and found that he lacked the relevant capacities. Inevitably, her views had to be explored with some care and, given the inherent complexity of the case, it was listed before a tier-three judge (i.e. a Judge of the High Court). As Sir Mark noted:

> *9. As Dr Rippon's evidence proceeded, the true difficulty became clear. When PWK was relaxed and in a good place he might well be regarded as having capacity. However, when he became anxious his position could be very different. Moreover, there were many things that could trigger anxiety and quite often his carers would be confronted with irrational behaviour that could be difficult to manage.*

The question therefore arose as to how the legal position should be addressed. Sir Mark identified that

> *15. in this case there is likely to be a particular focus on understanding relevant information, retaining it and using or weighing it. There will be many occasions when PWK is hampered by anxiety when those grounds are clearly made out. However, that will not always be the case. It may fluctuate. The question is how the law deals with that.*
>
> *16. In Royal Borough of Greenwich v CDM [2018] EWCOP 15, Cohen J made a declaration of fluctuating capacity. There are, as it seems to me, two potential difficulties with that approach. The first is the question of whether the statute actually permits the making of a declaration in those terms. The second is that there is the practical problem of how those responsible for PWK's care could in fact operate such a declaration on the ground. It is not, of course, my place to say that this decision was wrong in the circumstances of that case, but I do believe that PWK's case requires a rather different perspective.*
>
> *17. I take the liberty, if I may, of adopting the position that I sought to set out in my judgment in A,B & C v X, Y & Z [2012] EWHC 2400 (COP). There I was dealing with a person with some fluctuating capacity. I sought to draw a distinction between isolated decisions, for example, making a will or power of attorney, and cases where decisions may regularly have to be taken sometimes at short notice, as for example, in managing one's own affairs.*
>
> *18. In paragraph 41 of the judgment I expressed myself as follows:*
>
> > *'In the light of Dr Posser's evidence, I am satisfied on balance that he lacks capacity to manage his own affairs. In so finding I acknowledge, as I have done in relation to the other*

> *matters, that there would be times when a snapshot of his condition would reveal an ability to manage his affairs. But the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs.'*

19. Some have referred to this as taking a longitudinal view. In my view, this approach has the value of clarity. It establishes that the starting point is incapacity. The protection for the protected person lies in the mandatory requirements of Section 4, in particular subsections (3) and (6) which provide as follows:

> *'(3) He must consider –*
>
> *(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
> *(b) if it appears likely that he will, when that is likely to be.*
>
> *(6) He must consider, so far as is reasonably ascertainable –*
>
> *(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
> *(b) the beliefs and values that would be likely to influence his decision if he had capacity, and*
> *(c) the other factors that he would be likely to consider if he were able to do so.'*

20. It seems to me that the closer the protected person is at the moment of actual decision to capacity, the greater the weight that his views must carry and of course, any decision made must take in to account that he may acquire capacity and, therefore, it must not be beyond change.

On the facts of the case, Sir Mark found that:

> *21 [...] all the relevant decision-making with which I am concerned lies in the field of repeat rather than isolated decisions. Dr Rippon's view, which was not really the subject of challenge, was that where a longitudinal perspective was adopted then PWK lacked capacity in all relevant areas.*

Sir Mark declined then to give detailed directions under s.4 MCA 2005, it being:

> *26. [...] enough to say that the detailed care package provided under Section 117 of the Mental Health Act 1983 is, as it*

seems to me, entirely in his best interests and that it is further both proportionate and in his best interests to deprive him of his liberty to the extent implicit in that package. The details are matters to be worked out on the ground on the basis of decisions made in accordance with Section 4 by those responsible for his care.

In terms of the car, Sir Mark Hedley noted that it was a:

28. […] controversial matter. However, three things are clear: first, that PWK cannot drive it himself; secondly, no one can compel an unwilling carer to drive it for him; and thirdly, no one has attempted to assert a right to drive in the face opposition from the care providers. However, possession of the car and access to it and use of it, even whilst stationary, have proved to be controversial. As I say, matters relating to this wholly dominated PWK's written observations and in particular his second address to me.

29. Having reflected with care on this, I have concluded that PWK lacks capacity to make decisions about the use of his car. I am not convinced that he is always able to retain all the necessary information. However, I am amply satisfied that, because of the acute anxiety that this subject generates in him, he is unable to use and weigh that information as part of the decision-making process.

30. It is not for me, again, to make best interest determinations about this for it is necessarily part of the care package. I am satisfied that both the social worker and the care providers understand the importance of this matter to PWK and will take account of that. It may be wise that, if the decision is to remove the vehicle, to ensure that it is done at the behest of Motability rather than the Local Authority or the care providers as I think PWK might find that an easier decision to accept.

Comment

Sir Mark expressed himself with characteristic tact in relation to the rather problematic first decision in *CDM*'s case. The judgment in the present case was given in July 2019 (but not published on Bailii until much later in the year); it therefore predated the second decision in *CDM*'s case in which Newton J took a rather different approach, much closer to that adopted by Sir Mark (in that case, framed as distinguishing between macro- and micro- decisions). It is respectfully suggested that the approach of Sir Mark and Newton J provide the right way forward for the Court of Protection to grapple with the difficult issue of fluctuating capacity. Outside the court setting, professionals are sometimes in an easier position of 'only' having to explain why at any given point they had a reasonable belief that the person had or lacked capacity. But fluctuating capacity can at other times be incredibly difficult for professionals so the longitudinal approach to repeated or macro decisions may help in that regard. Hopefully the next iteration of the Code of Practice will also provide further guidance to them in this regard.

Will, preferences and estrangement

A Local Authority v PS & HS [2019] EWCOP 60 (Judd J)

Mental capacity – best interests – contact

Summary[3]

In this case, the court had to decide upon an 80 year-old woman's capacity and best interests in relation to contact with her former husband, whom she had divorced some 25 years previously. The woman, PS, had had some limited contact with her former husband, HS, over the subsequent years until the autumn of 2016, when she developed what became clear was dementia. Thereafter, HS spent more and more time with PS; her daughter became more anxious about the amount of time that HS was spending with PS, especially as a consequence of comments that PS was making about him getting into bed with her. DB stated that PS was telling her that she did not want "that man" to be there at her home.

In February 2019, the local authority received a safeguarding referral with concerns that PS was being sexually abused by HS, and also that he had a key to her home and had opened a joint bank account with her. In order to assess PS's care and support needs she was moved from her home to a care home, where she stayed for three weeks before moving to a Care Home where she remained at the time that the matter was heard in November 2019. HS had not seen PS since February, although the police closed their investigation into whether or not he sexually assaulted her in March 2019. The local authority's plan was for PS to remain at the Care Home permanently, and she saw her daughter, DB, approximately three times a week.

The medical evidence adduced by the local authority was that PS did not have insight into her dementia and the impact it had on her memory, orientation and visual perception. She was said to be very disorientated with respect to time and intermittently with respect to space. She had comparatively well-preserved social skills and language but she had significant cognitive impairment, which markedly fluctuated during the day and from day to day. The local authority's case was that PS did not know who HS was, did not realise that he was her ex-husband, and that when she was seeing him in 2018 and early 2019 she exhibited anxiety about this 'man' being in her house. The Official Solicitor, as PS's litigation friend, supported the local authority application on very much the same grounds; the Official Solicitor noted that PS had been pleased at times to see HS, but this was without cognisance of who he was, and was not consistent.

Judd J noted that HS appeared to accept PS's diagnosis, but because he had not been able to see her since February he found it difficult to appreciate her current state and did not readily accept the evidence of others who had seen her. He stated that when he was still seeing her in February and before, she was capable of conversing lucidly for extended periods of time. He said that she was pleased to see him when he went around to her house, and when he saw her by chance in Waitrose in March 2019. He found it very difficult to accept evidence that contact with him either did, or would distress her. He believed that she certainly did recognise

[3] Katie having been involved in the case, she has not contributed to this case report.

him and know who he was. He wished to see her again, and felt that he would know then whether or not she wished to see him. He therefore opposed the making of any declaration as to capacity.

Judd J found that PS lacked capacity to make the decision as to contact with HS:

> *16. I am clear after hearing the social worker and DB that PS does not have capacity to make the decision as to contact with HS. She does not know who he is, and she is not able to appreciate the negative and positive effects that contact with him has upon her. She is not able to weigh up and retain information about what type of contact she could have and in what circumstances. There is no prospect that her capacity to make this decision will improve, and nor is there any way in which she could be assisted with this.*

This therefore meant that Judd J had:

> *24. [...] to make the decision as to whether it is in PS's best interests to have contact with HS. I have come to the clear conclusion that it is not and that I should make an order to that effect. When she had capacity she did not want to see him other than very occasionally, and it seems impossible to believe that the values she held then would have changed now. I suspect that HS feels that the death of DS would have drawn them closer together, but that is very speculative. The fact that PS can demonstrate some superficial pleasure upon seeing HS is not achieved because of who he is but because she does not realise who he is. Also, the contact can cause her anxiety, as was demonstrated during 2018, 2019 and also after the chance encounter in Waitrose. PS's important relationships for the last 25 years have been with DB and DS when she was alive, and also with her son in law and her grandchildren. DB has been very close to PS for years, and her views about her mother's wishes, feelings and best interests deserve the greatest of respect.*

Comment

This is a clear example of a court seeking to work through systematically and carefully questions of capacity and best interests in the context of what could either have been a very significant interference with PS's rights under Article 8 ECHR, or a significant step towards upholding those rights. Another way of framing this in the language of the Convention on the Rights of Persons with Disabilities would be as a way of seeking to balance PS's will and preferences.

It is not quite clear from the judgment when the application was brought, in particular, whether it was before or after PS was moved to the care home. As to whether and when such a move absent a court order would be lawful, see further here.

Finally, and perhaps unfairly, it is perhaps worth flagging up some of the language within the judgment relating to capacity. The medical evidence referred to PS's lack of "insight" into her dementia, and her disorientation with respect to time and space; Judd J referred to the fact that PS did not know who HS was and that she was not able to "appreciate" the negative and positive effects that contact with him has upon her. None of these aspects are, in fact, part of the functional test in s.3 MCA 2005 (to which Judd J then referred in her judgment, so there is no suggestion that she reached an unlawful

determination). The 'translation gap' between the language of the Act and the language of (and phenomena encountered in) every day practice is striking, and is driving much of the current work of the Mental Health and Justice project.

RPRs, BIAs and legal aid

The London Borough of Hillingdon v JV & Ors [2019] EWCOP 61 (Senior Judge Hilder)

Article 5 ECHR – DoLS RPR

Summary

A 73 year old woman, JV, was subject to a Standard Authorisation for deprivation of liberty in her living arrangements at a care home, Care Home A. She had first been subject to a DoLS authorisation in respect of another care home, Care Home R. Her two children, whom she had appointed jointly and severally as her attorneys, supported the placement. Whilst at Care Home R, she had been supported by three different RPRs, two of whom had been selected by one of her attorneys, and the last, RV (her son), by the BIA.

The attorneys failed to pay the fees due. As a result, the placement was terminated. The London Borough of Hillingdon arranged for JV to receive 24 hour care in a Travelodge for a period of 4 days to avoid her being 'street homeless.' Thereafter, on 17th September 2019 she was placed at Care Home A as an emergency placement. An urgent authorisation having been granted, Hillingdon both took the matter to court under s.21A and granted a standard authorisation. Hillingdon appointed a paid RPR.

RV and his sister made an application for RV to be "reinstated" as JV's attorney, on the basis that Hillingdon had sought to remove RV as the RPR.

Having conducted a careful review of the provisions of Schedule A1 and the accompanying regulations, Senior Judge Hilder held that:

> *37. Schedule A1 and the regulations appear to conceive of the appointment of an RPR as specific to a particular standard authorisation, not as a general status such as may 'roll over' from one authorisation to the next. The wording of paragraph 139(1) of the Schedule envisages a fresh appointment with each granting of a standard authorisation, and regulation 12 provides that appointment "must be for the period of the standard authorisation." The explanation of the RPR role set out at paragraph 7.2 of the Code[1] seems to follow this approach, and so too did the Applicant Local Authority and the Second and Third Respondents in the series of three selections of RPR for JV whilst she was living at Care Home R.*

This meant, therefore, the appointment of a paid RPR upon granting the current standard authorisation in respect of JV's living arrangements at Care Home A was not a 'termination' of RV's appointment under the third authorisation in respect of Care Home R, but rather a fresh selection. RV had previously been appointed as RPR, but in respect of a completely different placement.

Senior Judge Hilder then had to examine the basis upon which the paid RPR had been appointed, in circumstances where regulation 6 of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representatives) Regulations 2008, SI

2008/1315 provides that, if the BIA determines that the relevant person does not have capacity to select the RPR but has either a deputy or an attorney with authority to do so, pursuant to Regulation 6 that attorney or deputy may select the RPR, including potentially him/herself. There is fallback provision if the attorney or deputy does not wish to make the selection. After a further review of the (complex) regulations, Senior Judge Hilder concluded that the BIA had erred:

> *67. Having come to the view that she could not confirm RV's selection of himself as RPR because he did not appear to her to meet the eligibility requirements, the Best Interests Assessor should have invited RV to make another selection. That did not happen. It was not open to the BIA either to choose the RPR, or to notify the supervisory body that she had made no selection. Therefore the circumstances of regulation 8(5) have not arisen, and it was not open to the supervisory body to select for appointment a paid RPR.*

Senior Judge Hilder noted that one of the arguments advanced on RV's behalf was that

> *64. Effectively therefore, in pointing out that "Removal of the RPR would mean that he would be unable to apply for legal aid" the suggestion is that, if RV was the appointed RPR, he would be entitled to public funding for representing his own position, not for representing JV (whose litigation friend, presently at least, takes a different position.) None of the parties before me has made any detailed submissions as to whether this suggestion is in fact the correct interpretation of the Civil Legal Aid Regulations. I make no assumptions on that point. Mr. Boden asserts simply that funding issues are irrelevant to the approach to be taken to the selection of the RPR.*
>
> *65. Of course the court recognises the importance of access to legal representation for all litigants, and is slow to reach any conclusion which closes a possible avenue of funding such representation. However, in so far as there may be an issue about whether an RPR who is not acting as the litigation friend of the person deprived of their liberty is nonetheless entitled to public funding for his own representation in s21A proceedings, that issue is clearly not within the jurisdiction of the Court of Protection. More immediately, I can find no basis for disagreeing with Mr. Boden's submission* [on behalf of the local authority] *that access to funding is not a relevant consideration for selection of an RPR.*

She therefore concluded that:

> *69. The primary function of the RPR in this matter has been discharged already, in that proceedings are already before the court in respect of the standard authorisation. In so far as an RPR has a wider remit than that, it seems to me to fall within the range of tasks which RV can anyway discharge as JV's son and within the active authorisations of also being her welfare attorney.*
>
> *70. JV's position is appropriately secured by being party to these proceedings in her own right, and the appointment of the Official Solicitor as litigation friend for her. Wider issues of entitlement to public funding are outside the jurisdiction of this court, and not relevant to selection of an*

> *RPR in accordance with the regulations.*

Comment

DoLS may be towards the end of its life, but the regime is not quite dead yet (and will, in any event, continue to run for a period in parallel with LPS when the latter comes into force). This judgment is therefore helpful confirmation of how BIAs should consider questions of appointment of an RPR where there is a welfare attorney (or deputy) in play. It therefore reads as a useful follow-on to the judgment of Baker J in *Re AJ* [2015] EWCOP 5, in which guidance was given as to how to determine whether a proposed RPR was eligible.

Further, and whilst we do not know from the judgment why Hillingdon brought the application itself, they should be commended for doing so because that ensured (as the case then fell under s.21A) that JV would be entitled to non-means-tested legal aid. It made no difference to Hillingdon to take this route to seek consideration of JV's position. But had they sought decisions and declarations about JV under the provisions of s.16, any eligibility for legal aid would have been means-tested and, on the facts of this case, it looks most unlikely she would have received it.

Short note: finding the right balance with constrained resources

The decision in *AG v AM and Others* [2020] EWCOP 59 is a useful reminder of the distinction between public law decisions and best interests decisions (the Court of Protection having jurisdiction over the former but not the latter) and the way in which, in practice, public law decisions may limit significantly the best interests decisions that can sensibly be made.

In summary, the case concerned a s.21A challenge to a DoLS authorisation and the two available options were: (i) P remaining in the nursing home where he was residing at the time; or (ii) P returning home with a package of care funded by the CCG. However, the CCG was not prepared to keep P's place at the nursing home open while the home care option was trialled. Moreover, the home care option relied on standard GP services – the CCG was not willing to provide enhanced GP services.

From the outset DJ Eldergill recognised that:

> *…there is a limit to what the NHS can or is willing to spend on care at home as an alternative to care in a nursing home.* […] [P]*rovided they do not act so irrationally as to be unlawful, etc, it is NHS bodies, local and other public authorities – not judges – who decide how to allocate their limited resources between the local citizens for whom they must provide.*
>
> *I accept that this court cannot direct a local authority or NHS body to provide services which they have assessed that AM does not require or which they have decided at their reasonable discretion not to provide.*

As such, he was limited to the available options. This meant that although DJ Eldergill indicated that he would have wanted to trial the home care package (while keeping P's current nursing place open), this course of action was not open to him.

The decision is also a useful example of the balance sheet analysis, with the Judge considering in detail the advantages and disadvantages of the two available options as a

means of reaching his final conclusion on best interests. In short, the Judge found that the home package had much to commend it, including the provision of care by loved ones, cultural familiarity (P was originally from Somalia), visits from friends and neighbours, as well as being a significant package of care. However, the critical factor weighing against P's return home was that under the package offered by the CCG, P would have to rely on standard GP services for his medical care (whereas at the nursing home 24 hour medical support would be available). The likely consequences for P of this reduced medical input included an increase in the number of hospital admissions as well as an increased risk of premature death. DJ Eldergill considered the seriousness of this issue to be underlined by the fact that none of the local GP practices with whom P's case had been discussed had expressed a willingness to register him as a patient (even if the CCG could ultimately compel them to do so). In such circumstances the judge concluded: "*…I believe that granting AG's application carries a significant risk of her husband losing his place and current quality of life at X Nursing Home without there being a corresponding 'risk of gain' which justifies the risk of harm.*"

Improperly resisting a deputy application

TQ v VT [2019] EWCOP 68 (HHJ Clayton)

Deputies – welfare matters

Summary

This case concerns an application to be appointed personal welfare made by VT's former professional care worker, TQ. It provides a salutary warning against poorly considered decision-making based on blanket policies.

VT was a severely disabled young man who suffered from Lennox-Gastaut syndrome, a severe form of epilepsy as well as severe global delay. He had learning disabilities and could not walk; some of his difficulties were considered likely to have arisen as a result of neonatal drug addiction.

At the time of the application, VT was 18. His mother had never been able to care for him and had died in 2015. He had never known his father. His aunt had looked after him from birth, but had died in 2013 when P was 12. He did not have relationships with any other family members, his siblings having variously been adopted or placed in special guardianship.

In 2014, the First Respondent Birmingham Children's Trust ('BCT') obtained a care order to have VT placed in a residential care home. Here he met TQ who was appointed his key worker and developed a particular attachment to him, manifested in, among other things, taking him on holiday to Disneyland Paris.

In March 2019, having turned 18, VT was moved by BCT to a new adult placement. TQ, wishing to maintain her relationship of care with him, and in light of his having effectively no other family support, made an application to be appointed is personal welfare deputy. Following this application, between April and June 2019, there was no contact between TQ and VT.

At a hearing in June 2019, the court made an interim order under s.48 MCA 2005 that VT lacked capacity to make decisions regarding contact and that it was in his best interests to have contact with TQ on notice. The court made concomitant orders against BCT and the CCG responsible for funding his care to provide

statements setting out why TQ's deputyship was opposed including any evidence and reasoned best interests analysis for this and every other decision made on his behalf since his 18th birthday.

In light of what the judgment describes as 'poor quality' written evidence, oral evidence was required. Neither resisted the appointment of TQ as deputy per se but both insisted on serious restrictions to her appointment. BCT and the CCG both gave oral evidence, at the conclusion of which both withdrew their objections to the application.

BCT and the CCG's evidence was, in the submission of the OS which the court adopted in full, 'there was a need to bring the relationship between TQ and P to an end for no other reason than the pursuit of a "policy" that professional relationships are time bound.' (para 16). This 'rigid' thought process, guided entirely by the belief that it was inappropriate to blur the boundaries between a professional carer and friend resulted in what the court considered to be ill thought-through and indefensible decision making, by both the statutory bodies and the care home which rejected TQ's desire to visit as a non-relative as "a nonsense".

The Official Solicitor made an application for her costs which were awarded against both parties, HHJ Clayton observing:

> 22. [...] *there was a pursuit of a flawed policy by both BCT and the management at Placement 1 and that the CCG, in failing to challenge the decisions taken acquiesced in them. The pursuit of this policy was a fundamental flaw. It infected the decision making of BCT, the CCG and Placement 1. The pursuit of the policy resulted in the requirements of section 4 of the MCA being ignored. The policy became the only factor in determining P's best interests on issues surrounding his ongoing relationship with TQ. To fail to consider the benefit to P of TQ spending time with him, helping to stimulate him, feed him, talk to him and to show her genuine care of him, when he had no other single person in his life who was willing to do that, outside of a professional relationship which had commenced in 2018 or 2019, was bewildering and shocking.'...*
>
> [...]
>
> *24. The Mental Capacity Act Code of Practice sets out precisely what should be recorded by those professionals involved in the care of a person who lacks capacity when working out the best interests of that person for each relevant decision. Records should be made of how the decisions were reached, why the decisions have been taken, who participated and what particular factors were taken into account. The record should remain upon the person's file.*
>
> *25. The failure to comply with the MCA 2005 was not a technicality. It led to a wholesale failure of best interest decisions in respect of P as to his contact with TQ; a failure to include TQ, as a person important to P, in the decision making process; a lack of structure in any decision making as to whether TQ should be appointed as P's PWD; failure to make timely decisions as to repair of damage furniture in P's bedroom, to order a new hoist sling to replace the damaged one being used, to agree funding for his sleep system which he had been assessed to need; failure to apply for authorization of his deprivation of liberty*

under schedule A1 MCA 2005 prior to his move to Placement 1 so that he was unlawfully deprived of his liberty and without the protection of the Deprivation of Liberty Safeguards for a period of time.

26. It was no surprise once the extent of the failings became clear that the BCT and CCG withdrew their opposition to TQ being made PWD without limit save for medical issues. The benefit to P of her being appointed PWD is obvious following the failings of the BCT and CCG as I have described. It is clear, too, that she has demonstrated an unwavering commitment to P and his right to have his voice heard. Without her application it is a voice that would continue to have been lost. I cannot praise her highly enough for her quiet, selfless and dignified determination. I have no hesitation in appointing her PWD.

[…]

28. […] *I cannot escape the inevitable conclusion that this application was only made by TQ as a result of P's rights being violated and her despair at the failings of the system, of which she knows a great deal, as a professional carer for P previously and a continued professional carer for other young people lacking capacity. I have considered Part 19(5) of the COP Rules and noted that I may depart from the general rule that there is usually no costs ordered in welfare decisions when taking account of certain factors. I have described in detail the failings before and during the proceedings. I have taken account of the change in position by the parties without the requirement for TQ to give evidence, with only their own evidence causing the BCT and the CCG to decide TQ's application should not be opposed. I have come to the conclusion that the costs of the OS should be born in full by the BCT and CCG in equal shares.*

Comment

Unfortunately, the parties having agreed the legal framework, there is no further analysis of the law, save for a reference to Hayden J's decision in Mottram, Lawson and Hopton (Re: Appointment of Welfare Deputies) [2019] EWCOP 22 – but no further consideration on what that judgment might mean in terms of general application. It is significant that HHJ Clayton referred to the application as being unusual and having been made "*as a result of* [VT's] *rights being violated and* [TQ's] *despair at the failings of the system*" (para 28). VT was transferred to a new placement without a standard authorisation in place and with no formal capacity assessment on best interest decision-making. This case should not, we suggest, be viewed as setting any precedent for care workers generally taking on roles as personal welfare deputies for 'Ps' who have been in their care as minors.

What this judgment is useful for, however, is demonstrating the importance of maintaining focus on P's best interests throughout rather than being guided by blanket policies. It is also useful for demonstrating the importance of thorough and effective written evidence. Witness statements in the case were criticised for being served in bullet points, unsigned, and lacking in detail and analysis. HHJ Clayton observed that had the information required been set out appropriately in written evidence it was likely that those involved would have realised prior to the hearing that the case was unusual and that there was a real need for P to have a personal welfare deputy.

Short note: DoL and PVS

The permission decision in *Chadha v HM Senior Coroner for West London* [2017] EWCA Civ 2710 was considered in November 2017 although it has only recently appeared in the public domain on www.bailii.org. Timewise, it was decided between the first instance decision and Court of Appeal decision in *R (on the application of Ferreira) v HM Senior Coroner for Inner South London* [2015] EWHC 2990 (Admin) and [2017] EWCA Civ 31.

In summary, Mr Chadha applied for permission to appeal against an order of Sir Stephen Silber dismissing his application to apply for judicial review of the Coroner not to investigate the death of his wife. The claimant's wife, Mrs Chadha, had been in a persistent vegetative state in hospital for four years before she died. The Coroner decided to discontinue his investigation because of a natural cause finding of death and there being no other reason to continue his investigation. Mr Chadha argued that there were three reasons to suspect that Mrs Chadha had been in "state detention": (1) she had been in a persistent vegetative state for four years and this was, therefore her living state, (2) two nurses regarded the hospital as "detaining her", and (3) Mr Chadha had attempted to have his wife removed from the hospital but the hospital would not agree.

Lady Justice Sharp refused permission on the same grounds as Sir Stephen Silber and Simon LJ who had refused permission to appeal on the papers. The court found that Mrs Chadha was not confined by compulsion; she was simply unable to move and was receiving essential medical care in hospital. The fact that she did not have capacity to consent to treatment and was being treated on a "best interests" basis did not mean that she was being compulsorily detained by a public authority. Although it was not clear whether there was a deprivation of liberty authorisation in place at the time of her death, even if there was, it would not mean that she was in fact deprived of her liberty. In reality, she was not being kept confined; she was simply unable to leave hospital in the time she was taken there after her injury. Sharp LJ does not seem to have addressed the third contention advanced by Mr Chadha, namely that he was prevented from removing his wife from hospital.

Association of Anaesthetists award for Alex

His fellow editors congratulate Alex on being awarded a 'Foundation Award' from the Association of Anaesthetists of Great Britain and Ireland for his work supporting the Association in the development of guidance.

Dr Steve Yentis, Consultant Anaesthetist, said of Alex:

> *The Association is both fortunate and grateful for the hard work that he has devoted to all those working in the field in general, and to the Association in particular, for which he truly deserves the honour of a Foundation Award.*

Alex received his award at the Association's Winter Scientific Meeting 2020 which took place in January.

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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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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. 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

LSA Mental Health conference

Adrian will be chairing and Jill speaking at the LSA Mental Health conference in Glasgow on 13 February. For more details , and to book, see here.

The law and brain death

Katie will be chairing and Tor speaking at a seminar and discussion taking a critical look at cases concerning brain death in the High Court and Court of Protection. It will take place on 26 February in London. For more details, and to book, see here.

SOLAR conference

Adrian will be speaking on "AWI: Don't wait for legislation – the imperatives apply now!" at the annual conference of the Society of Local Authority Lawyers and Administrators in Scotland, being held on 12 and 13 March in Glasgow. For more details, and to book see here.

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see here.

Other conferences and events of interest

Mental Diversity Law Conference

The call for papers is now open for the Third UK and Ireland Mental Diversity Law Conference, to be held at the University of Nottingham on 23 and 24 June. For more details, see here.

Peter Edwards Law courses

Peter Edwards Law have announced their new programme of courses, covering a wide range of topics across the mental capacity and mental health field. For more details, 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 edition will be out in March 2020. 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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