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MENTAL CAPACITY REPORT: COMPENDIUM

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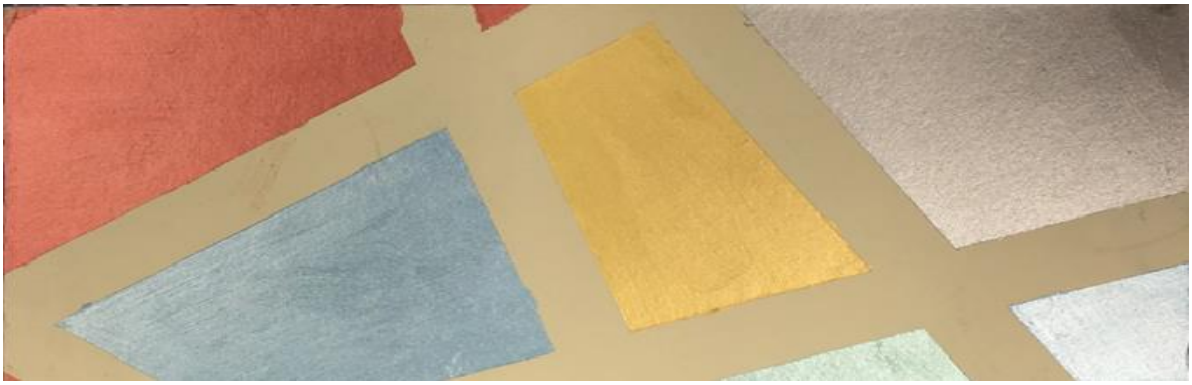

Welcome to the March 2018 Mental Capacity Report. A combination of the January report coming out late in the month, the shortness of February, and the diversion of most of the editors to the Supreme Court in the *Y* case, means that we have had no February report, but are now firmly back on track. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, constructing a best interests decision in practice and the JCHR inquiry into DOLS reform;

(2) In the Property and Affairs Report: *Banks v Goodfellow* resurgens, trust corporations and appointees under the microscope;

(2) In the Practice and Procedure Report: Baker J on Charles J and Sir James Munby, children, confinement and judicial authorisation and the problems of litigants in persons;

(3) In the Wider Context Report: the MCA Action day, immigration detention and access to court for those with impaired capacity and international developments of relevance to capacity law reform;

(4) In the Scotland Report: the Scottish Government consultation on the Adults with Incapacity Act, and a round-up of recent relevant case-law;

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.

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Re Y update

The Supreme Court heard the Official Solicitor's appeal against the decision of O'Farrell J in *Re Y* on 26 and 27 February. The hearing was streamed on the Supreme Court's website, where it is still available, and we will report as soon as it is available their judgment as to when (and why) decisions about the withdrawal of CANH from those in a prolonged disorder of consciousness must come to court.

Constructing the choice for P in practice

P v G [2017] EWCOP B26 (HHJ Marston QC)

Best interests – P's wishes

Summary

This was a case that was decided in May 2017, but only appeared on Bailli in February 2018. P was an elderly lady who had cognitive impairments after suffering a series of strokes. P was living in a nursing home and brought proceedings pursuant to section 21A challenging her deprivation of liberty. The options available to the court were (1) for P to remain living in the South West of England in the nursing home close to two of her children, or (2) for P to move to the Midlands to the home of her ex-daughter in law, to be cared for by a range of other family members and friends, most of whom would be providing care voluntarily. The court held that both were viable options.

There was no reliable evidence of P's current wishes and feelings but the Judge held that it "*was however very clear on the evidence that she would, prior to her stroke, have wanted, should anything happen to her, to be looked after by her family and not in a care home.*"

P's representatives submitted that when comparing the two options, the "*best interest balance would come down decisively in favour of C's home in the Midlands.*" Given that this option enabled P to be cared for by her family and is the least restrictive option, this is not surprising.

The complicating factor in this case was that two of P's children who lived in the South West, and whom she saw every couple of days (it was accepted by the court therefore that these were her primary relationships at the time of the decision), had made it clear they would not visit P if she moved.

The factor that weighed most heavily in the balance was what the court understood P's wishes and feelings would be if she had capacity. HHJ Marston concluded that P's children's refusal to visit her in the Midlands would not have stopped her from moving there, and there "*would be a strong personal and cultural belief that having looked after her family for 50 plus years it was now the time for them to look after her. ……. I find that would be reflected in what P would want for herself. If it comes to a choice of being looked*

after in the way that is in her best interests, the way she expected to be looked after or staying in the home I am convinced her choice would be to be looked after by her family." HHJ Marston therefore held that a move to the Midlands was in P's best interests.

Unsurprisingly the Court had no difficulty in rejecting their argument that moving P would be a breach of her children's right to family life because they would not see her, saying "[t]*heir refusal to take up contact is the thing which causes contact to break down not anything the court does. If moving P is in her best interests any breach of their right to a family life is proportionate and the remedy for it is in E and S's own hands.*"

Comment

Cases where parties threaten to cut off contact with P if their arguments do not succeed are difficult for the courts, and unfortunately, all too common. On the one hand it is dangerous for a court to accede to what could be considered a threat on the part of litigants as to how they will behave if the litigation does not go their way, but on the other, the court must honestly evaluate the impact on P of making any particular decision, whatever the rights or wrongs of the conduct in question. What is interesting about this case is the way the judge felt able to make findings (based on what he had learned about P during the proceedings and her previously expressed wishes and feelings) about what P would want in the circumstances facing the court, if she had capacity.

Joint Committee on Human Rights inquiry into DOLS reform

Whilst we await the Government's response to the Law Commission's Mental Capacity and Deprivation of Liberty report, the Joint Committee on Human Rights has launched an inquiry into 'the right to freedom and safety: Reform of the Deprivation of Liberty Safeguards.' The Committee has issued an open call for evidence from interested parties on:

- Whether the Law Commission's proposals for Liberty Protection Safeguards strike the correct balance between adequate protection for human rights with the need for a scheme which is less bureaucratic and onerous than the Deprivation of Liberty Safeguards
- Whether the Government should proceed to implement the proposals for Liberty Protection Safeguards as a matter of urgency
- Whether a definition of deprivation of liberty for care and treatment should be debated by Parliament and set out in statute

Submissions should be no more than 1,500 words and the deadline is 2 March 2018. Further information can be found here.

The *Cheshire West* effect in the mental health setting

A CQC report published on 23 January examining the reasons for the increase in detentions under the MHA 1983 found (perhaps unsurprisingly) that there is no single cause for the rise in rates of detention this decade, but that one of the reasons is likely to be the *Cheshire West* effect, in particular in relation to older patients. Even if *Cheshire West* served as no more than a wake-up call that Strasbourg had meant what it said in *HL*, the case has only hastened the demise of the informal patient. As the CQC report notes, some areas reported that 80% of patients on acute wards are now detained and that on some older people's wards, every patient is detained. Whether, and how, this trend can be reversed, will continue the exercise the MHA review over the coming months.

We should note also in this context the most recent CQC Monitoring the Mental Health Act report, published as we went to press, the most striking (and depressing) findings of which being that the CQC found:

- 32% (1,034 of 3,253) of care plans reviewed showed no evidence of patient involvement. This was 29% last year.
- 17% (594 of 3,434) showed no evidence of consideration of the patient's particular needs. This was 10% last year.
- 31% (550 of 1,788) showed no evidence of the patient's views. In 2015/16, 26% had not been recorded.
- 17% (588 of 3,372) showed no evidence of consideration of the least restrictive options for care. This compares to 10% of records last year.
- 24% (570 of 2,403) showed no evidence of discharge planning, compared with 32% last year.

Deprivation of liberty in the hospital setting – new guidance note

We have updated our guidance note on deprivation of liberty in the hospital setting to take account of the 'carve out' from the scope of Article 5 the courts have developed in the hospital context. The note also provides a guide through the thickets of the MHA/MCA interface and some practical steps to take in an emergency.

Welsh Government review of PVS/MCS cases

In an interesting development occurring in parallel with (but not directly related to) the *Y* case, the Welsh Government has wheeled into action in relation to people in a PVS/MCS, in three ways:

1. The Chief Medical Officer has written to all health boards in Wales to assess the potential number of cases in Wales and to seek assurance that their diagnosis, care and treatment is being undertaken in their best interests.

2. Professor Baroness Finlay of Llandaff, former clinical palliative care lead for Wales and current chair of the National Mental Capacity Forum for England and Wales to lead a review of decision making within one specific case brought to the Government's attention;

3. The Deputy Chief Medical Officer for Wales has been asked to convene a task and finish group to consider whether there is a need for any additional guidance, education or training to be developed for the health and social care sector in Wales.

We will report further developments as and when they are made public.

Social Work England consultation

We would urge readers to respond to the consultation on the secondary legislation governing Social Work England, which closes on 21 March. This new regulatory body will have responsibility for setting the criteria for and approving courses in England for Best Interests Assessors and (we anticipate) any equivalent posts under any replacement for DOLS.

Short note: 'free to leave' – an Irish perspective

In *PL v The Clinical Director of St. Patrick's University Hospital & Ors* [2018] IECA 29, the Irish Court of Appeal had cause to consider how immediate the right of a voluntary patient at a psychiatric patient to leave that place must be. The case arose in a different statutory context (the equivalent of s.5 MHA 1983, which can be deployed where a person treated as a voluntary patient 'indicates at any time he or she wishes to leave') but contains some interesting observations on whether voluntary patients can and should be able to exercise an immediate right to leave.

The Court of Appeal held that:

> *had, for example, Mr. L. awoken in the middle of the night and determined that he would leave the SCU that very instant. He could not, I think, have insisted that the hospital staff be roused from their slumbers to open the doors forthwith. The hospital staff would likewise have been entitled to place reasonable restraints on Mr. L.'s movements within the hospital grounds, such, as for example, restraining him from climbing over the garden wall on the basis that this was not a safe or appropriate means of egress from the hospital. But, absent the use of the s. 23 detention power, what the hospital could not lawfully do was to prevent a voluntary patient such as Mr. L. from leaving at any appropriate time and by an appropriate means of exit once he determined to leave.*

It is suggested that exactly the same applies when deciding whether a person is free to leave for purposes of the 'acid test.'

PROPERTY AND AFFAIRS

PP: erratum and further comment

A glazing over of the editorial eye at proof-reading stage meant that we gave a duff reference for the *PP* cases we covered in the January report. The correct references (as correctly given in the summary on our database) are [2015] EWCOP 93; [2016] EWCOP 65 and [2017] EWCOP 29.

We also had interesting follow-up comments from both John Howard at the Official Solicitor's office and Alexander Drapkin (instructed by the Official Solicitor for PP) as to the basis upon which DJ Batten made the order bringing the gift into hotchpot. They helpfully clarified that the attorney was willing to repay the money had the court not ratified the gift, so the difficult jurisdictional question that we posed did not, in fact, arise.

Trust corporations as deputies

Re Various Incapacitated Persons and the Appointment of Trust Corporations as Deputies [2018] EWCOP 3 (Senior Judge Hilder)

Practice and procedure (Court of Protection) – Other

Summary

In this case Senior Judge Hilder considered and gave guidance in relation to applications on behalf of trust corporations to become property and affairs deputies.

The trust corporations in question were all associated with solicitors' legal practices so the order formulated only relates to such corporations. The judgment does, however, give some consideration to trust corporations associated with banks and charities and, to a lesser degree, trust corporations that have no connection with any regulated entity.

The court's concerns centered on the effectiveness of regulation by a regulatory body (in the cases before the court, the SRA) and the adequacy of indemnity insurance.

After receiving information from the SRA, bond security providers and the OPG, the court set out in the second schedule to the order the information and undertakings it would require from 2 of the 3 types of trust corporation making applications in this case.

Those were trust corporations regulated directly by the SRA and corporations not so regulated but which had no employees save a company secretary, whose directors were all solicitors, who retained the associated legal practice to carry out all the practical work in managing P's affairs and which were covered by that practice's professional indemnity policy.

In essence the court considered that the protection to P afforded in those cases was equivalent to the protection afforded to P if the deputy was an individual solicitor. Indeed, the court recognized that in some respects P's position was better because of the continuity afforded by a trust corporation and the benefits of corporate governance.

The court at paragraphs 65-68 of the judgment set out various factors that it would need to consider in relation to other types of trust corporations, for example those associated with banks or charities. As regards corporations that are not subject to any regulation, the court made it clear that applications from such bodies would be treated on their merits but *"with caution",* see paragraph 66.

Comment

There are other applications in the pipeline that will, no doubt, result in rulings concerning other types of trust corporations so, watch this space.

Banks v Goodfellow resurgens (for now?)

James v James & Ors [2018] EWHC 43 (Ch) (Chancery Division (HHJ Paul Matthews sitting as a Judge of the High Court)

Summary

In this case the court had to rule on the validity of a will where the capacity of the testator was in issue. The parties initially, in their skeleton arguments, agreed that the common law rule for the assessment of testamentary capacity when a will is contested applied namely that propounded by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565. (See paragraph 71 of the judgment).

In closing submissions, however, the claimant (who was contesting the will) argued that the test ought to be the same as that in s.3 MCA 2005. The court, therefore, had to decide the issue.

The court from paragraph 72 to 82 reviewed the first instance authorities noting that there were a number that had considered the point *obiter* and two that had made rulings on the point (both decisions of deputy High Court Judges).

The latter of the two was reached after full consideration of the former so the judge considered that he was bound by it in accordance with the rule of judicial precedent that holds that a court of co-ordinate jurisdiction should follow such a later decision in preference to the earlier one, see paragraph 83.

In addition, however, the court went on to hold that the later decision was right and that the common law test still prevailed, see paragraphs 84-87. The court then considered the facts and upheld the will.

Comment

Subject to the views of the Court of Appeal and Supreme Court, this issue must now be taken to be settled. In practice the difference may rarely result in a different result, although the judge did point out that the common law test is less stringent in some respects although the burden of proof at common law is on the propounder of the will whereas under the MCA the presumption of capacity applies throughout, see paragraph 77.

The difference could, in theory, lead to a ruling by the Court of Protection to the effect that, pursuant to the MCA test, P lacks capacity to make a will and authorising the making of a statutory will on P's behalf with P, not impressed with that ruling, thereafter making a will that on his death is upheld on the common law test and revokes the statutory will. The matter is currently being considered by the Law Commission, who have provisionally proposed replacing the common law test with the MCA test.

Appointeeship under scrutiny

DB (as executor of the estate of OE) v SSWP and Birmingham CC [2018] UKUT 46 (AAC) Upper Tribunal (Administrative Appeals Chamber)(UTJ Mitchell)

Summary

In *DB (as executor of the estate of OE) v SSWP and Birmingham CC (SPC)*, Upper Tribunal Judge Mitchell took the opportunity to express some views on the process by which the Department of Work and Pension made Birmingham City Council a woman's social security appointee at a time when her nephew held an enduring power of attorney. After she died, the nephew brought an appeal as executor of her estate against a number of decisions of the Secretary of State for Work and Pension relating to benefits decisions. These succeeded for reasons that are not of relevance here, but the nephew's main grievance was that he had been made his aunt's appointee.

As UTJ Mitchell noted, appointment decisions do not attract a right of appeal to the First-tier Tribunal, and hence neither that Tribunal nor the Upper Tribunal, had jurisdiction to entertain an 'appeal' against an appointment decision. However, he had concerns about the way in which the application was handled, and he decided to express views to "*to provide some assistance to the DWP and local authorities in their efforts to operate the appointee system effectively and properly*."

The observations of wider relevance are contained at paragraph 3 of the judgment, thus:

> (a) *the Social Security (Claims and Payments) Regulations 1987 do not contain an express prohibition on making an appointment despite some other person holding an enduring or lasting power of attorney, in respect of the claimant, that extends to welfare benefits matters. However, the Secretary of State has a power to make an appointment, not a duty. It may be difficult to identify a justification for exercising the power of appointment in the face of opposition from a person with a lasting or enduring power of attorney that extends to welfare*

benefits matters. This would involve disrespecting the wishes of a claimant given at a time when the claimant had mental capacity to select a person to deal with his or her affairs;

(b) *the Secretary of State has power to revoke an appointment. It may be difficult to identify a good reason for the DWP not revoking an appointment at the request of a person who holds a lasting or enduring power of attorney that extends to welfare benefits matters;*

(c) *an appointment has significant consequences for the claimant. Applications for appointment need to be scrutinised with care* [UTJ Mitchell noted a number of problematic features in relation to the specific application in question, including that it was unsupported by medical evidence, was unsigned and appeared to reveal that the local authority was unaware that the nephew held an EPA in his aunt's favour, all of which had not been investigated by the DWP]'

(d) *for most benefits, appointments are made under the 1987 Regulations. But they are not where the benefit is one to which the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 apply. In contrast to the 1987 Regulations, the 2013 Regulations prevent an appointment where someone has a lasting or enduring power of attorney in respect of the claimant. The reason for the different approaches is not obvious and none has been given by the DWP in these proceedings.*

It is also of note that, in the instant case, the DWP's response to evidence that Mr B held an enduring power of attorney was not to revoke the council's appointment but (a) to assert that Mr B had no right to any information about Miss E's benefits because he was 'no longer' her authorised representative, and (b) to argue that, as Miss E's attorney, Mr B had been under a duty to notify the DWP of her admission to a care home. As UTJ Mitchell rather – but justifiably – tartly put it *"I would hope the DWP reflect on whether these actions were appropriate*."

Comment

We have had a long-standing concern as to appointeeship, which is an uncomfortable relic of an older age, not least because (as the MCA Code of Practice makes clear, at para 8.36), appointees are not covered by the MCA 2005 or its governing principles. Appointeeship may be administratively convenient, but, as this judgment points out, it has very significant consequences for the claimant, and the protections for the claimant and their interests appear to be rudimentary at best. Readers will recall that the UK entered a reservation against Article 12 CRPD because "*the existing social security benefit appointee system lacked appropriate safeguards in the arrangements to enable the appointment of a person to collect and claim benefits on behalf of someone else*."[1] The Government withdrew the reservation following "*the development and piloting of a proportionate system of review to address this issue, which involved disabled people, a review system was introduced in October 2011 and is being rolled out to cover all appointees. We believe that this meets the requirements of Article 12.4*." This judgment (in relation to an

[1] UK Initial Report On the UN Convention on the Rights of Persons with Disabilities: para 41.

appointeeship made on 27 June 2012) should undoubtedly give pause to consider whether this really can be the case.

PRACTICE AND PROCEDURE

The past and future of the Court of Protection

[*Editorial Note: By way of (belated) tribute to Charles J, who retired in February, and (anticipatory) tribute to Sir James Munby P, who retires in the summer, we reproduce, in lightly edited form, and with grateful thanks to LexisNexis for permission, the introduction to the Court of Protection Practice 2018 written by its new general editor, Baker J*]

The Judicial College now offers training courses for judges who sit in the Court of Protection, and all judges authorised to sit in the Court are expected to attend such a course. When I started sitting in the Court of Protection following my appointment to the Bench in 2009, no such training was available. Somewhat anxious about my ignorance of the law and practice in this area, I sought advice from a senior member of the judiciary who blithely told me "don't worry, you'll pick it up as you go along." Thus it was that I found myself in the splendid Manchester Civil Justice Centre a few weeks later conducting a preliminary hearing in the litigation which became known as *G v E*, in which I was confronted with a submission from counsel that the court was in contumelious breach of Article 5 of ECHR because of its failure to comply with its statutory obligations. At that point, I was only dimly aware of the Mental Capacity Act 2005 and the forbidding Deprivation of Liberty Safeguards. A furtive glance under the judicial desk at Schedule AI and Schedule 1A to the Act confirmed that there was no chance that I would be able to "pick it up as I went along".

Fortunately, help was at hand in the form of the Court of Protection Practice, with its comprehensive coverage of the statutes, rules, and codes of practice, and at the front a clear and succinct textual summary of the whole field, starting with a fascinating historical section explaining how we have arrived at where we are now. That evening spent reading the text in the judges lodgings in Manchester was amongst the most useful few hours of my judicial career. By the following morning I was able to look counsel in the eye and demonstrate sufficient understanding of the *Winterwerp* criteria to fend off her attack.

Ever since, I have always had a copy of this book by my side and on many occasions I have been grateful for the breadth of its erudition and the clarity of its exposition. And it is therefore an enormous privilege to be asked to succeed Gordon Ashton as general editor. In taking on this responsibility, I am again aware that, notwithstanding over eight years' experience of sitting in the court and delivering a number of judgments on the interpretation of the statute and rules, my knowledge of this area of the law will never approach the depth of understanding which Gordon acquired through a lifetime's work specialising in this field. I am pleased that, despite the change of general editor, this remains very much Gordon's book. All of those who have contributed to it – and, I am sure, all those who read or refer to it – will wish to join me in thanking him for his outstanding work and his profoundly important contribution to the law relating to mental capacity in this country.

This introduction affords me the opportunity to salute two other individuals whose contribution have been of immense importance, each of whom will retire from the Bench in the next few months. By the time this book is published, Mr Justice Charles will have stepped down as Vice-President of the Court. In that role he has performed invaluable service in reforming the practices and procedures of the court, addressing the many deficiencies in its structure and administration, and helping to steady the ship and steer it through the storm raised by the *Cheshire West* decision. It is thanks to Bill Charles that the Court is now organised in a way which better equips it to serve the community and in particular those vulnerable members of the community for whom it exists.

The summer of 2018 will also see the retirement of the President of the Family Division and the Court of Protection. Over the past thirty years, stretching back to his appearance as counsel in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, no one has had a greater influence on the law relating to mental capacity than Sir James Munby. Under his leadership, the work of the family courts and the Court of Protection has achieved greater recognition and respect across the justice system and, thanks to his unswerving commitment to transparency, in the wider community. His legendary erudition is on a scale which will never be matched, but in addition he has a degree of wisdom and humanity rarely encountered even in this jurisdiction where those qualities are particularly prized. Anyone seeking inspiration to face the challenges of working in this field need look no further than paragraph 120 of his judgment in *Re MM* [2007] EWHC 2003 (Fam). That passage cites an observation of Mr Justice Oliver Wendall Holmes from a judgment in 1919. I venture to suggest that, a hundred years from now, lawyers and judges will still be citing decisions and dicta of Sir James Munby.

I have remarked elsewhere (*Kent CC v A Mother and others* [2011] EWHC (Fam) 402, para 132) that

> [The] *last thirty years have seen a radical reappraisal of the way in which people with a learning disability are treated in society. It is now recognised that they need to be supported and enabled to lead their lives as full members of the community, free from discrimination and prejudice. This policy is right, not only for the individual, since it gives due respect to his or her personal autonomy and human rights, but also for society at large, since it is to the benefit of the whole community that all people are included and respected as equal members of society.*

The modern Court of Protection has a crucial role to play in implementing this policy. I have some sympathy with those who regret that, when passing the 2005 Act which did so much to reform the law relating to incapacitated adults, Parliament decided that the name of the old court should be retained. As I have observed in a number of cases, those who work in this field, including judges, have to be on their guard against the "protection imperative" - the tendency to be drawn towards an outcome that is more protective of the adult, both in the assessment of capacity and in making decisions about best interests. The focus of our work ought to be as much, if not more, on empowering those with a disability as on their protection. One of the challenges facing the new Court as it enters its second decade is to do more to enable those adults who are subject to its jurisdiction to participate in proceedings. The recently introduced rules and procedures governing representation - formerly in rule 3A, now in rule 1.2 of the new 2017 Rules - are an important step in addressing this challenge, but will be of limited use

unless funds are found to resource the various options. Similarly, the programme of regionalisation - brought about largely through the determination of the President and Mr. Justice Charles - will greatly improve access to the Court for the benefit of those who are the subject of proceedings and those who care for them. But the benefits of regionalisation will not be realised unless sufficient resources are made available to ensure that there are judges and court staff in the places where they are needed. It seems scarcely credible that it was thought appropriate to set up the new Court largely centred on London when its work plainly affected people throughout the country. Now that this error has been corrected, we are seeing a substantial increase in the volume of welfare cases across England and Wales. In the South-West, for example - where, until recently, I was Family Division Liaison Judge for the Western Circuit and thus involved in decisions about the deployment of judges - the number of cases in the Court has increased by 50% in the second year of regionalisation, without any increase in the judicial or administrative workforce. The pressures caused by the dramatic increase in workload in the Court of Protection are being felt across the justice system, particularly in family and civil justice. The system of regional hubs, under regional lead judges, supported by a team of district judges responsible for allocation, is proving very successful but the judges and administrative staff are unquestionably feeling the strain. Perhaps for this reason, the planned devolution of responsibility for issuing welfare applications to the regions has been postponed, although apparently only for a few months.

It is important to note that the regionalisation programme does not extend to property and affairs applications which numerically form by far the greater proportion of cases and which will continue to remain under the umbrella of the specialist team of judges and administrative staff at First Avenue House under the leadership of the Senior Judge, Carolyn Hilder. Amongst her many tasks is coordinating the recruitment of new judges for the Court across the country. There is an ongoing and urgent need for judges and plans to draw them from a wider cross-section of the existing judiciary, including tribunal judges, are in hand. I hope that in the near future suitably qualified deputy district judges will start sitting in the Court. There can surely be no reason for this not to happen. Part-time fee-paid judges hear about 20% of cases in other jurisdictions - family and civil. In the past year, selected deputy district judges have been authorised to sit in public law children's cases. The issues in such cases are no less important and difficult than those coming before the Court of Protection. Over the past year, I have sought to encourage lawyers specialising in the field of mental capacity law to consider applying for part-time judicial office, and I take this opportunity to do so again. There are comparatively few lawyers in that category currently on the Bench in any capacity, and their knowledge and experience would be an important addition to the expertise of the judiciary as a whole.

The past year has been notable for the consolidation of the changes introduced by the various "pilot" schemes covering case management, the use of s. 49 reports, and transparency. Of these, it was the last that caused the greatest controversy when it was first proposed, the change being significantly more radical than the incremental approach adopted towards transparency in the family courts. Although there is by no means unanimity on the merits of this reform, the consensus is that the

changes have been successful. There remain practical difficulties - the requirement to sign in when attending court is cumbersome, and the listing arrangements have not always worked as smoothly as hoped. The media complain that there is no national list of COP cases so that those members of the specialist press are unable to find out about cases of public interest taking place outside London. It is clear, however, that the culture has changed dramatically so that it is generally accepted that sitting in open court does not lead to any discernible diminution in the quality of justice.

Another notable development during the past year was the recasting of the rules and practice directions. For the most part, with one notable exception, this consisted of a consolidation and tidying up exercise, rather than radical reform. The exception was the complete abolition of Practice Direction 9E dealing with serious medical treatment. Henceforth, such cases fall under the same case management rules as other welfare applications. At a stroke, the special rules for serious medical cases were swept away. It remains to be seen how this change will work out in practice. It is anticipated that applications for orders concerning serious medical treatment of incapacitated adults will continue to be allocated to Tier 3 (i.e in effect High Court) judges, although there is now no express requirement to that effect in the allocation rules. But the extent to which that jurisdiction will be engaged in future is open to question. In *NHS Trust v Y and another* [2017] EWHC 2866 QB, O'Farrell J, sitting in the Queen's Bench Division, following dicta of Peter Jackson J (as he then was) in *Re M (Withdrawl of Treatment: Need for Proceedings)* [2017] EWCOP 19, made a declaration that that it is not mandatory to bring before the court the withdrawal of clinically assisted nutrition and hydration from someone with a prolonged disorder of consciousness in circumstances where the clinical team and the family are agreed that it is not in his best interests that he continues to receive that treatment. At the time of writing, it is understood that this decision will proceed to an appeal in the Supreme Court. At this point, however, it seems that the determined campaign for reform in this area, led by Celia and Jenny Kitzinger, has achieved a remarkable success.

Other notable decisions in the past year include *N v ACCG and others* [2017] UKSC 22, in which the Supreme Court confirmed (albeit on a different basis than that adopted in the lower courts) that a decision as to what is in a person's best interests is a choice between available options. Of equal practical importance is the decision in *Director of Legal Aid Casework and others v Briggs* [2017] EWCA Civ 1169 in which the Court of Appeal overturned the decision of the judge at first instance that he could, within the scope of proceedings under s.21A (which were supported by non-means-tested public funding) consider whether life-sustaining treatment should be given to a man in a minimally conscious state who was being deprived of his liberty, on the grounds that challenging detention under s.21A relates to decisions about the deprivation of liberty and not the circumstances leading up to it.

Taken together, the developments described in the last two paragraphs will lead to a reduction in the number of cases coming before the Court. But the complexities of the law, and the ingenuity of the lawyers, will always result in new seams of work being discovered. It is always unwise to make predictions as to future legal developments, particularly in an area where case law often evolves at a rapid pace so that the predictions may be out of date before they are published. It is fair to say, however,

that all practitioners await with interest the government's response to the Law Commission Report on Mental Capacity and Deprivation of Liberty (Law Com no 372) and in particular to the Commission's proposals for a new scheme to replace the Deprivation of Liberty Safeguards (provisionally called the Liberty Protection Safeguards). The case for some reform of the DOLS is overwhelming, and the Law Commission's final model seems eminently workable. Whether Parliamentary time can be found to accommodate amending legislation, given the focus on Brexit, remains to be seen.

Mr Justice Jonathan Baker

Confinement, consent and judicial authorisation for children

Re A-F (Children) [2018] EWHC 138 (Fam) (Family Division (Sir James Munby P))

Article 5 - deprivation of liberty

Summary

Sir James Munby P has pronounced upon two key issues in relation to deprivation of liberty and children:

1. When is a child to be considered to be confined (i.e. for the purpose of the first of the three limbs required to establish a deprivation of liberty, the other two being a lack of valid consent and imputability to the state)?

2. If a child is confined, and no person with true parental responsibility can give consent on their behalf (including where the child is subject to a care order or is in foster care), what process should be followed to obtain the necessary authorisation?

In a wide-ranging judgment, Sir James Munby P reached the following conclusions which are, in general terms, directed to all those under 18, but will (in reality) be particularly relevant to those aged under 16 as they are predominantly directed to applications to be made in conjunction with care proceedings. For those aged 16/17, the more likely route will be the *Re X* process, especially where there is any prospect that the individual's circumstances are such that they are likely to continue to be deprived of their liberty post 18 in circumstances not covered by DOLS and/or otherwise to continue to be subject to the jurisdiction of the Court of Protection.

Confinement

Although it is necessary to have regard to the actual circumstances of the child and comparing them with the notional circumstances of the typical child of (to use Lord Kerr's phraseology from *Cheshire West)* the same "age", "station", "familial background" and "relative maturity" who is "free from disability," (but not a 'typical child' subject to a care order), a "rule of thumb" is that:

1. A child aged 10, even if under pretty constant supervision, is unlikely to be "confined";

2. A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion;

3. Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

Process

Sir James Munby P outlined when and what steps are required to obtain judicial authorisation for the deprivation of a child as the counterpart of the *Re X* process for those aged 16+, summarised below.

Need to apply to the court: An application to the High Court for the exercise of its inherent jurisdiction should be made where the circumstances in which the child is, or will be, living constitute, at least ***arguably*** (taking a realistic rather than a fanciful view), a deprivation of liberty.

What has to be approved There is no need for the court to make an order specifically authorising each element of the circumstances constituting the "confinement". It is sufficient if the order (i) authorises the child's deprivation of liberty at placement X, as described (generally) in some document to which the order is cross-referenced, and if appropriate (ii) authorises (without the need to be more specific) medication and the use of restraint.

Process The key elements of an Article 5 compliant process can be summarised as follows:

1. If a substantive order (interim or final) is to be made authorising a deprivation of liberty, there must be an oral hearing in the Family Division (though this can be before a section 9 judge). A substantive order must not be made on paper, but directions can, in an appropriate case, be given on paper without an oral hearing.

2. The child must be a party to the proceedings and have a guardian (if at all possible the children's guardian who is acting or who acted for the child in the care proceedings) who will no doubt wish to see the child in placement unless there is a very good child welfare reason to the contrary or that has already taken place. The child, if of an age to express wishes and feelings, should be permitted to do so to the judge ***in person*** if that is what the child wants.

3. A 'bulk application' (see the ***Re X cases***) is not lawful, though in appropriate circumstances where there is significant evidential overlap there is no reason why a number of separate cases should not be heard together or in sequence on the same day before one judge.

Evidence The evidence in support of the substantive application (interim or final) should address the following matters and include:

1. The nature of the regime in which it is proposed to place the child, identifying and describing, in particular, those features which it is said do or may involve "confinement". Identification of the salient features will suffice; minute detail is not required.

2. The child's circumstances, identifying and describing, in particular, those aspects of the child's situation which it is said require that the child be placed as proposed and be subjected to the proposed regime and, where possible, the future prognosis.

3. Why it is said that the proposed placement and regime are necessary and proportionate in meeting the child's welfare needs and that no less restrictive regime will do.

4. The views of the child, the child's parents and the Independent Reviewing Officer, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health (typically the most recent documents will suffice).

Interface with care proceedings

5. If, when care proceedings are issued, there is a real likelihood that authorisation for a deprivation of liberty may be required, the proceedings should be issued in the usual way in the Family Court (***not*** the High Court) but be allocated, if at all possible, to a Circuit Judge who is also a section 9 judge. Sir James agreed that thought should be given to amending the C110A form to enable the issue to be highlighted.

6. Where care proceedings have been allocated for case management and/or final hearing to a judge who is not a section 9 judge, but it has become apparent that there is a real likelihood that authorisation for a deprivation of liberty may be required, steps should be taken if at all possible, and without delaying the hearing of the care proceedings, to reallocate the care proceedings, or at least the final hearing of the care proceedings, to a Circuit Judge who is also a section 9 judge.

7. The care proceedings will remain in the Family Court and must ***not*** be transferred to the High Court (note that a District Judge or Circuit Judge has no power to transfer a care case to the High Court: see FPR 29.17(3) and (4) and PD29C). The section 9 Circuit Judge conducting the two sets of proceedings – the care proceedings in the Family Court and the inherent jurisdiction proceedings in the High Court – can do so sitting simultaneously in both courts.

8. If this is not possible, steps should be taken to arrange a separate hearing in front of a section 9 judge as soon as possible (if at all possible within days at most) after the final hearing of the care proceedings. Typically, there will be no need for the judge to revisit matters already determined by the care judge, unless there are grounds for thinking that circumstances have changed; indeed, the care judge should, wherever possible and appropriate, address as many of these issues as possible in the care proceedings judgment.

9. The evidence should include, in addition to all the other evidence required in the care proceedings, evidence on the matters referred to above. These matters should also, mutatis mutandis, be included in the section 31A care plan put before the court in the care proceedings.

10. Where the care proceedings have been concluded for some time, the process will be the 'standalone' one indicated above.

Review Continuing review is crucial to the continued lawfulness of any "confinement". What is required are:

1. Regular reviews by the local authority as part of its normal processes in respect of any child in care.

2. A review by a judge at least once every 12 months. The matter must be brought back before the judge without waiting for the next 12-monthly review if there has been any significant change (whether deterioration or improvement) in the child's condition or if it is proposed to move the child to a different placement.

3. The child must be a party to the review and have a guardian (if at all possible the guardian who has previously acted for the child).

4. If there has been no significant change of circumstances since the previous hearing / review, the review can take place on the papers, though the judge can of course direct an oral hearing. The form of the next review is a matter on which the judge can give appropriate directions at the conclusion of the previous hearing.

Comment

For those familiar with the *Re X* debates and process, the approach adopted by the President is unsurprising, save in one regard, namely the absence of any discussion of whether medical evidence of unsoundness of mind is required. We understand from Kate Burnell of St John's Building Chambers (instructed for the children's guardians) that there was discussion at the hearing – which does not feature in the judgment – as to which limb of Article 5 is in play in these cases. With children, unlike with those over 18, it would in some cases be possible to rely upon Article (1)(d) (i.e. deprivation of liberty for purposes of 'educational supervision'). A local authority applicant will need to consider which limb to hang its hat on and adduce evidence accordingly.

We also note that the Official Solicitor is still (!) waiting for the Legal Aid Agency to determine whether legal aid will be granted to apply for permission to appeal to the Supreme Court in the case of *Re D (a child)* [2017] EWCA Civ 1695, in which the Court of Appeal held that parents could in principle consent to the confinement of their incapacitated child. In the meantime, however, we are aware of a case involving in February 2018 Charles J made an order authorising the deprivation of liberty of a 16 year old in a residential placement even where it appeared that the parent was consenting to the arrangements as being the child's best interests. Charles J appeared to take the view that the court was not precluded by Re D from making such an order where it was in P's best interests to do so notwithstanding that a parent could, in principle, consent to the arrangements. Unfortunately, there is

no judgment publicly available as the position was agreed between the parties and endorsed by the court.

Short note: care proceedings and medical treatment

In *AB (A Child)* [2018] EWFC 3, Sir James Munby P made the following observations about when local authorities should bring care proceedings for purposes of seeking to ensure that a child receives a specific medical treatment:

> *i) Cases such as this (Re Jake (A Child) [2015] EWHC 2442 (Fam), [2016] 2 FCR 118, is another example) raise very complex issues, as yet little explored in the authorities, as to whether the appropriate process is by way of application for a care order or application under the inherent jurisdiction. Local authorities need to think long and hard before embarking upon care proceedings against otherwise unimpeachable parents who may justifiably resent recourse to what they are likely to see as an unnecessarily adversarial and punitive remedy.*
>
> *ii) A local authority does not need any specific locus standi to be able to invoke the inherent jurisdiction: see In re D (A Minor) (Wardship: Sterilisation) [1976] Fam 185. Section 100 does not prevent a local authority invoking the inherent jurisdiction in relation to medical treatment issues: see Re C (Children: Power to Choose Forenames) [2016] EWCA Civ 374, [2017] 1 FLR 487, para 97.*
>
> *iii) Whatever its strict rights may be, a local authority will usually be ill-advised to rely upon its parental responsibility under section 33(3)(a) of the 1989 Act as entitling it to authorise medical treatment opposed by parents who also have parental responsibility: see Barnet London Borough Council v AL and others [2017] EWHC 125 (Fam), [2017] 4 WLR 53, para 32, and the discussion in Re C (Children: Power to Choose Forenames) [2016] EWCA Civ 374, [2017] 1 FLR 487, paras 92-95. For a local authority to embark upon care proceedings in such a case merely to clothe it with parental responsibility is likely to be problematic and may well turn out to be ineffective.*
>
> *iv) If, on the other hand, in a case such as this, a local authority is thinking of embarking upon care proceedings with a view, as here, to removing the child from the parents, it needs to think very carefully not merely about the practicalities of finding an appropriate placement, whether institutional or in a specialised foster placement, but also about the practicalities of ensuring that the parents have proper contact with their child during what may be its last few months or weeks of life. And by proper contact I do not mean contact two or three times a week for a couple of hours a time if the parents reasonably want more, even much more. As I said in Re Jake (A Child) [2015] EWHC 2442 (Fam), [2016] 2 FCR 118, para 29, "In terms of simple humanity, parents must have as much time as they want, not least because it may be a distressingly short time, with their much loved baby." And it is simply unbearable to contemplate the reaction of parents unable to be with their child at the moment of death because of geography or, even worse, bureaucracy.*

Sir James therefore made it clear that it is not appropriate then for local authorities to use its parental authority obtained pursuant to section 33 of the Children Act 1989 to consent to a child's medical treatment in the face of parental objection. Such cases should be brought before the Court for orders pursuant to the Court's inherent jurisdiction. The President did not address the issue raised by Mostyn J in the case of *Re JM (A Child)* [2015] EWHC 2832 (Fam) in which the latter had held that it was appropriate for orders authorizing medical treatment to be granted by the Court by way of a single issue order pursuant to s.8 Children Act 1989. This is perhaps unsurprising given that none of the recent cases have been framed as s.8 orders, but it seems to us that the President's decision leaves this option open to local authorities.

Short note: litigants in persons – expectations and impossible positions

In *Barton v Wright Hassall LLP* [2018] UKSC 22, the Supreme Court made clear that "[u]*nless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take*" (para 18 per Lord Sumption). Given the ever-increasing numbers of litigants in person in the Court of Protection, one of the tasks of the ad hoc Rules Committee as it goes forward will undoubtedly be to ensure that it keeps under review both the accessibility and the clarity of the Rules and accompanying Practice Directions.

Conversely, in *J (DV Facts)* [2018] EWCA Civ 115, the Court of Appeal had to grapple with the "*very substantial difficulty engendered by a litigant in person whose case needs to be 'put' to a key factual witness, where the allegations that that witness makes need to be challenged and are of the most intimate and serious nature, and where the litigant and the witness are themselves the accused and accuser*." Seeking to outline the ways in which to navigate the option of direct questioning from the alleged abuser and the alternative of questioning by the judge, McFarlane LJ noted that there was:

> *73* […] *the possibility of affording rights of audience to an alleged abuser's McKenzie Friend so that he or she may conduct the necessary cross examination. The possibility of a McKenzie Friend acting as an advocate is not referred to in PD12J and, as has already been noted, the guidance on McKenzie Friends advises that, generally, courts should be slow to afford rights of audience. For my part, in terms of the spectrum of tasks that may be undertaken by an advocate, cross examination of a witness in the circumstances upon which this judgment is focussed must be at the top end in terms of sensitivity and importance; it is a forensic process which requires both skill and experience of a high order. Whilst it will be a matter for individual judges in particular cases to determine an application by a McKenzie Friend for rights of audience in order to cross examine in these circumstances, I anticipate that it will be extremely rare for such an application to be granted.*

McFarlane LJ held that:

> *74.* […] *where an alleged perpetrator is unrepresented, the court has a very limited range of options available in order to meet the twin, but often conflicting, needs of supporting the witness to enable her evidence to be heard and, at the same time, affording the alleged perpetrator a sufficient*

> *opportunity to have his case fairly put to her. Of the options currently available, the least worst is likely to be that of the judge assuming the role of questioner.*

Perhaps unsurprisingly, McFarlane LJ drew attention to proposals to address the problem of a litigant in person who wishes or needs to cross examine a witness contained in clause 47 of the Prison and Courts Bill which, in the event, fell when Parliament was dissolved prior to the General Election in 2017. These proposals, of importance to the family courts, would not apply in the Court of Protection – one might think that it would be sensible to ensure that if the Bill does get brought forward again, this court is included, as the issues could equally well apply in proceedings before it.

Short note: fact-finding and criminal proceedings

In *Re R (Children)* [2018] EWCA Civ 198, the Court of Appeal made important observations about the approach to take to fact-finding in relation to circumstances that had previously been considered in criminal proceedings. McFarlane LJ emphasised at paragraph 82 that:

> *a) The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a criminal court* […]*;*
>
> *b) The primary purpose of the family process is to determine what has gone on in the past, so that those findings may inform the ultimate welfare evaluation as to the child's future with the court's eyes open to such risks as the factual determination may have established* […]*;*
>
> *c) Criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court* […]*;*
>
> *d) As a matter of principle, it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts* […].

McFarlane LJ also noted at paragraph 86 that:

> *On the basis of the guidance in PD12J, and on the basis of general principles, a family court should only embark upon a fact-finding investigation where it is both necessary and proportionate to do so, having regard to the overarching purpose of public law proceedings of (a) establishing whether the CA 1989, s 31 threshold criteria are satisfied and (b) determining the future plan for the child's care by affording paramount consideration to his or her welfare.*

Whilst there are no threshold criteria in Court of Protection proceedings nor (yet) the equivalent of PD12J to the FPR 2010, dealing with *Child Arrangements and Contact Orders: Domestic Abuse and Harm*, the approach set out above apply equally by analogy to the interaction between Court of Protection proceedings and criminal proceedings, as do the two pertinent concluding observations of McFarlane LJ on these issues:

90. Lastly, I would mention the specific matter of the use of language. The potential for the court to become drawn into reliance upon criminal law principles is demonstrated by the present appeal. Even where the family court succeeds in avoiding direct reference to the criminal law, it is important that, so far as it is possible to do so, the language of the judgment (and in particular any findings) is expressed in terms which avoid specific words or phrases which may have a bespoke meaning in the context of the criminal jurisdiction, for example 'self-defence', 'reasonable force' or 'the loss of self-control'. Phrases such as 'inappropriate force' or 'proportionate force' may reflect the judge's findings in a particular case, and avoid the risk that the judge's words may be misunderstood as expressing a finding based directly upon criminal law principles.

91. At the end of the day, the often very difficult role of a judge once it has been determined that a finding of fact hearing is necessary can be reduced to the short statement that the family judge's task in such cases is simply to find the facts. Once any facts are found, they will then form the basis of a more wide-ranging assessment of any consequent risks to the child whose future welfare needs will then fall to be determined.

Vulnerable clients

Professor Jo Delahunty QC, Gresham Professor of Law, delivered a lecture on 1 February 2018 at Barnard's Inn Hall in London entitled 'vulnerable clients and the family justice system'. You can hear the whole lecture here. In this thought- provoking lecture, she posed five questions (i) should a disability prevent someone from being a good enough parent; (ii) What disabilities does the court encounter, is vulnerability the same as disability; (iii) what does the family justice do to protect the rights of the disabled person to be a parent and of the child to be adequately parented?; (iv)How can a vulnerable person be helped to ensure their voice is heard in court and (v) Beyond the court room: do we really make a difference in society where it counts?

Of particular interest to mental capacity practitioners is the focus on the impact on children of disabled persons arising not from abuse at the parents' hands, but arising from the perceived risk of neglect arising from the parents' intellectual abilities, impact of social and economic deprivation. Professor Delahunty speaks eloquently of the difficulty in providing families with the support they need to allow the child to be effectively parented within the family home but warns that support should not become substitute parenting. Depressingly, she suggests that there has been little progress over the last 15 years in providing appropriate support to learning disabled parents, and also that there is little evidence of joint working between the adult social services concerned with supporting the adult, and the children's social services concerned with the child.

THE WIDER CONTEXT

Mental Capacity Action Day

The National Mental Capacity Act Forum is holding its annual action day on 5th March at the BMA. The theme for this year is supported decision-making, which will be explored with a range of speakers and workshops. It is (un)fortunately a sell-out already, but we can bring you one (virtual) highlight in the form of this video made by Grace and Lorraine Currie on living with a brain injury, and the power of art.

Immigration detention, capacity and access to justice

R (VC) v Secretary of State for the Home Department [2018] EWCA Civ 57 (Court of Appeal (Arden Lewison, Beatson LJJ)

Article 5 ECHR – damages – other proceedings – judicial review

Summary

The case concerned a Nigerian national (VC) in the UK who suffered from bipolar affective disorder with psychotic features. He was admitted to hospital on multiple occasions for treatment under the Mental Health Act 1983 (MHA). VC was also detained under the Immigration Act 1971 by the Secretary of State in an immigration removal centre between 11 June 2014 and 5 May 2016 before being transferred to a psychiatric facility and compulsorily detained under the MHA.

VC challenged the legality of his detention under the Immigration Act and the delay in securing his transfer to hospital for treatment. The first instance court held that the Secretary of State had misinterpreted her policy on the detention of those with mental illness but, save for the period between 3 and 27 April 2015, VC's detention was not unlawful.

On VC's appeal, the Court of Appeal disagreed with the first instance judge and held that the Secretary of State's breaches rendered the detention unlawful between 30 June 2014 and 27 April 2015. In particular, the Secretary of State had not discharged the burden of demonstrating, on the balance of probabilities, that she could and would have detained VC in any event. It followed that VC was entitled to compensatory damages in respect of the period 30 June 2014 to 27 April 2015 and that damages were to be assessed on the basis that VC would have been in the community rather than in detention.

The Court of Appeal also considered an argument that the Secretary of State had discriminated against VC by not making reasonable adjustments under the Equality Act 2010 for mentally ill detainees to make representations on decisions regarding their continued detention and segregation. This argument was supported by the Equality and Human Rights Commission intervening. The Court held that the Secretary of State had failed to discharge the burden of proof to demonstrate that she had

complied with her duty to make reasonable adjustments. It was suggested, for example, that a system akin to IMCAs could be devised in which an advocate would assist mentally ill detainees in making representations in respect of decisions to detain or remove a detainee from association. The Court did not accept the Secretary of State's argument that representation at the public expense could not be provided on an anticipatory or continuing basis. Although the Court accepted that cost was a factor in assessing the reasonableness of the proposals, there was no evidence that the Secretary of State had made an assessment of cost and concluded that the proposals were unaffordable.

Comment

This immigration detention case may be of interest to practitioners for the observations made in relation to access to courts for those with cognitive impairments. The Court of Appeal found that mentally ill detainees were at a substantial disadvantage compared to other detainees because there were circumstances in which issues may arise about their detention about which they would, if they had the ability to do so, want to make representations, but are unable to do so because of their mental illness. The Court noted that while in other detention contexts there are automatic independent reviews of the detention, in immigration detention a bail application has to be initiated by the detainee to obtain an independent review.

The Court's recognition of the difficulties faced by mentally ill detainees in accessing an independent review is welcome and is supported by Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD). Although this was not cited by the Court, Article 13 provides that States "shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings…" The recent annual report of the UN High Commissioner for Human Rights on the right to access justice under article 13 of the CRPD (available here) made the following recommendations which resonate in the domestic context:

- States should modify civil, criminal and procedural laws which prevent persons with disabilities from directly or indirectly participating in judicial or administrative processes on an equal basis with others either by granting third-party recognition in law or in fact without free and informed consent or by denying legal standing.
- States should also implement laws and policies that ensure that information needed to defend rights is accessible, and that free and affordable legal aid is provided to persons with disabilities in all areas of law.
- States should implement anti-discrimination measures including providing procedural accommodations where necessary, in all their forms and in all legal proceedings.

On one view, this case also calls into question the correctness of the approach taken by the Court in *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79 (which was not mentioned in the judgment). In that case, the Court of Appeal readily accepted that if Mr Bostridge had not been unlawfully recalled under a Community Treatment Order (CTO), he would have been lawfully detained in any event under s.3 MHA rather than in the community. He therefore suffered no loss and was entitled to receive nominal damages only. In *Bostridge*, there was no real analysis of whether the defendant in that case (Oxleas NHS Foundation Trust) had discharged the burden of proof to the requisite standard, but rather an assumption that because Mr Bostridge was detainable under the MHA, he would have been detained under section 3 of the MHA in any event. At the very least, the decision in *Bostridge* should be read in light of this most recent Court of Appeal judgment.

How many more cases does it take?

A Safeguarding Adults review commissioned by Somerset Safeguarding Adults Board into serious abuse at Mendip House has been published. Mendip House was a home for 6 adults with autism run by the National Autistic Society. It was one of a number of separately registered properties on the Society's Somerset Court campus, where service users were sent by a large number of placing authorities.

It closed on 31 October 2016 following allegations of serious abuse made by whistle blowers. The allegations included care staff playing on their Playstations while on shift and failing to take service users out as a result; using residents' funding to pay for their meals during outings over a number of years, bullying, service user absconding, humiliation of service users, including throwing food at them.

The review highlights concerns about the risks of not investigating and managing safeguarding incidents and in particular the recruitment of staff in such placements. It also puts particular emphasis on the need for placing authorities, many of whom are inevitably far from the placement they fund, to conduct coordinated reviews of the individuals placed in such homes.

Personal Injury Payments and Care Needs Assessments

In a story reported by Community Care (but where the underlying judgment is not available), the High Court has rejected an application for judicial review of a decision by the Local Government and Social Care Ombudsman that a woman's personal injury award should not be taken into account by the responsible local authority when assessing her eligible needs.

The application was brought by Wokingham Borough Council. It concerned a woman for whom the local authority had a duty under the Care Act, reported to have been awarded a sum of £1.3 million in 1998 for damages arising out of a claim for clinical negligence dating back to 1975.

Wokingham Borough Council carried out a needs assessment in July 2015 shortly after the woman moved into the borough. It argued that her personal injury award, £729,675 of which it maintained had been awarded specifically to pay for her care needs, ought to be taken into account when assessing

her eligible needs. It limited her payments accordingly and while it did eventually agree to reinstate her funding and to provide some back payments, it refused to do so back to the point at which she was first identified as having eligible needs. The woman's solicitor complained to the Local Government and Social Care Ombudsman that the local government had made an error by failing to disregard her personal injury award.

The ombudsman concluded that the law provides that personal injury awards must be disregarded in financial assessments unless the court orders an undertaking that no application for public funding should be made accordance with the judgment in *Peters v East Midlands SHA* [2009] EWCA Civ 145. Accordingly, it upheld her complaint and ordered the council to backdate payments for her care for all her assessed eligible needs. Mr Justice Fraser refused the application for judicial review of the ombudsman's decision and, further, certified the application as totally without merit.

The Local Government Ombudsman has confirmed that it will look at similar cases in a similar way. Local authorities will no doubt regret the financial implications of such a decision in these financially straitened times; those acting on behalf of clients with significant care needs will doubtless welcome the decision.

European Committee on Prevention of Torture – UK response

The UK response to the report of the European Committee on the Prevention of Torture has now been published, following the visit of the Committee in 2016. For present purposes of particular interest is the Government's response to the Committee's recommendation that the MHA 1983 be amended "*so as to require an immediate external psychiatric opinion in any case where a patient does not agree with the treatment proposed by the establishment's doctors; further, patients should be able to appeal against a compulsory treatment decision to the Mental Health Tribunal. Patients should provide their consent to treatment in writing on a specific form.*" This recommendation comes from the same place as (although does not expressly refer to) the line of Strasbourg jurisprudence on Article 8 ECHR started in *X v Finland* and developed in *LM v Slovenia*. At paras 194-199, the Government, in essence, dodged a substantive response by outlining current practice and highlighting the work of the independent Mental Health Act Review.

Mapping institutional and community care across Europe

A useful comparative study of institutional, coercive and community-based mental health services across Europe can be found in the updated *Mapping Exclusion* report produced by Mental Health Europe.

Legal capacity law reform across the world

The most recent Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas Aguilar, contains both a review of her activities in 2017 and a thematic study on the right of

persons with disabilities to equal recognition as a person before the law including, in particular, a useful (if frustratingly high-level) survey of reform efforts around the world which are moving in different directions towards compliance with the CRPD (the Northern Ireland Mental Capacity Act getting a mention in footnote 16…).

Not mentioned by the Special Rapporteur, probably because it came out too recently, is an interesting report by the Tasmanian Law Reform Institute reviewing the Guardianship and Administration Act 1995 (Tas) in light of subsequent developments around the world.

SCOTLAND

Adults with Incapacity reform

Consultation by Scottish Government on proposals for reform of the Adults with Incapacity (Scotland) Act 2000 ("2000 Act") opened on 31st January 2018 with issue of the consultation document "Adults with Incapacity Reform" ("the Document"). The Document and link for online responses are here. The consultation will close on 30th April 2018.

Everyone with an interest in Scotland's existing adults with incapacity ("AWI") regime and its operation should read the Document in full, and consider whether they can contribute to the process of review and reform of AWI law and practice by responding. We accordingly offer here only a brief outline of the content, followed – at this relatively early point in the process of consideration and discussion – by some limited general comment.

The Document commences by acknowledging that at the time when it was passed the 2000 Act "was widely acclaimed as ground breaking law". It then immediately focuses upon *HL v UK,* (2005) 40 EHRR 32 (the "Bournewood case"), and ensuing developments leading to the Scottish Law Commission Report on Adults with Incapacity (Report No 240, 2014) which proposed a regime intended to ensure compliance with Article 5 of the European Convention on Human Rights ("ECHR"), and the ensuing Scottish Government consultation in 2016. It reports the main themes emerging from that consultation in two categories. Firstly, regarding compliance with the deprivation of liberty provisions of ECHR Article 5; there is a compelling need to ensure a lawful process for persons who may need to be deprived of their liberty in community or hospital settings, and who lack capacity to agree to such a placement; the Scottish Law Commission proposals would "result in a huge workload for an already pressurised system and workforce"; and any changes to the law should take place in the context of a wider revision of AWI legislation.

As to views on possible changes to AWI legislation, the Document reports that the "most popular areas for change" were a move to a form of graded guardianship; consideration for a change of jurisdiction for AWI cases from the sheriff court to a tribunal; creation of a short-term/emergency placement order that can be used at short notice; and consideration of changes needed to implement the UN Convention on the Rights of Persons with Disabilities ("UN CRPD").

On the topic of "restrictions on a person's liberty", the Document offers a proposed definition of significant restrictions on liberty. It proposes that significant restrictions are permissible if "a person seeks through words or actions to express their wish to be in a given place and to receive care and treatment in a given manner"; that if there is no consent but also no "apparent objection", the restriction may be authorised by a grade 2 guardianship order (see below); and that if there is no consent and objection from the adult or other interested parties, the matter should be addressed by grade 3 guardianship. A valid power of attorney with relevant powers should be relied upon "to authorise a move to a setting where there may be significant restrictions on a person's liberty".

On the section 1 principles of the 2000 Act, the Document proposes a new principle: "There shall be no intervention in the affairs of an adult unless it can be demonstrated that all practical help and support to help the adult make a decision about the matter requiring intervention has been given without success".

On powers of attorney, the Document proposes a need for clarity as to how and when a power of attorney should be activated. In the context of the deprivation of liberty proposals, it suggests that clarification is also needed as to the use of powers of attorney in situations that might give rise to restrictions on a person's liberty. It is suggested that advance consent in the power of attorney document should suffice. The Document proposes creation of a role of "official supporter", appointed by an adult capable of making such appointment. Views are sought as to how such a supporter might be appointed. A possibility suggested in the Document is for a power of attorney to contain an appointment of a supporter, with the supporter registered in the same way as the attorney at present.

A chapter of the Document is devoted to capacity assessments, and asks whether consideration should be given to extending the range of professionals who can carry out capacity assessments for the purposes of guardianship orders.

By far the longest chapter of the Document is devoted to the topic of graded guardianship, and is linked to an ensuing chapter addressing the question of the forum for cases under AWI legislation. The graded guardianship proposals appear to follow closely the suggestions first mooted by the Public Guardian in 2011. There would be three grades. It would be envisaged that grade 1 would encompass the great majority of cases. Scottish Government proposes that application "will be made by a standard form which will be available online and can be completed by the applicant without the need for legal advice". The applicant could select from "a wide range of welfare and financial powers". Only where welfare powers are sought, a report would be required from a local authority social worker. The applicant would be required to complete an "OPG Guardian Declaration" on a form provided by the Public Guardian. It appears that no independent report would be required where property and/or financial powers are sought. In all cases, a single certificate of incapacity would be required. Intimation of the application would be the responsibility of the applicant.

The main trigger to lift applications from grade 1 to grade 2 would be a financial limit to be set by regulation. A trigger of £50,000 is suggested. The other principal trigger would be that the adult is able to object and does so. Grade 2 would also apply in the event of other parties being in dispute, or if a restriction of liberty were to be proposed.

At grade 2, the same incapacity certificate and OPG Guardian Declaration would be required as for grade 1. If welfare powers were sought, there would require to be a report by a mental health officer rather than any social worker. There would still be no requirement for independent reporting in relation to property and/or financial powers, and intimation would still be the responsibility of the applicant. In addition to the above requirements, a medical report by a section 22 doctor (a medical practitioner

approved as having special experience in the diagnosis and treatment of mental disorder) would be required if a significant restriction of liberty is proposed.

The application for a grade 3 guardianship would require the same application process as for grade 2. Grade 3 would be required only where the adult or any interested party disagrees with the application. The application would either be made initially at grade 3, or would be transferred from a lower grade. Any reference by OPG, a local authority or the Mental Welfare Commission following an investigation would be treated as a grade 3 application.

The maximum permitted duration of guardianship orders would be three years at grade 1, and five years at grades 2 and 3. The Document contains proposals for renewal procedures. It proposes the abolition of intervention orders. It proposes the possibility of corporate rather than individual guardians. It proposes that access to funds and management of residents' finances (under Parts 3 and 4 respectively of the 2000 Act) be transferred into the graded guardianship system.

Choice of forum for the AWI jurisdiction led to much debate in the law reform process leading to the 2000 Act. In the 2016 consultation, the Mental Health and Disability Sub-Committee of the Law Society of Scotland ("MHDC") proposed a unified tribunal dealing with mental health, AWI, and adult support and protection jurisdictions. It was expected that the Document would present models for retention of the sheriff court, or transfer of a tribunal, in the context of a system of graded guardianship. Instead, it proposes that the Office of the Public Guardian should be the forum for all grade 1 guardianships, and that the alternatives of sheriff court or tribunal should apply only to grades 2 and 3 cases. It sets out possible alternative models at those grades.

The Document contains provision for supervision and support for guardians (addressing welfare guardians and property and financial guardians separately), and brief proposals for support for guardians and support for attorneys. It contains proposals for an order for cessation of a residential placement, and creation of a short-term placement. It asks whether, in the event of the proposals in the Document being implemented, there would remain any need for the existing procedure under section 13ZA of the Social Work (Scotland) Act 1968.

The Document asks whether there should be legislative provision for advance directives, though it appears to address advance directives only in relation to healthcare, and not in the normal much broader modern sense.

As regards the scheme of authorisation for medical treatment under sections 47 – 50 of the 2000 Act, the Document proposes that the scope of the existing section 47 certificate be extended to enable the lead medical practitioner to authorise that an incapable adult patient can be prevented from leaving hospital whilst undergoing medical treatment (including diagnostic tests) for a physical illness. It is proposed that there would be no requirement for involvement of a mental health officer. The authority to treat would last 28 days, with the possibility of renewal and a limit (not specified) "on the number of times that this could happen without judicial involvement in the decision".

On medical research, the Document asks whether: "Where there is no appropriate guardian or nearest relative, should we move to a position where two doctors … may authorise … participation …?". A subsidiary question is whether persons preparing powers of attorney should "be encouraged to articulate whether they would wish to be involved health research".

A final question asks whether other matters within AWI legislation would benefit from review or change.

Comment

The grade 1 guardianship proposals would represent, for the first time in Scottish history, a substantial diminution in the rights, and respect for the status, of people with any form of cognitive impairment, in favour of bureaucratic convenience. When the subject of graded guardianship was first tabled by the Public Guardian in 2011, MHDC raised the obvious concerns expressed in a document of July 2012 available here. Grade 1 as proposed appeared clearly to be non-compliant with the requirement of ECHR Article 6 that: "In the determination of his civil rights … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Even more, that would appear to violate Article 8 rights. Throughout history, until now, and since long before ECHR, it has always been accepted that appointment of a guardian (however named) to an adult is a major step in relation to the rights of that adult requiring a judicial process, conducted with great care. Thus, following the introduction of statutory guardianship by the Mental Deficiency and Lunacy (Scotland) Act 1913, the standard text on that Act (bearing the title of the Act, by J Edward Graham, William Hodge & Company, 1914) stated: "… the responsibility put upon the medical practitioners who certify such cases, and upon the Sheriff who grants a judicial order for dealing with them, is a grave one".

The Document does not even address the question of ECHR compliance, nor does it even address the preliminary issues raised in 2012 such as the lack of expertise of OPG in welfare matters. Especially at grade 1, in financial matters the proposals would appear to represent a "fraudster's charter": the applicant will seek financial powers by a tick-box exercise online, there will be no independent reporting and, contrary to all the various miscellaneous procedures under the 2000 Act, the applicant rather than OPG would be responsible for intimation. The process is expressly described in the Document as non-judicial, to the extreme extent of the use of the passive voice at the point of granting of a guardianship order, with no-one identified as responsible for making the order (and thus bearing the "grave responsibility" identified over a century ago): "If there are no objections then the application may be granted after the 21 day period".

It cannot be seen as other than discriminatory that the triggers for the somewhat greater safeguards of grades 2 and 3 would be (a) a financial level, apparently for welfare as well as financial applications, of a specified figure, and (b) the fact that the adult is able to object and in fact objects. It is irrelevant, apparently, that a lower figure than the threshold may represent an adult's entire income and/or capital,

and – contrary to all human rights norms – inability to consent is apparently to be equated with consent.

The Document appears to be based upon many fundamental misconceptions, and to contain contradictions and ambiguities. We have space for only a few examples. It is notable that none of the many consultation questions in relation to the proposed graded guardianship system seek responses from the viewpoint of adults who might be the subject of the procedure, and the safeguarding and promotion of their rights, including their basic rights under ECHR and UN CRPD.

In relation to UN CRPD, it is suggested on page 10 that: "The Scottish Government is committed to fully ratifying the UN Convention". It is not within the competence of the Scottish Parliament to ratify such an international instrument, and in any event (as the Document itself acknowledges elsewhere) in 2009 it was ratified by the UK Government, on behalf of all UK jurisdictions. The task of the Scottish Parliament is to implement UN CRPD.

Chapter Eight commences with an assertion that UN CRPD "emphasises that every available support should be given to a person with a mental disability to maximise their decision-making ability". Article 12.3 of UN CRPD requires States Parties "to provide access by persons with disabilities to the support they may require", not just whatever happens to be available, and to provide it "in exercising their legal capacity", meaning much more than making decisions. That narrowing also appears in misquotation of the 2000 Act: thus, section 1(6)(a) refers broadly to "acting", not – as misquoted in the Document – to "acting on decisions".

Of fundamental significance, on page 7 section 1(3) of the 2000 Act is fundamentally misquoted, by suggesting that "any action or decision taken should be the minimum necessary to achieve the purpose". Crucially, under the 2000 Act it must be "the least restrictive option in relation to the freedom of the adult" consistent with the purpose of the intervention. Granting a guardianship order with the full safeguards of the present process would be likely to be substantially less restrictive in relation to the freedom of the adult than the proposed grade 1 procedure. It is possible that unless the rights of the adult were to be eroded to the extent of reducing the protections of the existing section 1 principles, grade 1 as proposed would never be implemented, as procedures less restrictive of the freedom of the adult would always be available.

Another misrepresentation of the present position under the 2000 Act is in relation to the concept of a "corporate guardian". This topic was discussed in paragraphs 6.45 – 6.60 of the Scottish Law Commission Report No 151 on Incapable Adults (1995) which led to the 2000 Act. The Commission clearly concluded that only an individual should be appointed as welfare guardian, with the one exception of provisions for the chief social work officer. Where the Document suggests on pages 45–46 that: "The chief social work officer will in practice delegate his functions", the Act actually places a statutory responsibility upon the chief social work officer, if appointed guardian, to notify to all concerned "the name of the officer responsible at any time for carrying out the functions and duties of guardian". That concession was made solely because chief social work officers would be likely to hold

more guardianships than they could properly carry full responsibility for. The Document contains no equivalent requirement, in its proposals for corporate guardians, to make an individual responsible and to ensure the suitability and competence of the nominated individual. The only form of corporate financial guardianship envisaged in Report No 151 was the Public Guardian acting as financial guardian of last resort.

The most significant ambiguity in the Document is as to whether the bullet-point list elements on page 12 for determining a significant restriction on liberty apply as alternatives or cumulatively.

Contradictions include the assertion on page 27 that grade 1 guardianship "would be used for day-to-day welfare matters and for managing simpler financial affairs", contradicted by, in the examples of powers on pages 29 and 30, in relation to welfare matters the wide powers to consent to "any medical treatment not specifically disallowed by the Act or procedure or therapy of whatever nature" and, in relation to financial matters, power to borrow money and grant security, to receive or renounce any testamentary or other entitlements, to implement tax-planning or similar arrangements, and so forth. Another is the suggestion on page 51 that there should be "no discretion on OPG at grade 1 to make judicial-type decisions", yet an anonymous official in OPG would carry the "grave responsibility" of making the essentially judicial decision to grant the guardianship order (that being the implication of the remarkable use of the passive voice in describing the actual act of granting the guardianship order, quoted above).

One trusts that significant proposals such as abolishing intervention orders will not have been made without a properly researched evidence base, in that case as to the uses to which intervention orders have in fact been put to date, presumably demonstrating (though this seems surprising) that none of them could have been equally well achieved by a guardianship, and that a guardianship order to such effect would not have been disproportionate. Evidence is also not disclosed in relation to assertions such as the following: "The significant number of cases where a full court process adds little value" (page 10); the implication in "powers that are absolutely necessary" (page 27) that unnecessary powers have been granted, and if so of what nature and to what extent, with demonstration as to how these might be better weeded out under the proposed system; vague assertions such as "We have often heard that in some situations the present guardianship process is too onerous" (page 27) and "We have been told of …" (page 44).

The Document mentions the Essex Autonomy Project Three Jurisdictions Report, but does not appear to incorporate any of the proposals in that report to achieve compliance with UN CRPD. It does not address many proposals for improvement of the 2000 Act made in response to the 2016 consultation. As regards forum, it suggests that there was a proposal to transfer AWI matters to the Mental Health Tribunal. The MHDC proposal was for creation of a new unified tribunal, to include also the adult support and protection jurisdiction, and of course – crucially – to ensure due and proper judicial determination of all AWI matters currently within the jurisdiction of sheriffs (the only proper alternative to that being that all such matters continue to be judicially determined by sheriffs).

Adrian D Ward

RH v RH, [2017] SAC (Civ) 31; 2018 S.L.T. (Sh Ct) 19

Many times in the Report (and previously in the Newsletter) I have wrestled with the many different possible connections between person and place, often under the title "Where am I?". This case concerns a child, not an adult, but it introduces the two further concepts of nationality and "home court". Subject to the important caveat that it does concern a child, the persuasive reasoning of the Sheriff Appeal Court may be found helpful in some adult cross-border situations.

In this case father, mother and child were all American citizens. Mother brought the child to Scotland and both acquired habitual residence in Scotland. On 15th April 2016, mother raised proceedings in Dundee Sheriff Court, seeking a residence order and an interim residence order in respect of the child, and interdict and interim interdict. Five days later, father commenced proceedings in Tennessee for divorce, temporary injunction and a temporary restraining order. Following various further steps in procedure in the Tennessee court, by the time of the present case in Scotland the Tennessee court had granted decree of divorce, had designated mother as custodian and primary residential parent of the child, and had awarded supervised parenting to the father in terms of a parenting plan order. An appeal by the father was outstanding, but a defect in the Tennessee decree had been identified.

The mother applied to Dundee Sheriff Court for a residence order and an interim residence order, and for interdict and interim interdict. On the father's motion, the sheriff sisted the Scottish proceedings on the basis that there were existing proceedings in Tennessee regarding the matters addressed in the mother's application in Scotland, and it would be more appropriate for those matters to be determined in the Tennessee court. The sheriff's conclusions were that (1) the Tennessee proceedings were further advanced, (2) ongoing proceedings in two jurisdictions risked a lack of certainty, (3) the mother's residence in Scotland was precarious, as she had been issued with notice of curtailment of her leave to remain, and (4) the Tennessee court, as the party's "home court", was better placed to determine the child's best interests.

The mother appealed to the Sheriff Appeal Court, which identified as the core issue the interpretation of section 14(2) of the Family Law Act 1986, and its application to the facts. Section 14(2) allows the court to sist proceedings, or (where the Hague Convention on the Civil Aspects of International Child Abduction 1980 applies) request an authority in another contracting state to assume jurisdiction, if (a) proceedings with respect to the matters to which the application relates are continuing outside Scotland; (b) it would be more appropriate for those matters to be determined in proceedings outside Scotland and such proceedings are likely to be taken there, and (c) (where that Hague Convention applies) the court should exercise its powers under Article 8 of that Hague Convention. Applying a dictum of Lord McCluskey in *Hill v Hill*, 1991, SLT 189, the Sheriff Appeal Court considered that the court had discretion as regards both element (a) and element (b) above. The Sheriff Appeal Court however concluded that it should "proceed on the basis that the relevance of the welfare of the child as the

paramount consideration is in the context of which court will decide what orders shall be made, rather than any substantive decision as to what orders ought to be made".

Granting the appeal, the Sheriff Appeal Court held that the sheriff had failed to have sufficient regard to the habitual residence of the child in Scotland. Habitual residence weighed heavily where the child's welfare was the paramount consideration. The court with jurisdiction based on the child's present location was likely to be the most appropriate forum for hearing of evidence, even if any decision might be transient due to uncertainty over the child's future location. Moreover, cases involving children required prompt progression: so long as the child remained resident in Scotland, a determination in Scotland might be required to enforce any decision of the Tennessee court. Accordingly, in practical terms it would be in the overall interests of justice for the proceedings in Dundee Sheriff Court to continue.

Hypothetically substituting for the child in this case an adult lacking sufficient capacity to make an independent decision about travel and residence, it might be that such an adult would be held to have acquired and not lost habitual residence in the United States. Even in that situation, however, some of the grounds on which the Sheriff Appeal Court allowed this appeal might still carry weight.

Adrian D Ward

Glasgow City Council v Scottish Legal Aid Board, [2017] CSOH 155; 2018 S.L.T. 115

In this case, Lord Woolman, in the Outer House of the Court of Session, refused a petition by Glasgow City Council seeking to quash a decision by Scottish Legal Aid Board not to provide information to the Council by an applicant for Legal Aid (the applicant for Legal Aid being referred to in this note as "the applicant") in support of a request by the applicant for review of a refusal of Legal Aid. SLAB refused to provide the information without the applicant's consent. The applicant did not consent. The application sought Legal Aid to reclaim an unsuccessful petition by the applicant for judicial review of assessments by the Council that it would be appropriate to transfer the applicant's "elderly and infirm" mother from care in her own home to care in a residential establishment. The court in the present case held that SLAB was entitled to refuse to supply the information in question in terms of the clear wording of section 34 of the Legal Aid (Scotland) Act 1986.

For the full grounds upon which the court arrived at that decision, see the decision itself. We refer to it here principally for the following point. The lady at the centre of the proceedings had granted a power of attorney in favour of her son. The Legal Aid certificate was granted in name of the mother. The Council contended that SLAB should have granted Legal Aid to the son as attorney. Lord Woolman disagreed. He commented that the son "is using the power of attorney to conduct the litigation on her behalf and in her interests. It seems unduly formalistic to require the Board to endorse the Legal Aid certificate to note his interest as her representative". This is consistent with the more general point that where an adult engaged in litigation has an appointee under any provisions of the Adults with Incapacity (Scotland) Act 2000 who actually conducts the litigation on the adult's behalf, it is the adult

– and not such appointee – who is the party to the litigation, in whose name it should be conducted (see for example *Secretary of State for Work and Pensions v (First) The City of Glasgow Council (Second) IB* [2017] CSIH 35, described in the June 2017 Report) and in whose name ancillary matters such as a grant of Legal Aid should be applied.

Adrian D Ward

Q v Glasgow City Council, [2018] CSIH 5; 2018 S.L.T. 151

The son and attorney referred to in the preceding item did, on his mother's behalf, appeal to the Inner House the decision of the Lord Ordinary dismissing his petition challenging the lawfulness of assessment decisions by Glasgow City Council. The Inner House refused the appeal. The fact that the mother's impairments put her at particular risk of falling might have supported the proposition that she required one-to-one care, did not mean that the Council's conclusion that her needs called for a less intensive degree of care than hitherto was irrational or perverse. The Council was entitled to conclude that the lady's needs were not so different from those of other elderly persons at risk of falls, that while 24-hour care might be necessary, that could be provided in a care home without one-to-one supervision and attention.

We described the case at first instance in the November 2016 Newsletter. As the appeal was successful, we shall not repeat that description of the circumstances and of the decision of Lord Boyd at first instance. For the discussion at appeal, and the grounds upon which Lord Boyd's decision was upheld, see the appeal decision. Here we would simply observe that upon appeal, as at first instance, only limited consideration was given to the mother's views or as to whether she should in fact be removed from her own home against her wishes and placed in residential care. We referred to the right to respect for private and family life under Article 8 of ECHR, which explicitly extends to one's home and which may be interfered with only in the limited circumstances in Article 8.2, and to the several potentially relevant provisions of UN CRPD, including the right under Article 19 of CRPD to choose place of residence and to receive necessary support and services in the residence of their choice.

Adrian D Ward

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Conferences

Conferences at which editors/contributors are speaking

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.

Central Law Training Elder Client Conference

Adrian is speaking at this conference in Glasgow on 20 March. For details, and to book see here.

Royal Faculty of Procurators in Glasgow Private Client Conference

Adrian is speaking at this half-day conference on 21 March. For details, and to book, see here.

Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see here.

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 and to submit papers 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 April. 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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