MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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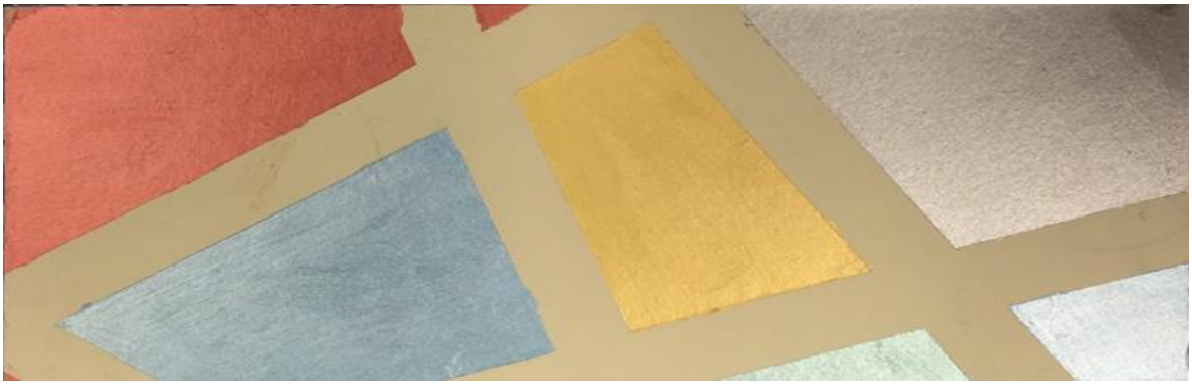

Welcome to the January 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, a further round in the *Re X* saga, a briefing note on PJ/MM, the Chief Coroner's annual report and Manuela Sykes' obituary;

(2) In the Property and Affairs Report: case-law and OPG guidance on gifts, and whether its effect on a will is information relevant to the test of whether a person has capacity to marry;

(2) In the Practice and Procedure Report: fluctuating capacity in the face of the court, Court of Protection statistics and a useful case for human rights claims arising out of the misuse of the MCA;

(3) In the Wider Context Report: interim guidance on CANH withdrawal, the NICE consultation on decision-making and capacity, an important study on everyday decision-making under the MCA and a book corner with recent books of interest;

(4) In the Scotland Report: Court of Protection orders before the Scottish courts and an update on the Scottish Government consultation on adults with incapacity;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Re Y update

The Supreme Court has confirmed the hearing date – 26 and 27 February – for the Official Solicitor's appeal against the decision of O'Farrell J *Re Y* [2017] EWHC 2866 (QB) that it was not mandatory to bring before the Court of Protection the withdrawal of CANH in the case of a man with a prolonged disorder consciousness in circumstances where the clinical team and Mr Y's family were agreed that it was not in his best interests to receive that treatment.

In the interim, clinical practitioners, in particular, will want to have regard to the interim guidance issued by the General Medical Council, British Medical Association and Royal College of Physicians that we cover in the 'Wider Context' section of the Report.

Deckchairs on the DOL Titanic?

Re KT & Ors [2018] EWCOP 1 (Charles J)
Article 5 – deprivation of liberty

Summary

Charles J has returned – again – to the vexed question of how *Re X* applications (now, strictly, COPDOL11 applications) can proceed where there is no-one can properly play the part of Rule 3A (now Rule 1.2(5)) representative. Charles J considered four test cases of the now nearly 300 that have now been stayed in accordance with his decision in *Re JM* [2016] EWCOP 15, there being no family member or friend is available for appointment as P's Rule 1.2(5) representative.

Background

In early 2017, the Government Legal Department had written to local authority applicants in stayed cases to indicate that (1) the most appropriate course of action was for the local authority to identify a professional advocate; but (2) where one was not available, the local authority should liaise to take forward the process of commissioning a Court of Protection General Visitor to complete a report under s.49 MCA 2005. The GLD letters indicated that Ministers had agreed to provide funding to HMCTS to enable greater use of visitors by the COP. On the basis of these letters, two applicant local authorities sought to lift stays in four cases, which were listed before Charles J as test cases.

Charles J, it is fair to say, was unimpressed by the letters, noting that they were devoid both of

detail as to extra funding, and also how and why it was now said that a professional advocate had or had always had been a practically available option in a significant number of cases. Following directions made in the test cases, the Secretary of State filed submissions which asserted that local authority applicants owed a duty under section 6 of the Human Rights Act 1998 "*to facilitate the speedy resolution of the application by (for example) ensuring that a professional advocate is appointed to represent P's interests so far as necessary*". It was asserted that this duty: "*falls into the same category as the DOLS duties which were considered in Liverpool City* Council," the unsuccessful judicial review brought by local authorities to seek to compel greater funding to discharge their DOLS obligations. As Charles J noted that, this was a radical departure from the position that had previously been taken by the Secretary of State in *JM*, where it had been agreed that local authority and other applicants do not owe a statutory duty to provide representation for P in the COP.

Whose obligation to provide representation for P?

Charles J expressed the preliminary view that the Secretary of State's argument as to the obligation of local authorities under the HRA was wrong, running counter to the decision on the obligations of a local authority in *Re A and C* [2010] EWHC 978 (in particular at paragraph 96) and its application in *Staffordshire County Council v SRK and others* [2016] EWCOP 27 and [2016] EWCA Civ 1317. However, even if they did owe such a duty, Charles J held that this did not assist the Secretary of State because the central, statutory, obligation lay with the Secretary of State for Justice to ensure that the COP, as a public authority, acts lawfully and so can apply a Convention compliant and fair procedure.

Visitor as Convention-compliant procedure?

Charles J agreed with the agreed position of both the applicant local authorities and the Secretary of State that the appointment of a Visitor would provide a fair and Convention compliant procedure because it would provide the essence of P's Article 5 procedural rights, which had been identified in *Re NRA & Others* [2015] EWCOP 59 as requiring an independent person to: (1) elicit P's wishes and feelings and make them and the matters mentioned in s.4(6) MCA 2005 known to the Court without causing P any or any unnecessary distress; (2) critically examine from the perspective of P's best interests, and with a detailed knowledge of P, the pros and cons of a care package, and whether it is the least restrictive available option; (3) keep the implementation of the care package under review and raise points relating to it and changes in P's behaviour or health. Charles J set out draft directions which could be made in cases where a Visitor was proposed. Charles J acknowledged that there were both advantages and disadvantages to the appointment of a Visitor over a family member or friend, the advantages being the independence and expertise of the visitor, the disadvantages being the absence of a more regular review on the ground by someone who knows P and wants to promote their best interests.

Having conducted a detailed review of the (depressing) evidence before him, Charles J did not consider that the offer to fund Visitors by the Secretary of State was likely to offer anything but a short-term or a very partial solution to the

issue. However, he held that this should not stop it being used for so long as it was available in practice.

Order of preference

In light of the matters set out above, Charles J had to resolve an issue as to whether, where no family member/friend is available to as Rule 1.2(5) representative, the second choice should be a Visitor (the local authorities' position) or a professional representative (the Secretary of State's position). In reality, as he noted, the dispute was based upon the budgetary battle between local and central government. In the abstract, Charles J considered, the appointment of a professional who could act independently as a Rule 1.2(5) representative and carry out regular reviews of P's placement and care package on the ground would in most cases be likely to have advantages over the appointment of a Visitor because it would provide a better basis of and for review and equivalent expertise and independence to that provided by a Visitor.

However, given that there was no evidence that professional representatives were practically available in most cases, Charles J held that if he had to make a choice, he would choose a Visitor. He recorded the sensible acceptance by the Secretary of State that generally the COP can and should accept an assertion from an applicant authority that a professional Rule representative is not available for appointment at face value.

Joinder of the Crown/further stays

Charles J has no intention of letting the Government off the hook, noting at para 91 that:

> *In cases where a visitor is appointed (or some other available procedure is adopted to enable an application or review to proceed) there is no need to, or purpose for joining, or continuing the joinder of, the Crown. But, as soon as any such practically available process is no longer available I consider that, for the reasons given in JM and earlier in this judgment the COP should join the Crown to and stay such applications and reviews.*

Way ahead

Charles J suggested that the Secretary of State, the Public Guardian and the COP (through the Senior Judge) try to agree a process by which the stays are lifted in the approximately 330 stayed cases on the same basis as in these cases. He indicated that in cases in which local authorities (or, presumably, other applicants) have not sought to lift the stay, an appropriate course would be for the Secretary of State to apply to lift the stay in a manner that ensures that a visitor will be available for appointment in each case. However, he left the ultimate decision as to how best to clear the backlog to the triumvirate set out above.

Comment

The decision in *Cheshire West* has huge resource implications. The Law Commission has estimated the cost of full compliance at £2.155 billion per year. One of the local authorities before the court, Wolverhampton, had brought 24 applications over the past 3 years, and estimated that that three times the present number should have been brought, the numbers being likely to increase with service users moving to supported living. The Law Commission had estimated that around 53,000

people are deprived of liberty outside hospitals and care homes, and calculated that this would cost local authorities and the NHS £609.5 million per year to authorise by obtaining welfare orders from the COP. Only a very small fraction of these applications are being made, although between January and March 2017, there were 969 applications relating to deprivation of liberty, up 43% on the equivalent quarter in 2016 (678). Of these, 600 were *Re X* applications.

In the circumstances, it is hardly surprising that Charles J considered that funding to provide an additional 200 Visitor reports a year hardly scratched the surface of the problem. As he recognised, his analysis of the position represents, in essence, the re-arranging of deckchairs on the legal Titanic. LPS – and/or or a radical rethinking of the law relating to deprivation of liberty – cannot come soon enough.

Briefing note on MM/PJ

NHS England has issued a note which considers the implications of these two judgments for the Transforming Care programme which reflects government policy to reduce the need for long term detention in hospital and meeting needs of those with learning disability and/or autism wherever possible in the community. The *PJ* decision (on community treatment orders) arguably makes it easier to achieve this aim but the *MM* decision (on conditional discharges) poses challenges to it, for almost a quarter of TCP inpatients are subject to restrictions under the Mental Health Act 1983.

The note summarises the Court of Appeal's decision. Reflecting one of the potential difficulties with the judgment, the note states that it is not appropriate for the tribunal to investigate or determine whether there is an objective DoL as a consequence of a CTO.

For restricted patients lacking the relevant capacity, the note stresses the need to secure the DoL authorisation before the conditional discharge. Illustrating the risks to patients, it states "[t]*here is the argument that to present the possibility of discharge from hospital to someone only to then advise that it would be unlawful amounts to emotional abuse, and managing a patient's expectations appropriately is essential*."

For restricted patients, the following guidance is given on the responsibilities of responsible clinicians and multi-disciplinary teams in:

- *ensuring the robustness of capacity assessments in relation to proposed accommodation, care and support. Ensure you all agree on the salient points and the methodology of communication and information giving before anyone embarks on a capacity assessment rather than trying to deal with differences of view on the outcome.*

- *the clarity and robustness of purpose of any control and supervision. Ensure you are all agreed on the risks and the appropriate steps to mitigate / manage these, have the restrictions been reduced as far as possible? Is further positive risk testing required? Then consider the various legal structures that might be able to authorise the restrictions (e.g. MoJ/tribunal conditions; offender licence; tenancy agreement etc). Also be clear about what the commissioner and MDT will expect in terms of action by the provider if the person doesn't*

> *comply with the restrictions and care plan; all of this will enable you all to understand what the supervision and control elements are and whether they are continuous (NB as above, the purpose of the restrictions is irrelevant to whether or not they amount to a DoL).*

The briefing also notes that "*perhaps perversely, this situation (whereby the Court of Protection could authorise a post discharge DoL and therefore facilitate discharge for a patient who lacks capacity, while a patient with capacity may have no such route available where the post discharge package amounts to a DoL) creates an incentive for patients and their representatives to argue that they lack capacity, and/or that the restrictions post discharge do not amount to a DoL. The assessment of capacity may therefore pose greater challenges*." Finally, along with a useful flowchart, the briefing helpfully provides some suggested wording for conditions of discharge.

We wait to hear whether the Supreme Court will give permission to MM and PJ to appeal the respective judgments in their two cases.

Chief Coroner's Report

The Chief Coroner published his Fourth Annual Report (for 2016-2017) to the Lord Chancellor on 30 November 2017. We only report on those aspects that relate to DOLs.

The report notes that (i) 241,211 deaths were reported to coroners in 2016, the highest figure to date. This is an increase of 4,805 (2%) from 2015. (ii) The number of cases that required investigation and inquest in 2016 was 40,504, an increase from the previous year. (iii) The average time of all cases from death to inquest completed had fallen from the previous year and was now 18 weeks.

It was noted that the number of DoLS cases will have affected these statistics (readers may recall that the previous Chief Coroner had issued guidance which stated that if a person died while 'DOL'd' under the statutory scheme, they had died in state detention and there was therefore a duty to report the death to the Coroner and for the Coroner to investigate the death).

The DOLs effect was thought to be particularly acute because there has been a 58% increase in reported DOLS cases from the 7,183 cases in 2015 to 11,376 reported in 2016. DOLs cases accounted for over 11,300 inquests in 2016. Investigating such a high number of DOLs cases has brought the average time for an inquest to be completed down as (i) a post-mortem examination will rarely be required in such cases and (ii) the inquests should normally be completed within a week.

The DOLs effect will not be seen in the 2017 – 2018 statistics as a result of the Policing and Crime Act 2017. People subject to authorisations under DoLS will no longer be considered to be 'otherwise in state detention' for the purposes of Section 1 of the Coroners and Justice Act 2009, and coroners will no longer be under a duty to investigate a death solely because a DoLS authorisation was in place: see the revised guidance here. We will see what impact that has upon the numbers of inquests in the 2017-2018 annual report; it will also be of interest to see whether that report shows how many referrals have been made for deaths in the 'grey zone' where an application has been made for an authorisation but not yet granted. Their situation was not addressed in

the guidance but has caused considerable head-scratching on the ground. As ever, the most sensible course of action is for local protocols to be developed with each coroner.

Manuela Sykes

Manuela Sykes, the subject of one of the most celebrated Court of Protection cases, died at the end of the last year, her obituary in the Guardian can be found here. We would strongly urge you to read it, bearing in mind District Judge Eldergill's observations that:

> *She has always wished to be head. She would wish her life to end with a bang not a whimper. This is her last chance to exert a political influence which is recognisable as her influence. Her last contribution to the country's political scene and the workings and deliberations of the council and social services committee which she sat on.*

Two new team publications

Finally, two publications for you:

- We have updated our guide to Judicial Authorisation of Deprivation of Liberty, to take account of changes in both substance and procedure (in particular the renumbering of rules and forms post 1 December);
- A discussion paper prepared by Alex (not binding on his fellow authors!) on 'valid consent' in the context of deprivation of liberty, designed to promote consideration of whether there is a (non-discriminatory) way to re-insert the concept of coercion into the definition.

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

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Conferences

Conferences at which editors/contributors are speaking

5th UCLH Mental Capacity Conference

Alex is speaking at the 5th University College London Hospital mental capacity conference on 20 February, alongside Sir James Munby P and Baroness Ilora Finlay. For more details, see here.

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see here.

Other conferences of interest

SALLY seminar

The next seminar in the ESRC-funded seminar series on Safeguarding Adults and Legal Literacy will be held on 16 February at the University of Bedfordshire's Luton campus, the topic being "Safeguarding Adults Boards and Reviews." See here for more details.

COPPA seminars

The Court of Protection Practitioners Association have a packed programme of seminars coming up, including (in the North West) a seminar on differing perspectives on proceedings on 31 January and (in London) a seminar on financial abuse on 7 February. For more details, and to book, see here.

Finder's Deputy day

The Third Finder's International Deputyship Development Day is taking place on 1 March in York. It is a free event open to all local authorities carrying out deputyship and appointeeship work, and includes a specific focus on hoarding. 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 report will be out in late February. 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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