



Welcome to the July 2022 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Injunctions against family members; Draft LPS forms published; and serious medical treatment applications.
- (2) In the Practice and Procedure Report: Remote observations of hearings and new SRA guidance on vulnerable clients.
- (3) In the Wider Context Report: Mental Health Bill Update; Archie Battersbee case in the Court of Appeal; Posthumous use of embryos; and CAMHS gatekeeping.
- (4) In the Scotland Report: World Congress and Scott Review Updates; Learning Disabilities and Mental Health legislation; and permanence orders.

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.

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

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Draft LPS Forms Published

DHSC has published a set of template forms designed to be used at key points in the LPS process when information needs to be transferred from one party to another. The template forms will also enable the recording of the LPS assessment information which will be required for authorisation.

As DHSC emphasises, it is important to distinguish these template forms from the data that Responsible Bodies will be required to report at a national level. The national reporting requirements are set out in the national minimum data set which is available in draft [here](#) alongside the consultation documents. Some items in the national minimum data set will not be covered in these templates and will be collected separately.

These template forms will not be mandatory but may be useful to ensure that there is consistency in the information collected by Responsible Bodies and help to establish expectations around LPS.

The draft template forms DHSC has developed are for operational use in England. The Welsh Government has developed its own draft template forms (working with a Task and Finish Group) which will be shared with stakeholders shortly.

There are nine draft template forms to record relevant information at the following key points of the LPS process:

[Template 8 – referral for final authorisation](#) a third party referral form to identify that an LPS authorisation may be required.

[Template 1 – referral for an IMCA](#)

[Template 2 – mental capacity assessment](#)

[Template 3 – medical assessment](#)

[Template 4 – necessary and proportionate assessment](#)

[Template 5 – submission for pre-authorisation review](#)

[Template 6 – referral for an unscheduled review](#)

[Template 7 – submission for renewal](#)

[Template 9 – authorisation record](#)

The template forms are currently in draft form, and DHSC may make changes to the forms before the LPS come into effect. Once the template forms have been finalised, the final versions will be made available online ahead of implementation of the LPS.

The draft template forms should not be used to transfer information under the current DoLS system. Once the LPS are implemented, those using the template forms must ensure that they are collecting, storing and sharing information in line with data protection requirements and relevant law.

DHSC also notes that:

We are sharing the draft template forms predominantly for information purposes. However, if you would like to share any feedback on the draft template forms, please email lps.cop@dhsc.gov.uk using the subject line 'feedback on draft LPS template forms'.

Updated Guide to Judicial Authorisations of Deprivations of Liberty

Alex, Tor and Neil have updated the guide to “community deprivation of liberty” – i.e. judicial authorisation of deprivation of liberty by the Court of Protection. The updates incorporate both the guidance given by Senior Judge Hilder as to applications relating to 16/17 year olds, and the broader guidance given by the judges as to “dos and dont’s” at a workshop convened by Senior Judge Hilder in May 2022. The updated guidance can be found [here](#).

Injunctions against family members

A NHS Foundation Trust v G and others [2022] EWCOP 25 (23 June 2022) (Hayden J)

COP jurisdiction and powers – Injunctions

Summary¹

A 27-year-old woman with a rare and profound degenerative neurological condition which affected the entirety of her central nervous system had been in hospital since 2008. The condition was progressive and was neither receptive to treatment nor amenable to cure. She had significantly outlived her life expectancy. 13 years ago, her parents in effect gave up their lives and moved to live in hospital accommodation to support her.

In December 2021, the court decided it was in her best interests to be transferred to a specialist care home as a step down measure to moving to her parents’ care: [2021] EWCOP 69. In February 2022, an application by her father to remove the reporting restrictions was refused. Her planned discharge in March 2022 did not go ahead and she was languishing in hospital. The Trust and CCG sought injunctive orders to ensure her discharge to a nursing home which was opposed by the parents, principally the father.

The relationship between the father and the hospital staff had corroded to being entirely dysfunctional. Staff felt intimidated by him, with the tragedy of his behaviour having been generated by his love of his daughter. He tried to deliberately sabotage the discharge placement and to undermine the confidence of the staff. His partner and mother were also likely to become embroiled in the execution of a plan to derail it.

Hearsay from anonymised witnesses

Much of the evidence in support of the injunction came from hospital staff that were anonymised. The father argued that little or no weight should therefore be given. Rejecting this, Hayden J was guided by s.4 of the Civil Evidence Act 1995 which sets out considerations relevant to the weight of hearsay evidence.

Injunction

The court held that MCA ss.16-17 provided a cogent framework for granting injunctive relief to give effect to the court’s orders or directions in cases where it finds it necessary or expedient to do so (para 9). By virtue of s.47 MCA, the court had in connection with its jurisdiction all the same powers, rights, privileges and authority as the High Court which are set out in s.37(1) of the

¹ Nicola having appeared in this case, she has not contributed to this summary.

Supreme Court Act 1981. They include being able to grant an injunction when it was just and convenient to do so, which in normal circumstances, requires a threat to do an act which constitutes an “invasion of a legal or equitable right”.

The evidence justified the injunctions to put in place clear boundaries to manage the family’s behaviour. It was “*both justified and proportionate here to regulate ... personal and nursing care, permitting the staff to operate effectively in the provision of [P’s] personal care, medication, nutrition, tracheostomy care and more generally, to establish her dignity as an adult.*” [50]

Comment

This judgment helpfully emphasises the breadth of the court’s jurisdiction regarding the implementing of its decisions under MCA ss.16-17. The approach to hearsay evidence reflects that taken in *Enfield LBC v SA* [2010] EWHC 196 (Admin). The exact terms of the injunctive relief were not spelt out but, presumably, in addition to her care in hospital, the relief would have ensured that the daughter could be discharged from hospital to the nursing home.

Dental treatment

South Tyneside and Sunderland NHS Foundation Trust v SA [2022] EWCOP 23 (24 June 2022) (Theis J)

Best interests – Medical Treatment

Summary

This case concerned the medical treatment of SA, a 22 year old man with a diagnosis of Autistic Spectrum Disorder, Severe Learning Disabilities, Communication difficulties and Attention Deficit Hyperactivity Disorder. Due to his needs SA has lived in a 24-hour supported care setting with a care team for the last 10 years.

The Trust sought orders enabling them to examine SA’s mouth under general anaesthetic and provide dental treatment, examine SA’s ears and perform suction clearance and/or insert grommets and take blood to monitor his current medication.

The matter came before the Court because the treatment proposed was not supported by SA’s parents. They did not set out a coherent argument against the proposed treatment, but wanted a frenectomy to be performed. They did not participate in the proceedings.

Having heard oral evidence from a range of clinicians, the Court held that the proposed treatment was in SA’s best interests, but a frenectomy was not.

Withdrawal of life-sustaining treatment

Imperial College Healthcare NHS Trust v Mrs C and Others [2022] EWCOP 28 (16 June 2022) (Hayden J)

Best Interests - Medical Treatment

Summary

This case concerned the medical best interests of Mrs C, a 77-year old woman in ICU, having been admitted to hospital following a fall. She had a background of hypertension, diabetes, and transient ischemic attacks. She had gallstones, arthritis and was awaiting tests for anaemia. On admission she was found to have a raised heart rate, an acute kidney injury with significant raised creatinine levels. Her glucose and sodium levels were high. The suspected anaemia was confirmed.

Two days after admission, Mrs C suffered a cardiac arrest and was admitted to ICU where she was ventilated. She had suffered an insult to the brain which the Court held ‘*was a profound, catastrophic hypoxic ischemic injury.*’ [14]

A DNACPR notice was put in place and a multidisciplinary team at the ICU determined that from a medical perspective it would be in Mrs C's best interests to undergo extubation without tracheostomy, and for a care plan to be put in place, providing palliative care.

The Court held that she was in a prolonged disorder of consciousness and the preponderance of evidence pointed to chronic vegetative state. The Judge did not determine whether she was in a vegetative state or moving towards a minimally conscious state.

It was agreed that it was not in Mrs C's best interests to remain mechanically ventilated on ICU with the endotracheal tube in place (which had been Mrs C's situation for nearly 6 months). The Court found that this was highly intrusive, profoundly burdensome and medically futile.

While it is not entirely clear, the Court appears to have sanctioned a plan to wean Mrs C from ventilation in circumstances where this plan had a very low prospect of success. Even if successful, Mrs C's neurological damage would continue to compromise her level of awareness and ability to experience life around her. Nevertheless, the Court held that on the evidence that had been heard, Mrs C would "be up for the fight".

Comment

It is difficult to tell from this ex tempore judgement precisely what the dispute between the family and the hospital was by the end of the hearing. The judgment refers to there being two clear alternative care plans, but only sets out one of them. Nevertheless, what is striking about this case is the weight the Court placed on matters such as what Mrs C herself would have wanted, and her zest and enthusiasm for life.

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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 and Seminars

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

16 September 2022	BIA/DoLS legal update (full-day)
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To book for an organisation or individual, further details are available [here](#) or you can email [Neil](#).

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 September. 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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