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MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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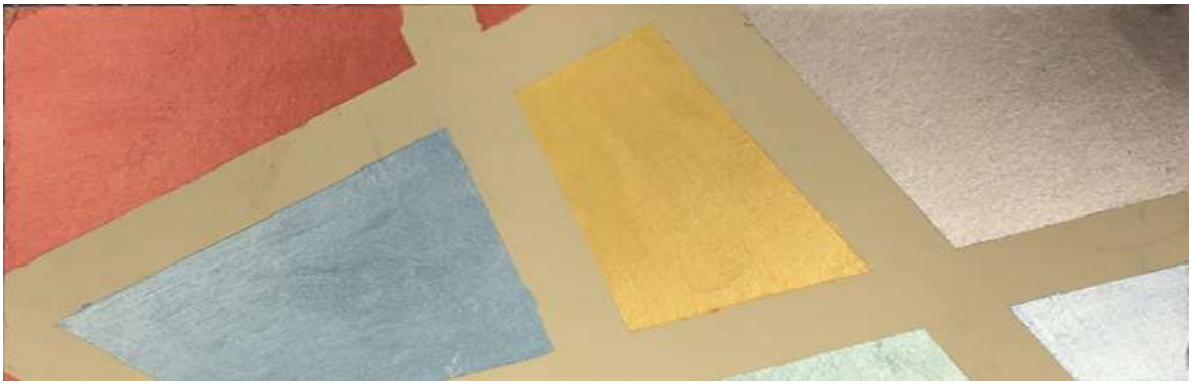

Welcome to the January 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: vaccination; life-sustaining treatment decisions and the limits of the court processes; capacity and unusual sexual practices; and the lockdown regulations and care in the context of incapacity;

(2) In the Property and Affairs Report: removing attorneys and Child Trust Funds in the context of those with impaired decision-making capacity;

(3) In the Practice and Procedure Report: party status and restricting the provision of information; a rare judgment on transparency, and the police and the Court of Protection;

(4) In the Wider Context Report: DNACPR decision-making under scrutiny, safeguarding and the MCA – SARs under scrutiny; and important decisions relating to different aspects of childhood;

(5) In the Scotland Report: the interim review of the Scott Mental Health Law Review under scrutiny and recent developments from Scottish Government.

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.

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Party status and restricting the provision of information

KK v Leeds City Council) [2020] EWCOP 64 (Cobb J)

Court of Protection jurisdiction and powers – costs

Summary

In this case, Cobb J had to consider whether P's maternal aunt should be joined to welfare proceedings. The aunt, KK, had been P's main carer for almost all of her childhood; they had last lived together 3 years previously, and they currently had contact with each other. At first instance, HHJ Hayes QC had refused KK's application for party status; KK sought permission to appeal this decision to Cobb J.

KK's application had been (and continued to be) resisted by both the applicant local authority and the Official Solicitor on her niece, DK's, behalf. At the hearing below, they presented and sought to rely upon, information which, although acknowledged to be relevant to the issue before the court, they wished to keep confidential from KK. HHJ Hayes QC received this documentary confidential material, and read it. Neither KK nor her lawyers were given access to this material. HHJ Hayes QC gave a separate shorter judgment in which he expressed his view about this confidential material, and its significance to the decision. A preliminary issue arose before Cobb J as to whether he, too, should read the material. No party argued that he should not, but Counsel for KK drew his attention to the guidance given by Lord Neuberger in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38 as to the potential difficulties that would arise. Cobb J directed himself that it was necessary for him to read the material and the supplementary judgment.

There was no dispute between the parties (and Cobb J was satisfied) that HHJ Hayes QC had identified and applied the relevant test on joinder and party status, set out in COPR 2017 rr. 9.13 and 9.15. Cobb J noted at paragraph 31 that endorsed his approach that in considering the desirability" test in COPR r.9.13(2), the "sufficient interest" of the applicant for party status is likely to be relevant. Crucially, HHJ Hayes QC had reached the conclusion that (1) revealing to KK what the confidential evidence was would mean

that DK would be likely to disengage from her engagement both with professionals and with these proceedings; (2) joining KK to the proceedings notwithstanding that written evidence would lead to the same consequences; and (3) this would undermine the process of ensuring DK's participation in the proceedings. HHJ Hayes QC found that he could not resolve the problem by joining KK as a party and then exercising the court's power to limit or redact disclosure, as the very fact of joinder would be to bring about the adverse consequences he was seeking to avoid.

As Cobb J identified, therefore, the real dispute in this appeal focused on HHJ Hayes QC's management and deployment of the confidential material and its impact on his decision.

There was "*an appropriately accepted premise by all counsel in this case that it is contrary to the principle of open justice for a judge to read or hear evidence, or receive argument, in private; they rightly and unanimously accept that open justice is fundamental to the dispensation of justice in a modern, democratic society (per Lord Neuberger in Bank Mellat v HMT at §2/§3). It follows that generally, every party has a right to know the full case against him, and the right to test and challenge that case fully. I say 'generally' because there are, as counsel in this case properly recognised, exceptions to this*."

There is, however, nothing in the MCA 2005 nor in the COPR 2017 which specifically govern the correct approach to managing sensitive material which is the subject of an application for non-disclosure. After a careful analysis both of the underlying judgment of HHJ Hayes QC and the competing arguments put before him on appeal, Cobb J drew the threads together as follows at paragraph 41:

> *it seems to me that a judge faced with the situation faced by HHJ Hayes QC at the hearing of the application for party status should consider the following points:*
>
> *i) The general obligation of open justice applies in the Court of Protection as in other jurisdictions* […]*;*
>
> *ii) A judge faced with a request to withhold relevant but sensitive information/evidence from an aspirant for party status, must satisfy him/herself that the request is validly made* […]*;*
>
> *iii) The best interests of P, alternatively the "interests and position" of P, should occupy a central place in any decision to provide or withhold sensitive information/evidence to an applicant (section 4 MCA 2005 when read with rule 1.1(3)(b) COPR 2017); the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same* […]*;*
>
> *iv) The expectation of an "equal footing" (rule 1.1(3)(d) COPR 2017) for the parties should be considered as one of the factors* […]*;*
>
> *v) While the principles of natural justice are always engaged, the obligation to give full disclosure of all information (including sensitive information) to someone who is not a*

> *partyis unlikely to be as great as it would be to an existing party* […]*;*
>
> *vi) Any decision to withhold information from an aspirant for party status can only be justified on the grounds of necessity* […]*;*
> *vii) In such a situation the Article 6 and Article 8 rights of P and the aspirant for party status are engaged; where they conflict, the rights of P must prevail* […]*;*
>
> *viii) The judge should always consider whether a step can be taken (one of the 'procedural mitigations' referred to at [26] above) to acquaint the aspirant with the essence of sensitive/withheld material; by providing a 'gist' of the material, or disclosing it to the applicant's lawyers; I suggest that a closed material hearing would rarely be appropriate in these circumstances.*

On the facts of the case, Cobb J was satisfied that HHJ Hayes QC rightly prioritised (so far as was reasonably practicable), the need to permit and encourage DK to participate in the proceedings which concern her, and/or to improve her ability to participate, as fully as possible in any act done for her and any decision affecting her (MCA 2005, s.4(4)). On the specific facts of the case, HHJ Hayes QC was not wrong to conclude that the very act of joining K would be to bring about adverse consequences for DK and to defeat the very purpose of the proceedings. Although unusual, the process by which HHJ Hayes QC had reached this conclusion was not fundamentally unjust. Cobb J also held that he had been correct to prepare a short supplementary judgment setting out his conclusions relevant to the confidential material, if for no reason because it enabled the appellate court to assess the extent to which, if at all, the confidential material has had a bearing on the overall outcome.

At paragraph 48, Cobb J concluded with two short points in dismissing the appeal.

> *i) It will, I suspect, be relatively uncommon for someone in the position of KK – a former primary carer of P (particularly where P is still a young adult) who wishes party status in proceedings under the MCA 2005– to be denied joinder to the proceedings, and be denied the chance to contribute to the decision-making in this welfare-based jurisdiction. That said, and adopting Bodey J's comments from Re SK […]) for this case, it will always be necessary to balance "the pros and cons of the particular joinder sought in the particular circumstances of the case";*
> *ii) The Judge's decision, and the dismissal of this appeal, does not detract from the obligation on the Local Authority to consult with KK (section 4(7) MCA 2005) as practicable and appropriate on welfare-based issues concerning DK.*

Comment

As Cobb J notes, it is very unusual for a person who has played – and appeared to play – so important a part in P's life not to be joined as a party to proceedings where they wish to be joined. A function of the nature of the proceedings is that, whilst two judges were clear that KK should not have been on the facts of the case, others cannot know why this was the case. Any case in which reliance has to be made upon confidential material arises deep concern, as was clearly caused to both HHJ Hayes QC

and Cobb J, and the outcome can never feel entirely satisfactory. Nonetheless, it is clear that both judges, applying, in turn, a line of case-law which emphasised the rigour with which any limitation upon disclosure of information to either a party or putative party has to be considered, gave the position very anxious scrutiny.

It is unlikely that the position that HHJ Hayes QC encountered will crop again often in the future, but at least there is now a clear route-map for parties / putative parties and the court to follow.

The police and the Court of Protection – whose interests?

AB (Court of Protection: Police Disclosure) [2019] EWCOP 66 (Keehan J)

Court of Protection jurisdiction and powers – interaction with criminal proceedings

Summary

In a decision handed down in October 2019, but which for some reason did not appear on Bailii until December 2020, Keehan J considered an application for disclosure of psychological reports in relation to the subject of Court of Protection proceedings. The Official Solicitor on his behalf opposed the application and submitted that only very limited information should be provided to the police in relation to the reports.

The background can be described shortly. There were three reports, two relating to litigation capacity and capacity to make decisions about residence, the third addressing the issue of AB's capacity in relation to access to the internet and social media. For purposes of preparing this report, AB underwent an education programme in relation to decision-making relating to accessing the internet and social media. After he had had undergone that programme that the psychologist prepared her third and final report in which she concluded that at that time AB had capacity to access the internet and social media. The police were undertaking an investigation into offences said to have been committed by AB in between one and two years earlier relating to category C images of children. Subject to the issue of disclosure of the report sought by the police, this investigation was concluded. Keehan J was told by Counsel for the police that if the expert had concluded that AB lacked capacity to access the internet and social media, it was likely the criminal proceedings would be discontinued against AB. Furthermore, if the court declined the police's application for disclosure, then the police would instruct their own expert to undertake a capacity assessment of AB.

The parties were agreed on the legal principles that should be applied. Rule 5.9 of the Court of Protection Rules 2017 provides for an application to be made by a person who is or was not a party to proceedings in the Court of Protection to inspect any other documents in the court records or to obtain a copy of such documents or extracts from such documents. It was submitted by the Official Solicitor (without dissent) that there was no existing authority on the principles to be applied in relation to such a request for disclosure under Rule 5.9, but it was agreed that the test to be applied was not a best interests test, but rather the test set down in *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] 2 WLR 322, with appropriate modifications. This test contains ten points, as follows:

1. The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor;

2. The welfare and interests of other children generally;

3. The maintenance of confidentiality in children cases;

4. The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies...;

5. The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice;

6. The public interest in the prosecution of serious crime and punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor;

7. The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order;

8. The desirability of cooperation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children;

9. In the case to which Section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations;

10. Any other material disclosure which has already taken place.

Keehan J agreed that he should apply those principles with the necessary changes for purposes of the Court of Protection. At paragraph 8, he noted:

> *and take account of the fact that AB does not wish these reports to be disclosed to the police. I take account and give considerable weight to the public interest in the administration of justice, the public interest in the prosecution of serious crime, and the public interest in convicting those who have been guilty of violent or sexual offences against children. Those are plainly important factors which ordinarily carry considerable and even determinative weight in applications for disclosure. In this case, however, I attach particular weight to issue 7:*
>
> > *"The gravity of the alleged offence and [more importantly] the relevance of the evidence to it..."*

It was only the third report which was of interest to the police in the case, but it did not deal with the question of whether he had had capacity in the period covered by the index offences with which AB was charged. Keehan J therefore held that the report contained nothing of relevance to the police investigation other than for the police to know that: (a) prior to coming to a conclusion, the expert had arranged for AB to undergo educative work; and (b) that her assessment that, in May 2019, AB had the capacity to access the internet and social media, was limited to that time and in the context of the educative work undertaken with him.

Keehan J was fortified in coming to his conclusion by also taking into account:

> *11. […] the singular importance in cases before the Court of Protection of those who are the subject of the proceedings being frank in their discussions and their cooperation with professionals. It is vital that those who are the subject of proceedings in the Court of Protection have confidence in the confidentiality of the proceedings and, in particular, the confidentiality of assessments undertaken of them for the purposes of determining whether or not they have capacity in the various relevant domains.*
>
> *12. It is, in my judgment, supremely important that those who are the subject of the Court of Protection are as frank as they possibly can be to those who are seeking to assess them and, accordingly, I would only consider disclosing the expert's report to the police if the weight to be given to the public interest was so great as to outweigh the consideration of frankness by AB in the Court of Protection proceedings. As it is, I have come to the conclusion that the expert's reports are not relevant to the issue that the police have to determine for the purposes of the prosecution of AB, namely between 2017 and 2018, did AB have capacity to access the internet and social media? As I have already said, the expert does not address that issue in any of her reports. Accordingly, the application is refused.*

Comment

Given the obvious irrelevance of the reports in question – even the report relating to capacity to access internet or social media – it is not surprising that Keehan J drew the conclusion that he did, although the judgment is a helpful reminder of the time-specificity of capacity.

It is, though, with respect, not entirely obvious that the importance of frankness upon which such weight was placed by Keehan J quite plays out in the same way as it does in relation to children. The *C* case was not concerned so much with potential incrimination by the child themselves, as by those who might potentially have committed offences against the child. There may, perhaps, be some more links required in the logical chain before the position in relation to the subject of proceedings before the Court of Protection is reached. Perhaps another, more satisfactory way, of framing this would have been to identify that the Court of Protection would be substantially hindered in its ability to discharge its inquisitorial functions if it were deprived of its ability to obtain the best information in relation to the subject of proceedings. The decision does, however, set up an interesting – and unresolved – tension as between the Court of Protection's functions in considering the best interests of the person, and

the wider societal interest in determining both whether that person has committed an offence and, if they have, their responsibility. It is not impossible to imagine a case in which this tension cannot be avoided on the basis of the irrelevance of the information being sought by the police.

Court of Protection costs – the position of litigants in person

JH v CH & SAP (Costs: the Chorley principle, Litigants in person) [2020] EWCOP 63 (HHJ Evans-Gordon)

Court of Protection jurisdiction and powers – costs

Summary

In this case, the court had to decide what costs a litigant in person is entitled to in the Court of Protection.

The first point that was argued was made by SAP, who was a party to the application because she was a nominated attorney under a disputed LPA. She was also an employed solicitor.

She argued that as an employed solicitor she was entitled to costs on the *Chorley* principle. This derives from *London Scottish Benefit Society v Chorley* [1884] 13 QBD 872. Its modern formulation can be found in *Halborg v EMW Law LLP* [2017] EWCA Civ 793, extended by *Robinson v EMW LLP* [2018] EWHC 1757. Its effect is that where a solicitor is party to litigation and instructs the firm of which he is partner, member or employee/consultant to represent him, the party can recover costs to include the solicitor's profit costs of the party's own time to the extent that that time would be time another solicitor would otherwise have spent on the case.

The court held that that principle applied in the Court of Protection (see paragraph 33) but held that it did not apply in this case as SAP had, throughout, asserted that she was acting in person (see paragraph 15, 25 and 32).

There then fell to be considered whether SAP was entitled to litigant in person costs. CPR r.46(5), which deals with litigant in person costs, is disapplied in the Court of Protection. It was argued that that meant that SAP was not entitled to any costs (save disbursements). The court held otherwise at paragraphs 35-38 as follows:

> *35. It follows that the only inter partes costs the second respondent can recover are those that any litigant in person could recover and those are the disbursements/court fees and any time costs recoverable on a detailed assessment. I appreciate that in considering that SAP is entitled to her time costs as a litigant in person I am differing from DJ Eldergill in London Borough of Hounslow v A Father & A Mother Case No. 13020924. I was provided with this case the day before I handed down judgment. Having considered it, and with great respect, I am not persuaded that the effect of the disapplication of CPR 46.5 or the fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 necessarily results in a litigant in person being unable to recover time costs.*
>
> *36. In my judgment, the disapplication of CPR 46.5 simply gives the Court of Protection wider discretion to deal with costs justly and proportionately in every case. In a large estate where a litigant has necessarily been required to carry out a lot of work, it may be proportionate to*

allow him some or all of his time costs at a rate that the costs assessor deems fit in the circumstances of the case. That may result in no time costs being allowed or the rate being limited. A blanket ban on the recovery of time costs would mean that a litigant in person could be severely disadvantaged. As DJ Eldergill noted, this would be an extremely unfair outcome, particularly in cases where a litigant in person must undertake considerable work to defend themselves against, say, an allegation of fraud. In my judgment, such a blanket ban, if intended, would have been set out clearly in the rules.

37. The fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 is of no assistance. The Court of Protection did not exist in 1975 and there is no material before me which would indicate that a deliberate decision was made to disapply the 1975 Act in the creation of the Court of Protection with a view to preventing litigants in person from recovering any time costs – that is a leap too far. The rules applicable to deputies are not, in my judgment analogous to inter partes costs in litigation. Part of, if not the primary, reason for the rules regarding deputies is to prevent conflicts of interest arising and/or to avoid a fiduciary profiting from their position. Only the court can allow a deputy remuneration for time spent discharging their duties and, as far as I am aware, this power is only used in cases involving professional deputies.

38. Notwithstanding its disapplication, in my judgment CPR 46.5 and/or the 1975 Act may, nonetheless, be helpful to a costs' judge in formulating his or her approach to the quantification of SAP's costs. This is a relatively large estate and the costs involved are relatively low once one disregards the client/solicitor costs and any deputy/client costs. It seems to me that SAP is obliged to reimburse KSN for disbursements under the common law therefore they are recoverable.

Comment

This judgment clarifies that a solicitor party in the COP is entitled to charge for their time as a solicitor pursuant to *Chorley* principles and what such a solicitor needs to do to be able to do so.

It also holds that, in default, a litigant in person in COP is entitled to some costs for their time with CPR r.46(5) as a guide without its being of direct application. In so ruling, as the judge acknowledged, the court was departing from the view taken by DJ Eldergill. The common law position is that a person who does not engage a solicitor to act for him cannot (outside of *Chorley* principles) get costs for his time he can only recover expenses. The Litigants in Person (Costs and Expenses) Act 1975 was passed to reverse that rule but it only applies where the Act or an Order made thereunder so provides. By its terms, the Act is not applied to the COP as the COP is not a Senior Court and it has not been added to the list by an Order. The fact that the COP was not a court in 1975 is not especially helpful as the Act has been amended since the COP became a court without including the COP in the courts to which it applies.

Short note: contempt, court orders and P's confidentiality – an update

The Court of Appeal has had little hesitation dismissing ([2020] EWCA Civ 1675) the appeal by Dahlia Griffith against her conviction and sentence of imprisonment for contempt, on

which we reported here. Having applied out of time to appeal and for a stay of the order, which had been refused, Ms Griffith did not appear – indeed, as at the day of the hearing, she had not been found and taken into custody.

Peter Jackson LJ held as follows:

> *14. The first matter to consider is the Appellant's absence at this appeal hearing. I am satisfied that she has had every opportunity to be represented and that, having chosen to represent herself, there is no good reason why she could not have attended. Her absence is unfortunately of a piece with her overall attitude to the court process. There is no good reason why her appeal should not be determined today.*
>
> *15. As to that, I conclude that the Judge dealt with these committal proceedings in a way that is beyond criticism. His approach is a model of the careful and balanced assessment that is necessary in a case of this kind. His finding that the Appellant is in contempt was supported by compelling reasoning, indeed the conclusion was inevitable. His approach to the sentencing exercise cannot be faulted. A sentence of this length is a long one, but it is unfortunately necessary in circumstances where the appellant has shown no acceptance, remorse or apology for the deliberate forgery of a court order.*
>
> *16. I would therefore dismiss this appeal. In doing so, I draw attention – and the Appellant's attention in particular – to the opportunity that is given to all contemnors to seek to purge their contempt by making an application to the trial court. In circumstances of this kind, the sentence of a contemnor who accepts their contempt and makes a genuine apology for their behaviour will always be carefully reviewed.*

Coulson LJ, agreeing with Peter Jackson LJ, noted that, "[A]*lthough the recent changes to CPR Part 81 will do much to make the contempt procedure less cumbersome and complex, there will still be many contempt cases in which a judge will have to roll up his or her sleeves and address in detail not only the facts and the law, but all the many balancing factors necessary to achieve a just outcome*." Sadly, for these purposes, CPR Part 81 does not, in fact, apply to the Court of Protection, its contempt procedures being governed by Part 21 of the Court of Protection Rules 2017, which have yet to be updated in line with the CPR changes which took effect on 1 October 2020.

Birth arrangements and delays in bringing proceedings

A London NHS Trust v KB and A London Local Authority [2020] EWCOP 59 (Poole J)

Best interests – medical treatment – deprivation of liberty

The Court was asked to determine whether a Caesarean section was in the best interests of KB who suffered a hypoxic brain injury at birth which left her with microcephaly, epilepsy and moderate to severe learning disability meaning that her IQ is no higher than between 35 and 49. Her communication was largely non-verbal, confined to a very few words. Final declarations were previously made that she lacked capacity to conduct the proceedings and to make decisions in relation to her antenatal care, the manner and location of the delivery of her baby, long term contraception, including sterilisation,

and deciding to engage in sexual relations. As the Judge remarked:

> *11. It is indeed disturbing that KB, a very vulnerable woman who is unable to consent to sexual relations, and who was or ought to have been constantly supervised, has had intercourse. Not only that, but no-one caring for her realised that she was pregnant until the GP's involvement when she was already five months pregnant.*

Orders were made in that regard for disclosure to the police and for samples to be taken to assist in the identification of the perpetrator of the sexual assault.

It was not possible to ascertain her past or present wishes and feelings, or the beliefs and values that would be likely to influence her decision about mode of delivery. But Poole J was sure that, if she had capacity, KB's priority would be to do the best for her unborn baby. All those involved – both family and professionals – supported the plan and the elective Caesarean section was considered to be in her best interests. She would be brought to the hospital, undergo a generalised anaesthesia, and authority was sought to use reasonable and proportionate measures, including the use of physical or medical restraint, to facilitate the transfers between home and the maternity unit. The resulting deprivation of liberty was authorised, although the evidence to date was that she had been entirely compliant so measures amounting to deprivation might not not ultimately be required.

Whether a non-therapeutic sterilisation was in her best interests was parked for now. As the Judge remarked:

> *36. An order for the non-therapeutic sterilisation of a person with learning difficulties would be a draconian step and one only rarely authorised by the court. In this case, decisions about contraception, including sterilisation, are entwined with issues concerning KB's care and safeguarding. As has been noted by the allocated social worker, if KB were in a safe environment she would not need contraception. The current position is that the perpetrator of the sexual assault on KB has yet to be identified. His identification will inform decisions about safeguarding, residence, and care in the future. Depending upon those arrangements, the need for this court to make any decision on contraception may resolve itself.*

As a welcome footnote, the judgment relates that the Caesarean went ahead as planned and mother and baby were well.

Comment

Given the consensus, and the alignment of the Caesarean section with what KB would have wanted, the best interests decision was not surprising. The application was necessary under the guidance at [2020] EWCOP 2 because (i) it involved an issue of non-therapeutic sterilisation, and (ii) the proposed treatment may have required a degree of restraint. Given the concerns expressed elsewhere in the judgment, the case also illustrates the importance of promptly involving the Official Solicitor in such applications, and of avoiding delay.

Short note: a judgment on transparency

There have been very few judgments on the operation of the transparency provisions of the

Court of Protection. One has recently appeared on Bailii (although decided last year): *Re P (Court of Protection: Transparency)* [2019] EWCOP 67. The case concerned a young man with a mild learning disability, autistic spectrum disorder and attention deficit hyperactivity disorder. He had recently been convicted of sexual offences, and was likely to face further prosecutions for further offences.

When the Court of Protection proceedings concerning (it appears) P's residence and care arrangements came before Keehan J, he questioned why an order had initially been made for the proceedings to be in private.

As he noted:

> *7. The usual approach is that hearings are heard in public and a transparency order will be made (see paragraph 2.1). The background to the "usual approach" was a desire to ensure that the Court of Protection, which has the power to make a wide range of orders involving those who lack capacity including medical treatment and deprivation of liberty orders, avoided the label of "the secret court". This label had been adopted by numerous press organisations. The concept of a "secret court" had the potential to undermine the confidence of the important work of the Court of Protection.*
>
> *8. Private hearings reinforce the concept of the secret court. The concerns about unwarranted and intrusive reporting could be addressed by an order which prevented the identification of information that could lead to the identification of the subject of the application and other parties.*

The concerns in the instant case, asserted by the local authority and/or National Probation Service, related to the potential for P (who had already been photographed by the press and been the subject of articles as a result of his conviction and sentencing at the Crown Court) to be identified, putting him and the residents at his placement at risk of abuse or harm.

Keehan J accepted that "[w]*hen considering the factors set out in PD 4C* [going to whether to have a public hearing], *the need to protect P is a very powerful factor in favour of holding the proceedings in private. The sanction for a breach of a transparency order is contempt proceedings. If the order is breached, however, the information which the order sought to protect may already be in the public domain and the harm to P and/or his placement may have already occurred*" (paragraph 15). However, the "*importance of public justice*, […] *is a central tenet of the Court of Protection. It should only be overridden when the circumstances of the case compellingly, and on the basis of cogent evidence, require the proceedings to be heard in private*" (paragraph 16). Keehan J considered that the balance could best be struck by: (1) excluding members of the public from attending future hearings; (2) permitting accredited members of the press and broadcast media to attend; and (3) making a transparency order which allowed the hearings to proceed in public but subject to reporting restrictions.

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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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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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

Annabel Lee: annabel.lee@39essex.com

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.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Katie Scott: katie.scott@39essex.com

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.

Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Adrian Ward: adw@tcyoung.co.uk

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.

Jill Stavert: j.stavert@napier.ac.uk

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

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 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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