MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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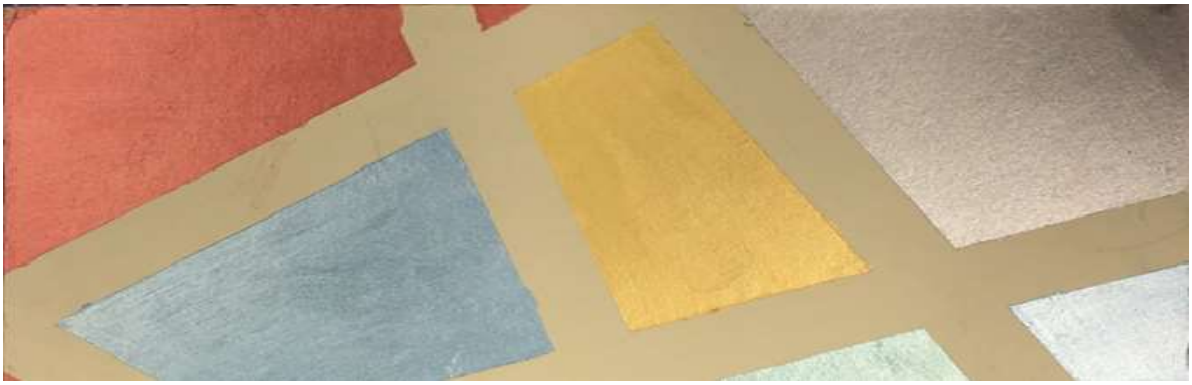

Welcome to the March 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: two cases each on vaccination, how long to keep going with life-sustaining treatment and obstetric arrangements, and important decisions on both family life and sexual relations;

(2) In the Property and Affairs Report: Mostyn J takes on marriage, ademption and foreign law, and updates from the OPG;

(3) In the Practice and Procedure Report: reasonable adjustments for deaf litigants and a new edition of the Equal Treatment Bench book;

(4) In the Wider Context Report: DNACPR guidance from NHS England, NICE safeguarding guidance, reports on law reform proposals of relevance around the world and (an innovation) a film review to accompany book reviews and research corner;

(5) In the Scotland Report: Scottish Parliamentary elections, Child Trust funds and analogies to be drawn from cases involving children.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

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Short note: ademption, foreign law and the MCA 2005

In *Rokkan v Rokkan and Harris* [2021] EWHC 481(Ch), the court had to decide whether a gift in a will adeemed (failed) by virtue of a transfer between bank accounts at a time when the testator lacked mental capacity.

The facts were that the testator held monies in 2 Norwegian bank accounts and in her will made specific bequests of the balances therein. Later and at a time when, for the purposes of a preliminary issue, it was assumed that the testator lacked capacity so to do, she transferred those balances to an English bank.

Section 24 Wills Act 1837 requires a will to be read as if made immediately before death and, therefore, if property specified in a gift has ceased to exist by that point, the gift fails, see paragraph 72. The bank balances in question had ceased to exist, so, unless there was a relevant exception to the rule, the gift in question failed.

The beneficiary relied on the MCA 2005, Sch. 2, para 8, which provides that if a deputy appointed on behalf of a person without capacity (P) makes a disposition of property, and under P's will or intestacy any person would have taken an interest in the property but for the disposal, that person takes the same interest in any property representing the original property as circumstances allow. This re-enacts s.101 of the Mental Health Act 1983.

He also relied on *Jenkins v Jones* (1866) LR 2 Eq. 323 where the testator made a specific gift of farm stock to his son; after he had lost capacity his wife and son (without the authority of the testator) sold farm stock and kept the proceeds in a separate account. The court held that as the conversion of the property was not the act of the testator the gift did not adeem and that it attached to the proceeds.

The court distinguished the latter on the analysis that the transfer had been made without authority (paragraph 85) and held that the former did not assist as, if the beneficiary's argument was right, then the section would not be necessary (paragraph 87).

The court upheld the orthodox position that ademption is not based on intention and the issue is simply one of looking at the fact of what

has happened (paragraph 89) and found that the gift had indeed adeemed and therefore failed.

The major part of the case considered conflict of laws in relation to succession and is an interesting read from that point of view too.

Marriage – the components of capacity revisited

NB v MI [2021] EWHC 224 (Fam) (High Court (Family Division)) (Mostyn J)

Mental capacity – marriage

Summary

In this case Mostyn J considered – and refused – an application for a declaration under the inherent jurisdiction that NB's Pakistani marriage to her husband MI was not valid as a marriage in this jurisdiction and thus, with the court's grant of a necessary extension of time, annulled.

The judgment is effectively in two parts. The first is an analysis and determination of NB's case. The second, from paragraphs 43 to 100, following which the court returns, briefly, to NB's case, is more of a treatise on the law of marriage and the power of the court – or lack thereof - to declare that a marriage was void at inception.

As to the first half, NB was, at the time of the hearing, a young woman in her early thirties of a "*Pakistani family, resident in England*." In 1995 aged 6 she was involved in a car accident as a result of which she suffered a "*catastrophic brain injury*" resulting in mental health difficulties and an impairment of cognitive functioning. A damages claim was settled for a large sum, and the money managed by a Deputy.

Interestingly – and very encouragingly – by 2019 NB was considered to have regained capacity such that her Deputyship was discharged: she was considered able to manage her property and affairs.

The application concerned NB's marriage which she had entered into in 2013 in Pakistan with MI. MI, having consummated the marriage and spent a number of weeks with NB in Pakistan shortly thereafter had otherwise been entirely absent from the marriage, living in Dubai, and apparently demonstrating little interest in pursuing a "married life" with his wife.

Mindful of her significant assets as a result of her personal injury award, NB brought an application to court for a declaration either that the foreign marriage should not be recognised or that it should be annulled. MI did not respond to the application. The court set out the nature of the application thus:

> *These are the questions that fall for determination:*
>
> *i) Did the applicant lack capacity to consent to marry on 1 June 2013?*
>
> *If yes:*
>
> *ii) Does the court have power under its inherent jurisdiction to declare that the marriage between the applicant and the respondent, valid according to the law of Pakistan, is not recognised as a valid marriage in this jurisdiction, and if so, should the power be exercised?*
>
> *iii) Should time be extended under s.13(4) of the Matrimonial Causes Act 1973 to permit the applicant's nullity petition to be heard?* (paragraph 9)

What follows in the judgment is a consideration and clarification of the – somewhat out of date – case law on marriage, much of which still derives from Munby J's *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326 which is now of course almost 20 years old. Mostyn J considers the evolution of modern marriage, the fact that many marriages, both historically and now, do not concern either procreation or indeed sex, and that many do not involve cohabitation. He specifically doubts the judgment of Parker J in *London Borough of Southwark v KA and Others* [2016] EWCOP 20 at paragraph 76, suggesting that capacity to enter into sexual relations is a requirement for capacity to marry, observing at paragraph 15:

> *It is possible to envisage a person lacking the mental and physical capacity to choose to engage in sexual relations, perhaps as a result of traumatic injury, but who nonetheless has full capacity to take a wife. Similarly, a couple may marry and live together tanquam soror vel tanquam frater (as sister and brother - see below). In X City Council v MB, NM and MAB Munby J at [62] helpfully reminded us of Briggs v Morgan (1820) 3 Phill Ecc 325 at 331-332, where Sir William Scott said it may be that a marriage "at a time of life when the passions are subdued" is "contracted only for comfortable society", the spouses being "fairly left to just reflection and more placid gratifications". Needless to say, these are all perfectly valid marriages.*

Gathering together the existing case law, Mostyn J set down a set of "straightforward propositions", namely:

> *i) The contract of marriage is a very simple one, which does not take a high degree of intelligence to comprehend.*
>
> *ii) Marriage is status-specific not spouse-specific.*
>
> *iii) While capacity to choose to engage in sexual relations and capacity to marry normally function at an equivalent level, they do not stand and fall together; the one is not conditional on the other.*
>
> *iv) A sexual relationship is not necessary for a valid marriage.*
>
> *v) The procreation of children is not an end of the institution of marriage.*
>
> *vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.*
>
> *vii) There may be financial consequences to a marriage and following its dissolution. But it is not of the essence of the marriage contract for the spouses to know of, let alone understand, those consequences.*
>
> *viii) Although most married couples live together and love one another this is not of the essence of the marriage contract.*
>
> *ix) The wisdom of a marriage is irrelevant."*

Accordingly, while two out of the three capacity reports considered that NB lacked the requisite capacity to enter into a marriage in 2013, Mostyn

J preferred the evidence of the sole expert who concluded that she possessed it.

Mostyn J observed that NB was asked what ramifications of the marriage she did not understand and her reply was she did not understand their financial differences; how the respondent would live here; what work he would do; or whether he would be prepared to sign a prenuptial agreement. However, he determined (at paragraph 35):

> *In my judgment the law does not impose on this applicant a requirement to be able to understand the full ramifications of marriage and specifically the question of where her husband might choose to live, or his involvement in the management of her damages. The fact that she might find it distressing to spend less time with her family while her husband to come to England says nothing at all about her capacity to consent to marriage…..*
>
> *39. The evidence given by the applicant satisfies me fully that she had capacity to marry. She was fully aware of the simple nature of the contract and that by an exchange of vows a union was created with mutual expectations of comfort, society and assistance. That she was not aware, and may not have been capable of being made aware, of the potential financial ramifications of marriage; of her husband's intentions as to residence and work; of whether he would sign a prenuptial agreement; or of any potential claim he may have against her on divorce is nothing to the point. None of these things tell me anything about her capacity to marry in June 2013. Again, they may tell me quite a lot about the wisdom of the marriage she entered into, but that is quite another matter.*

Accordingly, he refused to grant the applications sought albeit that he sought to give some comfort to the applicant by concluding his judgment with observations to the effect that, in the event she were to pursue divorce proceedings,

> *the prospects of the respondent succeeding in a claim for ancillary relief is vanishingly remote. The award of damages to the applicant was calibrated by reference to her needs, and compensation for her pain and suffering. This marriage never functioned as a marriage and accordingly I find it impossible to conceive of any circumstances, even were the respondent to suffer grave hardship, where he could mount a plausible claim against the applicant* (paragraph 112).

In the second half, provided in the event "a higher court disagrees with my primary finding" (paragraph 42) and therefore and strictly obiter, Mostyn J goes on to provide a fascinating history of the evolution of the law of marriage throughout the twentieth and early twenty-first century – dipping back to the seventeenth century as necessary.

Mostyn J's key concern was the practice of the court in seeking to avoid the statutory prohibition s.58(5)(a) of the Family Law Act 1986 that "No declaration may be made by any court, whether under this Part or otherwise - that a marriage was at its inception void." The judgments in *KC & Anor v City of Westminster Social & Community Services Dept. & Anor* [2008] EWCA Civ 198 and *Re RS (Capacity to Consent to*

Sexual Intercourse and Marriage) [2015] EWHC 3534 (Fam) both come for criticism in this regard: only Holman J in *A Local Authority v X & Anor (Children)* [2013] EWHC 3274 (Fam) is applauded for his refusal to grant the application sought – as Mostyn J observes (at paragraph 79):

> *A different, and to my mind more principled, approach was taken by Holman J in A Local Authority v X & Anor (Children) [2013] EWHC 3274 (Fam). This was a similar case where a local authority sought, pursuant to the inherent jurisdiction, a declaration of non-recognition of the marriage in Pakistan of X, a girl then aged 14. Although that marriage was valid under the laws of Pakistan, it was completely invalid, and void ab initio under English law on the ground of non-age: s.11(a)(ii) Matrimonial Causes Act 1973. Holman J refused the application stating: "I would be bypassing and flouting the statutory prohibition in section 58(5) of the 1986 Act by a mere device. I cannot do that and I am not prepared to do that." He held that there was nothing to prevent X petitioning for a decree of nullity.*

Hayden J, in contrast, is criticised for the approach adopted in *Re RS (Capacity to Consent to Sexual Intercourse and Marriage)* [2015] EWHC 3534 (Fam), a case concerning a 24-year-old man, who suffered from intellectual disability and autism spectrum disorder, who was married in Pakistan. The marriage was valid under the laws of Pakistan. The evidence was that he could not validly consent to the marriage in consequence of unsoundness of mind. Accordingly, it was an invalid, albeit voidable, marriage under s.12(1)(c) Matrimonial Causes Act 1973. Hayden J, however, accepted submissions made on behalf of the local authority that as a marriage that could not lawfully have been conducted in England, it could be declared void at the time of its inception on the grounds of public policy and in "*the interests of justice, fairness and respect for different aspects of individual autonomy*" (paragraph 52). Mostyn J, deprecating this approach, held:

> *84. For my part I must respectfully part company with this reasoning. I cannot shrink from the conclusion that the statutory prohibition in s.58(5)(a) of the Family Law Act 1986 has been, to use the words of Holman J, bypassed and flouted. I can see the temptation of a judge to find some kind of loophole where nullity proceedings are impossible, whether in consequence of want of jurisdiction, or because they are out of time. But this scenario was expressly considered by the Law Commission, and therefore impliedly by Parliament, which decided that the statutory prohibition should be unyielding even in those circumstances. Parliament could have inserted an exception on the ground of public policy but it chose not to do so.*

Even Sir James Munby does not escape criticism. The decision in *X City Council v MB, NM and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 96, again concerning a marriage of a 25 year old who undoubtedly lacked capacity to marry but whose parents wished him to marry in Pakistan. In that case Munby J (as he then was) made two declarations:

> *1. MAB does not have the capacity to marry.*
>
> *2. Any purported marriage by MAB whether celebrated inside or outside*

> *England and Wales will not be recognised in English law.*

Mostyn J observed:

> *87. There is no reference in the judgment to ss. 55 and 58 of the Family Law Act 1986. Nor is there any reference to the public policy power of non-recognition of an unconscionable foreign legal construct.*
>
> *88. In circumstances where no ceremony of marriage has taken place the statutory code does not directly apply. It only applies where a ceremony of marriage has taken place. Therefore it is not in direct violation of s.58(5)(a) for anticipatory declarations of this nature to be made. The first declaration only speaks to MAB's capacity at the time it was made and it is a truism that capacity can and does fluctuate. Therefore if MAB were to go through a ceremony of marriage at a later date his capacity at that point would have to be reassessed. However, the declaration is a useful record of the judicial finding of MAB's capacity to marry at that point in time.*
>
> *89. With respect, I cannot agree with the second declaration. It addresses a marriage at some point in the future. If MAB had recovered his capacity to marry at that point then it would be valid under English law. But if he had not, and his incapacity to consent to marriage endured, the declaration would be in conflict with the statutory prohibition. It could only be granted by application of the stringently exceptional public policy power which I have set out above. That is not referred to in [36] where the grant of the declaration is explained.*
>
> *I do not dispute the existence of the general power not to recognise, exceptionally, an unconscionable right, power, capacity, disability or legal relationship arising under the law of a foreign country. However, in a case where the statutory prohibition applies, the exercise of this power, if not in fact blocked by the prohibition (see above), must be very highly exceptional…*

Comment

In the second half of the judgment which, as we noted, is obiter, Mostyn J was ultimately primarily concerned less with the conclusions the courts reached in the majority of these cases rather, the manner in which they reached them. Much of this (lengthy) judgment might therefore be of academic rather than practical interest. It is, however, extremely helpful in its elucidation and updating of the position with regard to capacity to marry, and the issue as to whether capacity to enter into sexual relations is a requirement for capacity to marry is an issue where there is now a frank (live) dispute between different High Court judges.

Modernising lasting powers of attorney

In a blog on 16 February 2021, the OPG introduced the project the Ministry of Justice (MoJ) and the Office of the Public Guardian (OPG) are working on to modernise lasting powers of attorney.

The project aims to:

- increase safeguards for the donor
- improve the process of making and registering a lasting power of attorney

(LPA), for donors, attorneys and third parties

- Keep LPAs as affordable as possible whilst ensuring OPG is working sustainably
- In the spring of 2021, the Ministry of Justice intends to launch a public consultation on changes to the legal framework for LPAs.

For more information, details and updates on the modernising LPA work visit this new site.

If you would like to register your interest in assisting with our research and engagement, please fill in this contact form.

Use a lasting power of attorney – more LPAs are now eligible

In a blog on 4 March 2021, the OPG announced that the Use an LPA online service would be extended for use in relation to LPAs registered on or after 1 September 2019 (the cut-off date having been 17 July 2020).

The service enables users to share details of their LPA with third party organisations. The service has proven to be successful and saved many attorneys time and hassle by reducing the need to post out an LPA for validating with an organisation.

Getting started as an attorney or deputy

In a blog on 9 March 2021, the OPG sought to give some useful tips and ideas on how to make sure that attorneys and deputies getting started get off on the right foot.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

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

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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. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Adrian is speaking at a webinar organised by RFPG on 25 May at 17:30 on Adults with Incapacity. For details, and to book, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition 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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