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MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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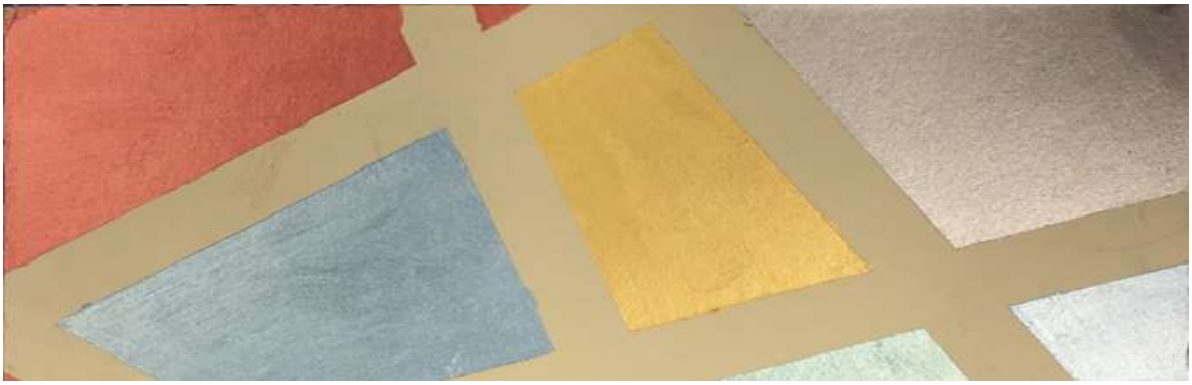

Welcome to the February 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: vaccination; interim authority to treat pending a final order, and a further LPS impact assessment;

(2) In the Property and Affairs Report: guidance following *ACC* for professional deputies;

(3) In the Practice and Procedure Report: a checklist for international relocation, covert treatment and the courts, and recording of court proceedings;

(4) In the Wider Context Report: decision-making and 16/17 year olds, FAQs following the *Devon* judgment on personal assessment, spotting coercion and control and the BIHR's resources for service providers;

(5) In the Scotland Report: further developments relating to the Scott review, including an update from the Chair, and Scottish consideration of relocation.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page 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

What to do when P wants to return home abroad?

Re UR [2021] EWCOP 10 (Keehan J)

International jurisdiction of the Court of Protection – other

In *Re UR* [2021] EWCOP 10, Hayden J has set out a checklist for situations where the Court of Protection is to be asked to decide that a person should leave the country permanently. The case concerned a 68 year old Polish woman. It was framed as a s.21A challenge to the DoLS authorisation relating to the care home where she was residing, but evolved into a case where, by agreement, a plan was developed to secure her return to Poland where she had been expressing a strong and consistent wish to go. She had family there, including a sister and niece; she also had the financial wherewithal to fund her own package of care, should that be required.

The judgment included a review of the case-law relating to s.21A and also the determination of best interests, which is sufficiently familiar not to require repetition here. Hayden J had little difficulty in concluding that it was in UR's best interests to return to Poland (and hence that the best interests requirement in the DoLS authorisation was not satisfied). In passing, he repeated a judicial concern that the use of a balance sheet for these purposes risks becoming a "*map without contours*" (although he emphasised that the balance sheet in the case before him in fact was far more sophisticated than the term would suggest, and renamed it "*analysis of the competing issues*").

Hayden J also had to consider whether UR would be prevented from leaving her care home and flying to Poland by operation of the lockdown regulations current as at January 2021; Hayden J was clear that she was not prevented from doing so by them, nor would the carers who would travel with her be breaching the regulations as they would have a reasonable excuse to accompany her, acting as they did in a work capacity. Unsurprisingly, Hayden J was quick to praise the "selfless and dedicated professionalism" of the care home and manager, who had indicated that they would be prepared to travel with her, and self-isolate/quarantine upon their return.

Hayden J identified that it was possible and in UR's best interests to return home, although there were a number of remaining practical issues to be addressed for the plan to be put in place. More generally, he set a checklist for cases in the Court of Protection for permanent

relocation from the jurisdiction of England and Wales:

> *i. Liaison with the relevant Embassy/ Consulate (in the first instance) to ascertain what guidance and assistance can be provided;*
> *ii. Evidence as to physical health to travel (GP);*
> *iii. Evidence as to mental health to travel (psychiatrist);*
> *iv. Legal opinion regarding citizenship, benefit entitlement, health and social care provision in the relevant country, and such other issues relevant to the case;*
> *v. Consideration of any applications that need to be made as a consequence of any legal opinion provided;*
> *vi. Independent social work evidence regarding the viability of the proposed package of care in the relevant country if such evidence cannot be provided by the parties to the proceedings or a direction under section 49 MCA;*
> *vii. Confirmation of travel costings from the commissioners of the care package, both in relation to P and any carers that may need to travel with them (who will pay?);*
> *viii. Confirmation that the necessary medication/ care will be available during travel from the UK/ for the immediate future in the new country*
> *ix. Transition plan/ care plan, to include a contingency plan and how the matter should return to court in the event of an emergency in implementing the proposed plan;*
> *x. Best interest evidence from the relevant commissioners;*
> *xi. Wishes and feelings evidence;*
> *xii. Residual orders to allow the plan to be implemented, including single issue financial orders regarding opening/closing of UK bank accounts, the purchasing of essential items to travel (if necessary);*
> *xiii. Covid-19 considerations prior to travel (if applicable)*

Hayden J also set out the full (anoymised) order that he had made, again as a template for future cases.

Comment

As (despite Brexit and COVID-19) the situation described in this case arises with increasing frequency, the checklist set out in this case is very helpful. Two points should be noted by way of caveat:

1. The approach set out here applies where the individual is at the time of the judgment habitually resident in England and Wales, so the court is exercising its full jurisdiction over them; different considerations might arise if it was acting to give effect to a foreign order for return – see *Re MN*.

2. If, as is hoped, the UK ratifies the 2000 Hague Convention in respect of England and Wales during the course of 2021, it will also be necessary in any case in which both jurisdictions are signatories for Central Authorities to be involved at the planning stage so as to comply with Article 33 of that Convention and paragraph 26(1) of Sch 3 to the MCA 2005 (which will come into force upon ratification of the Convention). Adrian provides more detail of this, along with a discussion of how the case relates to the position in Scotland (which, remember, for these purposes, is a foreign country), in the Scotland section of this Report.

Covert medical treatment and the courts

An NHS Trust v XB & Ors [2020] EWCOP 71 (Theis J)

Best interests – medical treatment – Court of Protection practice and procedure

Summary

Theis J has further emphasised the thinness of the legal ice for professionals seeking to administer medication covertly. The case concerned a man, XB, detained at a high security mental health hospital. He was diagnosed with treatment resistant paranoid schizophrenia. He required antihypertensive medication, which he refused to take. He was considered to lack capacity to make this decision, and it was proposed to administer it covertly. His siblings recognised that this treatment might need to be administered if his condition was life-threatening, but were concerned about the position and wanted the matter to be considered by the Court of Protection, and the decision taken separately from those who had a therapeutic relationship with him and the family who supported him.

Although XB's siblings had expressly raised the potential for an application, the Trust proceeded to give the medication covertly following a best interests meeting to which they were not invited (which the Trust subsequently accepted had been a mistake). XB discovered, in fact, that he was being administered the medication covertly, but this did not, Theis J find, mean that an application was no longer being required, because it remained clear that XB was likely to continue to object, and that it remained urgently necessary for him to continue to have it. Substantial delays ensured in making the application, and then in listing the application because of a failure to set a fixed date at the first directions hearing; throughout that period XB continued to be administered medication covertly.

In her consideration of the legal framework, Theis J set out the following convenient summary of the factors in play:

> *54. In relation to covert medical treatment Baker J (as he then was) emphasised in A Local Authority v P & ors [2018] EWCOP 10 that such treatment is a serious interference with an individual's right to respect for private life under Article 8. He noted in that judgment that the Supreme Court decision in An NHS Trust v Y [2019] AC 978 was awaited but he observed that in the case he was concerned with (involving the covert insertion of a contraceptive device) 'it is in my judgment highly probable that, in most, if not all, cases, professionals faced with a decision whether to take that steps will conclude that it is appropriate to apply to the court to facilitate a comprehensive analysis of best interests, with P having the benefit of legal representation and independent expert advice'.*
>
> *55. In An NHS v Y Lady Black recognised at paragraphs 125 and 126 that although an application to the court is not necessary in every case [126] 'there will undoubtedly be cases in which an application will be required (or desirable) because of the particular circumstances that appertain, and there should be no reticence about involving the court in such cases'.*
>
> *56. The principle that underpinned the Guidance issued by Hayden J (Vice President of the Court of Protection) on*

> *17 January 2020 relating to applications concerning medical treatment was that where there was agreement at the end of the relevant decision making process in accordance with the MCA 2005, with any relevant professional guidance being observed and relevant guidance in the Code of Practice being followed regarding the decision making capacity and best interests of the person in question then, in principle, medical treatment may be provided without application to the court (see paragraph 6). However, the Guidance equally makes clear at paragraph 8 that if at the end of the medical decision making process there remains concerns that the way forward in any case there is a 'lack of agreement as to a proposed course of action from those with an interest in the person's welfare' (paragraph 8 (c)) 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' (paragraph 8). The Guidance also makes clear at paragraph 10 that in any case that 'involves a serious interference with the person's rights under the ECHR' it is 'highly probable' that an application should be made.*

Theis J was clear that, given the anxiety expressed by XB's siblings about the administration of the medication, and the serious nature of the interference with his rights under Article 8 ECHR involved in administering covert medication, this was a case where there should have been no reticence in involving the court (paragraph 74).

On the evidence before her, Theis J had no hesitation in finding that XB lacked capacity to make decisions about his medical treatment, and that it was in his best interests to be administered the hypertension medication covertly.

Comment

It is important, perhaps, to make clear what Theis J said in this case. She was not saying that an application had been required; what she was saying (and this emerges most clearly from paragraph 76) that the Trust should have given very serious consideration as to whether an application should be made – and that any Trust in future in such a situation should equally give such consideration. She also made clear that, unsurprisingly, if an application was to be made, it should have been made and progressed quickly.

At one level, it is somewhat frustrating the courts consistently decline to set out circumstances in which applications must be made (with the exception of situations concerning life-sustaining treatment identified in *NHS Trust v Y*). At another level, it is understandable that the focus of the decisions – and of the Serious Medical Treatment guidance – is upon the need for Trusts (and others) to consider carefully whether they can simply proceed on the basis of s.5 MCA 2005, or whether the decision has to be taken by the court. Keeping the focus there means that the risk is avoided of giving the message that professionals are always 'safe' in situations not clearly identified as requiring a court application. That Trusts are increasingly getting the message is undoubtedly suggested by the sharp, and continuing, increase in medical

treatment applications over the past year – the demands of COVID-19 notwithstanding.

Recording proceedings – a no-no (as is bombarding the court with correspondence)

A Local Authority v TA, XA, GA and SR (GA's deputy for property and financial affairs) [2021] EWCOP 3 (Cobb J)

Court of Protection practice and procedure – other

Summary

In this judgment Cobb J considered two discrete issues in respect of a litigant in person ("TA") whose challenging behaviour had meant that progress of the proceedings relating to P's care had been slow. The issues were:

- Whether TA could record the hearings in the Court of Protection; and,
- Whether an order was required restricting TA's contact with the Court of Protection court office.

As to recording, TA sought the court's permission on the basis that he, as a litigant in person needed to revisit the issue discussed in court and that he could not be expected to take handwritten notes whilst making full representations to the court. He made various arguments in respect of breach of his human rights and allegations of censorship. He made the point that he was not *"in court"* and was *"outside the jurisdiction of the court"*; and therefore could record conversations, if he wished.

Cobb J reminded TA that, whilst he was not physically in the court building, he was *"every bit as much 'in a court' on the video platform."* Cobb J refused TA's application to record the hearings, because he saw no reason to depart from the normal procedure in respect of recordings. He further made three observations:

- Whilst the Court of Protection is not specifically included in the list of courts to which section 55 and schedule 25 of the Coronavirus Act 2020 ("the 2020 Act") applies (namely in section 85D(2) of the Courts Act 2003), the statutory criminal prohibitions in respect of making, or attempting to make, an unauthorised recording of the proceedings are to be included in every standard order, accompanied by a penal notice and punishable by contempt proceedings. That is in accordance with the guidance issued by Hayden J (Vice President of the Court of Protection) on remote hearings.
- In any event, it would be contempt of court, punishable by imprisonment, for any party to record a hearing without permission of the judge (see section 9 of the Contempt of Court Act 1981). There is a discretion to permit recording in circumstances (see *Practice Direction (Tape Recorders)* [1981] 1 WLR 1981) but Cobb J was not persuaded that TA demonstrated a reasonable need for such a recording.
- There is also a standard form transparency order in place, which prohibits the reporting of any material which identifies, or is likely to identify, that GA is the subject of proceedings; any person as a member of the family of GA; that A Local Authority is a party; and where GA lives. The content of video-recordings of the proceedings is controlled by s 12(1)(b) of the

> Administration of Justice Act 1960 and may not be published unless publication falls within the exceptions contained in Practice Direction 4A, paragraphs 33 to 37. He was satisfied that there would be a "publication" whenever the law of defamation would treat it as such, which includes most forms of dissemination, whether oral or written: *Re B* [2004] EWHC 411 at [82(iii)]. Thus, TA posting the recordings on a private YouTube channel constituted publication.

On the second issue, an order was sought at the court's own motion restricting TA's contact with the Court of Protection court office. The operations manager at the court office had filed a witness statement, which detailed the number of emails and the amount of correspondence from TA amounting to approximately 130 pieces of correspondence per month or 4.5 per day. TA had also made 39 COP9 applications over a 24-month period. The emails are copied into multiple recipients (with up to 100 on some occasions). TA would sign off the emails with his name followed by some epithet, including "Diligent and persistent as ever", "Not a Gentle Knight", "WikiLeaks Wannabe", "DPA [Data Protection Act] Pioneer", or "Leviathan Terminator". TA denied that his correspondence was excessive, inappropriate or intemperate.

Cobb J determined that there was no justification for the volume or tone of much of his correspondence; and his contact with the court office was wholly disproportionate to the issues in the various proceedings. He considered, *inter alia,* the *obiter* comments of King LJ in *Agarwala v Agarwala* [2016] EWCA Civ 1252, particularly:

> *Whilst every judge is sympathetic to the challenges faced by litigants in person, justice simply cannot be done through a torrent of informal, unfocussed emails, often sent directly to the judge and not to the other parties. Neither the judge nor the court staff can, or should, be expected to field communications of this type. In my view judges must be entitled, as part of their general case management powers, to put in place, where they feel it to be appropriate, strict directions regulating communications with the court and litigants should understand that failure to comply with such directions will mean that communications that they choose to send, notwithstanding those directions, will be neither responded to nor acted upon.*

Cobb J accordingly proposed to make an injunction, pursuant to the power invested in him by section 47(1) of the Mental Capacity Act 2005, restraining TA's communication with the court office. He noted that the order was exceptional, but it was entirely justified by the facts of the case (para 28):

> *There is a substantial risk that the process of the court will continue to be seriously abused, and that the proper administration of justice in the future will be seriously impeded by TA unless I intervene now with appropriate injunctive relief.*

Comment

Cobb J's decision is an important reminder to both litigants in person and legal representatives alike that remote hearings are still very much ordinary court proceedings, even if they are not taking place in the physical building; and

therefore the usual restrictions in respect of contempt apply.

In terms of the restriction in contact with the court order, it is perhaps of note that Cobb J specifically made the order pursuant to section 47(1) of the MCA 2005 (rather than sitting as a High Court exercising the inherent jurisdiction) so that it is open to Tier 1 and 2 judges sitting in the Court of Protection to make such orders in exceptional circumstances. He also usefully set out the terms of the order at the foot of his judgment.

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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 Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. 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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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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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

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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. 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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