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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Brain death and the courts

Two recent cases have required the courts to consider both the approach to the definition of brain death and the court's role.

The first case, *Oxford University NHS Trust v AB* [2019] EWHC 3516 (Fam), came before the court for determination as to whether AB had met the criteria for death. The facts of the case are tragic. AB was a fourteen year old girl who was found hanging at her home. She was airlifted to hospital where she was given emergency treatment including being provided with an i-Gel supraglottic breathing device. Despite this emergency treatment, she was pronounced dead at 10:26 on 22 October 2019. AB's family, committed Christians, objected to the withdrawal of AB's ventilation.

Francis J noted that there was no statutory definition of death, but relied on code of practice devised by the Academy of Royal Colleges in 2008 establishing the legal criteria for death entitled 'A code of practice for the diagnosis and confirmation of death'. The criteria for death set out in the Code of Practice (and adopted by the court) is:

> *(2.1.) The irreversible cessation of brain-stem function whether induced by intra-cranial events or the result of extra-cranial phenomena, such as hypoxia, will produce this clinical state and therefore irreversible cessation of the integrative function of the brain-stem equates with the death of the individual and allows the medical practitioner to diagnose death.*

Francis J acceded to the Trust's application on three grounds:

(i) First because the evidence from the medics (as supported by the Code of Practice) was that even if the body of AB remained on respiratory support, the loss of integrated biological function would inevitably lead to deterioration and organ necrosis within a short time.

(ii) Secondly because AB had met the neurological criteria for death as set out in the Code.

(iii) Thirdly further treatment by way of ventilation was futile *"because it will be pointless; it is impossible that anything will happen to bring AB back*."

The second case, *Manchester University NHS Foundation Trust v Namiq* [2020] EWHC 180 (Fam), concerned the treatment of Midrar Namiq, a baby born at full term, with no detectable heart rate and no respiratory output. His heart was restarted and he was placed on a ventilator at the Neonatal Intensive Care Unit. Three brain stem death tests to assess whether he was dead by neurological criteria (DNC) were carried out, the first on 1 October 2019. Each concluded that Midrar was DNC.

The Trust therefore brought the matter to Court seeking a declaration that that it was lawful to withdraw ventilation from Midrar. This was opposed by his parents.

The mother argued that when the court's inherent jurisdiction is invoked to declare a person dead then the court must apply a best interests test. Lieven J had no difficulty rejecting this argument, holding:

(I) That the question of whether a person is dead is a question for the medical professionals in the first instance, applying the relevant clinical tests as set out in the two relevant Codes of Practice. Firstly, "A Code of Practice for the Diagnosis and Confirmation of Death", dated 2008 and produced by the Academy of Medical Royal Colleges, and secondly in the case of babies under 2 months of age guidance called "The diagnosis of death by neurological criteria in infants less than two months old" dated April 2015 and produced by the Royal College of Paediatrics and Child Health.

(II) 'If a patient is brain stem dead then there are no best interests to consider. Once those criteria are met the patient has irreversibly lost whatever one might define as life'

Lieven J did however agree with the mother, that when determining whether the criteria for DNC is met the court must give the matter 'anxious scrutiny', and if there is any doubt, it would be most unlikely that declarations would be made.

Comment

The first time this issue came before the Court was in 2015 when the case of *Re A (A Child)* [2015] EWHC 443 (Fam) was heard by Hayden J. It is unclear why there have been three further cases heard in the last four months; the decision of Francis J noted above; this case; and a case that was heard by Hayden J before Christmas in which judgment is awaited.

What is striking about the case before Lieven J is the fact that it took almost two months from date of issue to final determination. While in most cases this would be an extremely swift timetable, in cases like this, where the issues are, although important, straightforward (Lieven J pointed out, the 'medical evidence could not have been clearer or more unequivocal' on the issue of whether Midrar met the DNC test), they ought to be capable of swift resolution. This is by no means a criticism of the court, who was faced here by two applications for adjournments including one which was appealed to the Court of Appeal.

Finally, we note that it now appears to be clear that where there is a genuine dispute about whether or not the DNC criteria are met, then it is appropriate to bring that dispute before a court for a determination. Such applications should be brought in the High Court pursuant to the inherent jurisdiction. We suggest that this applies equally to adults, because the question is not one either of capacity or of best interests.

However, if it is accepted that DNC are met, the decision to withdraw the treatment is a public law decision which can only be challenged in the administrative court.

CQC Monitoring the Mental Health Act 1983 report

The CQC's annual monitoring report for 2018-2019 has now been published. The Government's White Paper to respond to the independent Review of the Mental Health Act 1983 should soon be appearing. The review placed a strong emphasis upon greater respect for the choices of individual patients. In that context, that the CQC found that in 11% of care plans they reviewed there was no evidence of patient involvement at all shows how simply relying upon guidance – as it done at present – has been entirely inadequate.

Care Act needs mean needs

In *R (Antoniak) v Westminster City Council* [2019] EWHC 3465 (Admin), the High Court (Mr CMG Ockelton) provided important clarification in respect of the nature of a local authority's duty under s.9 of the Care Act 2014 to assess an adult's needs for care and support.

The court clarified that s.9 requires the relevant local authority to identify any needs for care and support regardless of whether, at the time of the assessment, all or any of the needs are being met. In other words, the needs assessment is provision blind – it is simply a question of whether the individual in question has needs. This logic applies not just to the initial identification all needs, but also to the application of the eligibility criteria and the wellbeing test.

In the claimant's case, Westminster determined that he did not have any eligible needs for care and support because his needs could be met by existing voluntary or private-sector agencies (by a therapist as regards home, by a charity as regards the community and by the Job Centre or a charity as regards work). As a result, the assessment and resulting eligibility decision were unlawful.

Deprivation of liberty and young people (1)

A London Borough v X, Y and Z [2019] EWHC B16 (Fam) (Family Division)(Theis J))

Article 5 – deprivation of liberty – children and young persons

Summary

This was a wardship application brought by the local authority in respect of Z, a 17 year old boy who had a range of very complex health needs rendering him wholly dependent on his parents to meet his day to day needs.

Initially the applicant local authority had issued care proceedings, seeking the removal of Z on the basis that he was suffering or likely to suffer significant harm due to the failure of the parents to follow medical advice regarding his care or

take him to medical appointments. This arose primarily as a result of the mother's mental health problems which had arisen in about mid-2018. Prior to this time, his parents had provided Z with a very good level of care.

During the care proceedings, the court made a series of orders aimed at enabling Z to access appropriate medical treatment while remaining in the care of his father in the family home. Ultimately this was only achieved once Family Law Act proceedings had been issued by the father, excluding the mother from the family home.

By the time the matter came on for final hearing it was agreed that Z should be looked after by his father, with the mother remaining in the family home but prohibited from exercising parental responsibility in respect of Z.

There remained a dispute however as to whether or not Z was deprived of his liberty in the family home within the meaning of Article 5 of the ECHR. It was agreed that his living arrangements (in which he was under constant supervision and not able to go out on his own) were a restriction on his liberty when compared to others of his age. However, the local authority argued that the objective criteria was not met for a deprivation of liberty because Z was not confined within the home beyond the ordinary requirements in any home (for example a locked front door; he was not locked in his room). Unsurprisingly, Theis J rejected this submission and found that there was indeed a deprivation of liberty because:

1. The objective criteria were met on the facts of this case. The court was struck by the fact that Z was assessed as requiring 2:1 care when attending his education provision.
2. Z lacked capacity to consent to the deprivation of liberty and following *Re D*, the father in the exercise of his parental responsibility could not consent on Z's behalf.
3. The deprivation of liberty was imputable to the state because the court had made Z a ward of the court and in so doing had retained control over Z's living arrangements, despite the fact that he was living in the family home and being cared for by his family.

Comment

Point 3 in the summary immediately above is of some interest – following *Re D*, Z's deprivation of liberty would have been imputable to the state even if the court had not made him a ward of court. As Lady Hale observed in *Re D,* in rejecting the argument that parental responsibility could serve to prevent a confinement being seen as a deprivation of liberty, one context in which such an argument might be advanced ""*is where the parent is the detainer or uses some other private person to detain the child. However, in both Nielsen and Storck it was recognised that the state has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances.*"

The court stated that Z was to remain a ward of the Court until his 18th birthday, at which point an application would need to be brought before the Court of Protection for authorisation of the arrangements. Of course, given Z's age (17), the matter could have been dealt with in the Court of Protection in any event.

As with most of the reported cases in this area now, and following the unfortunate lacuna in the

template order endorsed by the former President, the judgment does not state the grounds upon which the deprivation of liberty is justified: was it Article 5(1)(d) (educational supervision) or Article 5(1)(e) (unsoundness of mind)? And, if the latter, was the court provided with medical evidence of mental disorder sufficient to satisfy the *Winterwerp* criteria?

Deprivation of liberty and young people (2)

Hertfordshire CC v NK and AK [2020] EWHC 139 (Fam) (Family Division)(MacDonald J))

Article 5 – deprivation of liberty – children and young persons

In this case, MacDonald J declined to make an order a DoL order in respect of a 16 year old, on the basis that he did not consider that the child's current circumstances amounted to a deprivation of his liberty. Those circumstances at AK's placement, described at paragraph 10, were these:

> *i) The internal and external doors are not locked and AK is able to exit the property (AK has for example left for a cigarette with the knowledge of the staff and returned of his own accord);*
>
> *ii) AK has flexible, unsupervised contact with his mother two or three times a week and the length of those visits is dictated by AK and his mother. AK is dropped off and collected by the staff from [Y]. The collection occurs when AK states he is ready to return;*
>
> *iii) During his time on the unit he is subject to 2:1 supervision (AK has stated he would like this to reduce to 1:1 supervision)*
>
> .
>
> *iv) AK has* ***unlimited*** *access to, and use of his mobile telephone, the Internet and to his X-Box.*
>
> *v) When in his room at the unit AK is checked on every 15 minutes;*
>
> *vi) AK's room is* ***not*** *searched and neither is AK;*
>
> *vii) AK has a planned daily schedule and is rewarded financially for compliance.* (emphasis in original)

MacDonald J found that:

> *33. The question of whether AK is restricted to an extent that constitutes a deprivation of his liberty by reference to the applicable criteria set out above is as a matter of fact that falls to be determined by comparing the extent of the AK's actual freedom with someone of the child's age and station whose freedom is not limited. Having regard to the current situation for AK in his placement, I am not satisfied that the level of supervision and control to which AK is subject is sufficiently different from a child of AK's age and station to constitute a deprivation of liberty for the purposes of Art 5 of the ECHR.*

MacDonald J was further unpersuaded that the local authority had in place a more restrictive care plan which would be implemented if AK's behaviour deteriorated. First, whilst he accepted an anticipatory order could be made in principle, it was an exceptional remedy and one to be used sparingly. Second, he considered that in deciding whether given restrictions constitute a

deprivation of a child's liberty, it was the *current* situation of the child that ordinarily falls for consideration by the court. Third, there was a significant concern with the approach being urged upon him by the local authority:

38. The local authority's position amounts to the court being asked to confer upon an applicant local authority a continuing and contingent authority to deprive a child of his or her liberty *if* it becomes necessary to do so at some unidentified future point upon the *local authority's* assessment that this course of action is in the child's best interests. In *Re D* at [41] Baroness Hale made clear that the protection afforded by Art 5 of the ECHR is precisely so that there can be an *independent* assessment whether the arrangements that constitute a deprivation of liberty can b[2020] EWHC 139 (Fam)

> *e said to be in a person's best interests. It is implicit in the authorities that I have mentioned above that that assessment by an independent authority falls to be made at the point at which it is said the person is deprived of their liberty. Within this context, the making of an anticipatory order in favour of the local authority that will govern a situation that may or may not pertain in the future deprives the court of the ability to conduct an independent assessment of the circumstances of AK at the point in time his liberty is said to be deprived, in a situation that is likely to be highly fluid and that could change on a day by day basis.*
>
> *39. Whilst on behalf of the local authority Ms Branson submitted, relying the observations of Sir James Munby, P in A-F [2018] EWHC Fam 138 at [46] to [49], that a DOL order does not need to authorise each and every element of the circumstances that constitute confinement, the court's evaluation prior to granting such an order must condescend to the detailed circumstances which are said to justify the order at the point at which it is said that order is justified. In an urgent situation, this can be achieved by an immediate application to the urgent applications judge sitting in the Family Division, made to the Out of Hours Judge if necessary.* (emphasis in original)

Further, he could see wider disadvantages to the making of contingent or anticipatory DOL orders authorising the deprivation of liberty of vulnerable children on the happening of some future event.

> *40. [...] The current use of DOL orders to restrict the liberty of children in residential placements is a remedy that sits outside the statutory regime established by Parliament, after due consideration and debate, for the secure accommodation of children pursuant to s 25 of the Children Act 1989.*
>
> *41. In these circumstances, in the absence of a clear legislative intent and where the liberty of the subject is at stake and any restriction on that liberty will constitute a serious interference with the fundamental rights of the individual, the court must be extremely chary of proceeding in a manner that would have the effect of conferring on a local authority a wide discretion to regulate the deprivation of a child's liberty (as I am satisfied would be one of the clear effects of granting a contingent or anticipatory order to be implemented at some future date upon the local authority's own best interests assessment at that time)*

without the strict oversight that comes with granting a DOL order only after the court has evaluated the child's current situation by reference to the demands of the imperatives contained in Art 5 of the ECHR. I agree with Mr Sharp that this would amount to a significant, and undesirable, extension of the use of the inherent jurisdiction in cases of this nature.

MacDonald J did not rule out that an order would never be granted in respect of an arrangement that had not yet been implemented, but would be:

> *42.* […] *However, I anticipate that before making such an order the court will need cogent evidence that the regime proposed will be the regime that will be applied to the child if the DOL order is granted, rather than the far more speculative situation that pertains in this case.*

MacDonald J emphasised:

> *46. It is important that the local authority understands what the decision I have reached does* **not** *do. The decision of the court does* **not** *allow the local authority now to implement its stated care plan in full without a DOL order. Similarly, in circumstances where the local authority has contended before the court that the full implementation of the care plan at some future date would constitute a deprivation of AK's liberty for the purposes of Art 5, my decision does* **not** *absolve the local authority of the need to apply to the court for a DOL order if it decides at some future point to implement its stated care plan in full. In such circumstances, if the local authority determines at that future date that AK's welfare requires the care plan to be implemented in full, the local authority will need to at that point make the appropriate application and the court will make its determination. The decision of the court simply reflects, for the reasons I have given above, the consequence of none of these contingent events having yet come to pass.*

Comment

Each case is fact specific, but we suggest particular caution before seeking to translate MacDonald J's conclusions in respect of AK's circumstances to an adult. The 'acid test' in relation to those under 18 would still appear to be capable of being 'nuanced' to reflect the restrictions society would expect to be in place for a young person. But such nuancing falls away when the person turns 18.

Further, whilst MacDonald J was undoubtedly correct to be concerned at the speculative nature of the contingent declaration being sought by the local authority, it should perhaps be observed that the Court of Protection is very routinely asked to endorse plans amounting to a deprivation of liberty that are not yet in force, but will be upon discharge (say) from hospital. Indeed, both DoLS and (in due course) LPS are predicated also upon the ability to authorise a deprivation of liberty up to 28 days in advance. Perhaps the key difference in the instant case was the local authority had not put sufficient evidence before the court: (a) that the restrictions would, in fact, be put in place; and (b) to satisfy the court that they amounted to a deprivation of liberty and were necessary and proportionate.

Disabled Children: A Legal Handbook

Thanks to the Council on Disabled Children and Legal Action Group, all of the chapters of the third edition of this invaluable book (by Steve Broach and Luke Clements) can be downloaded for free here. We particularly recommend chapter 7 "Decision-making: the legal framework" for those seeking to understand the complexities of the interaction between the common law and the MCA 2005.

2020 World Congress in Argentina

Information is now available about the 6th World Congress to be held at Buenos Aires University, Argentina, from 29th September to 2nd October 2020, under the full title "Adult Support and Care" and the sub-title "From Adult Guardianship to Personal Autonomy". We shall report when the website for the 6th World Congress is available. The details that have now been issued are in the meantime available here. The first five World Congresses were held in Japan, Australia, United States, Germany and Korea, all using the title "World Congress on Adult Guardianship". Increasingly, the reference to "Guardianship" failed to encapsulate the much broader scope of the World Congresses. The International Advisory Board accordingly agreed that each successive World Congress from and including the 6th should be able to propose its own title for approval.

The 6th World Congress is building extensive support and involvement from throughout Latin America. Its aims include establishing a Latin American network on adult guardianship. There will be a focus upon the elderly generally, as well as adults with disabilities. The objectives include deepening understanding of the standards of the UN Convention on the Rights of Persons with Disabilities and of the Inter-American Convention on the Protection of the Human Rights of the Elderly, in relation to the day-to-day exercise of rights. It also seeks, on a worldwide basis, to foster interaction and exchange of information and experiences, among experts, supporters, assistants, guardians and representatives of the elderly and adults with disabilities, NGOs, public institutions, judges and authorities; and also to link people, NGOs and public policy makers with private companies interested in development products, which improve the lifestyle of adults and elderly persons with disabilities who require support and care.

See the Scotland section of this Report for announcement of the commitment by the Law Society of Scotland to be a main sponsor of the 7th World Congress in Scotland on 7th – 9th June 2022, which will return to the more generalised (but improved) title "World Congress on Adult Capacity", similar to the titles for the first five World Congresses with the alteration from "Guardianship" to "Capacity."

RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

This month, we highlight the article by Carmel Davies and others *What are the mechanisms that support healthcare professionals to adopt assisted decision-making practice? A rapid*

realist review. BMC Health Serv Res 19, 960 (2019). Designed to support implementation of the Irish Assisted Decision-Making (Capacity) Act, the article provides a very useful overview of tools and approaches that could be used to support decision-making, equally applicable in other jurisdictions.

Also of interest is the article by Lara Pivodic and others, *Physical restraining of nursing home residents in the last week of life: an epidemiological study in six European countries*. International Journal of Nursing Studies (104) (April 2020), examining practice in Belgium, England, Finland, Italy, the Netherlands and Poland.

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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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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. 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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