MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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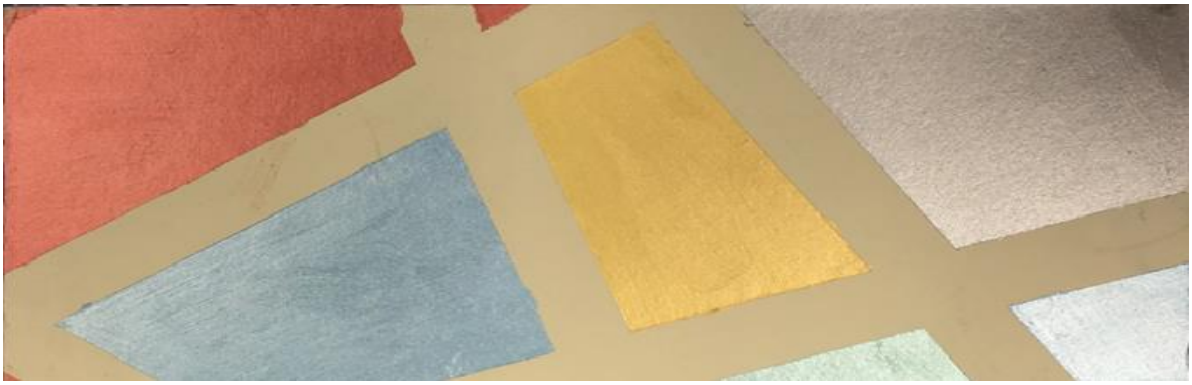

Welcome to the June 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a rare appellate level decision considering best interests (and confirming that they should be rare);

(2) In the Property and Affairs Report: (partially) endorsing an attorney's actions after the event;

(3) In the Practice and Procedure Report: choosing litigation friends;

(4) In the Wider Context Report: the National Mental Capacity Forum reports, and an important Strasbourg re-cap of the principles applying to capacity;

(5) In the Scotland Report: a new Public Guardian and the MWC is cautious about attorneys consenting to restrictions on liberty;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

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Victoria Butler-Cole
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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

Appeals, best interests, dementia and CANH

Re RW [2018] EWCA Civ 1067 (Court of Appeal (Arden, Sharp and Peter Jackson LJJ))

Best interests – Medical treatment – Practice and Procedure – Transparency – Appeals

Summary[1]

The small body of appellate level jurisdiction on the MCA has been added to in this case, concerning the continued provision of clinically assisted nutrition and hydration (CANH) via a nasogastric (NG) tube to an elderly man with end stage dementia. The question that had been before Parker J had been whether, if and when he was discharged home from hospital, it would be in his best interests for him to be discharged with an NG tube in place (as his family contended), or whether the NG tube should no longer be maintained upon discharge (the position of the Trust and the Official Solicitor on his behalf). Parker J endorsed the position of the Trust/Official Solicitor; the man's family sought permission to appeal.

Refusing permission to appeal, the Court of Appeal emphasised the high hurdle for challenging a decision made at first instance as to best interests, especially where the judge has directed themselves correctly as to the law. Both Sharp and Peter Jackson LJJ (the latter delivering his first Court of Appeal judgment in this area) also made interesting observations about the place of wishes and feelings in best interests decision-making especially where – as here – there was no reliable evidence as to what the individual in question might have done. Peter Jackson LJ noted that:

> [t]*he Law Commission's recent review of the law relating to Mental Capacity and Deprivation of Liberty Safeguards recommends a legislative addition to s.4(6), so that decision-makers should 'give particular weight to any wishes or feelings ascertained'. In its response on 14 March 2018, the Government accepted this recommendation, noting that the principle of taking account of an individual's wishes and feelings is very important and already represents good practice.*

Peter Jackson LJ made two important – wider – observations about best interests in the context of serious medical treatment observations. The first was to record that Counsel for the appellant had been "wise" to abandon a contention that "*above a 'minimally conscious state' the sanctity of life should absolutely prevail regardless of other balance sheet considerations, unless there is very clear and cogent evidence that P himself would have wished to have CANH withdrawn…*" Rather, Peter Jackson LJ noted at para 96:

[1] Katie being involved in the case, she did not contribute to this note.

> *The framework for the assessment of best interests is a universal framework, regardless of diagnosis, and attempts to load the scales in this manner should be firmly resisted.*

Further, Peter Jackson LJ emphasised that in considering serious medical treatment decisions, the Court of Protection:

> *must have the realistic treatment options clearly in mind. There is no purpose in deciding whether a particular option is in the best interests of the patient if it is not in fact known to be available. In RW's case, there is considerable uncertainty as to whether any hospital would re-intubate him after discharge from hospital, and that to my mind was a matter that the judge would have needed to further investigate if she had been minded to conclude that the NG tube should be maintained."*

Finally, the court also had cause to consider the question of transparency. Although the Trust had at one stage been anonymised, agreement had then been reached that it could be named; the contentious issue before Parker J had been whether the family, RW and the clinicians should be named. The family sought to contend that RW was in a similar position to Manuela Sykes, as a campaigner who would have wanted his name to be made public. Parker J held that none of these individuals should be named. Before the Court of Appeal, the outstanding challenge was to her decision as regards RW.

Rejecting the challenge, Sharp LJ made clear that the threshold for interfering in the judge's decision was a high one: *"i.e., where a first instance judge had "erred in principle or reached a conclusion which was plainly wrong, that is, one outside the ambit of conclusions which a judge could reasonably reach: see Browne v Associated Newspapers Ltd [2007] 3 WLR 289 at paragraph 45 and JIH v New Group Newspapers Ltd at para 26"* (para 74). She further made clear that she agreed with Peter Jackson LJ's observations (at paras 98-99) that:

> *98.* […] *In cases of this nature, the balance between Arts. 8 and 10 will normally be found to tip in favour of protecting the identity of the individual concerned. Individuals and families coming before the Court of Protection in often extreme circumstances should not have the further worry that they are likely to be identified to the public at large.*
>
> *99. There will be occasional cases (Derek Paravicini, Steven Neary, Manuela Sykes) where individuals are named. Of these, the last is most directly relevant to the situation of RW. Ms Sykes was a campaigner who, before losing capacity, had placed much information about herself and her dementia in the public domain. It is said by RW's sons that he would want the same, largely so that alleged shortcomings in his treatment at various hospitals could be publicised to the greatest effect. It is said that information about RW could be selected for publication, so as not to expose the indignity of his current condition. I do not find these arguments persuasive. There is no dependable evidence that RW would want his most private information to be identified to the world at large, and any grievances expressed by his sons (which find no support in the judge's judgment) are theirs, not his. The proposal that there should be a partial embargo, for example on photographs that we have seen of RW in his current condition, risks*

> *misinforming, rather than informing the public. I therefore agree with Sharp LJ's conclusion and her reasons, more fully expressed, as to the continued anonymisation of RW and his family members, and as to the duration of the order.*

In addition to the points of law recorded above, Sharp LJ's judgment contained a useful discussion (at paras 23-31, by reference, in particular, to the evidence of the independent expert geriatrician) of good medical practice in the context of end stage dementia.

Comment

It is rare for a challenge to be brought to a first instance judgment on best interests on the basis that the judge was simply wrong. This judgment – as with *Aintree* – makes clear why: the appellate courts are extremely reluctant to interfere in the evaluative process undertaken by first instance judges. Indeed, this judgment is unusual because it is so detailed in its explanation as to why permission was being refused; the Court of Appeal was, in reality, using the opportunity to emphasise the general points addressed above, hence why they gave permission (at para 82) for it to be cited in future cases.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Conferences

Conferences at which editors/contributors are speaking

Court of Protection seminar: The capacity to marry and divorce, and damages in the Court of Protection

Tor is speaking, with Fenella Morris QC, at a seminar organised by Irwin Mitchell on 21 June in London. For more details, and to book, please use this email address.

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details, see here.

Towards Liberty Protection Safeguards

This conference being held on 24 September in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, 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 early July. 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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