



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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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.'

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



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Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



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Conferences

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 early 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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