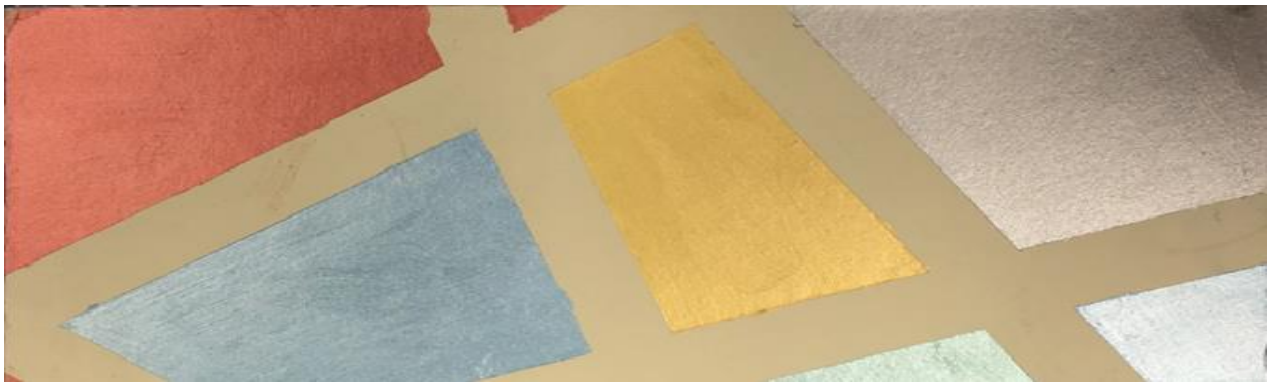

Welcome to the March 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Capacity to refuse treatment while on a CTO and deprivations of liberty for children;

(2) In the Property and Affairs Report: testamentary capacity;

(3) In the Practice and Procedure Report: naming P, public or private hearings, judicial visits and litigation capacity;

(4) In the Wider Context Report: voting rights and disability, sufficiency of care and Article 8, and Article 2 inquests;

(5) In the Scotland Report: Guardians' remuneration and the Scottish Mental Health Law;

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides.

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

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Unofficial guide to the Mental Capacity Act and Deprivation of Liberty Codes of Practice

There are two Codes of Practice to the Mental Capacity Act 2005, one for the main body of the Act, and one for the Deprivation of Liberty Safeguards. They are statutory Codes: they have been approved by Parliament, and the MCA 2005 requires certain people to have regard to them. Those people include anyone acting in a professional capacity. Neither Code of Practice has ever been updated since they were published, the main Code in 2007, and the DoLS Code in 2009. They are both out of date in significant ways. As part of the coming into force of the Mental Capacity (Amendment) Act 2019, we had anticipated that there would be a new Code published which would (in one place) update the main MCA Code and give guidance as to the operation of the Liberty Protection Safeguards. However, the LPS have been delayed and, whilst we anticipate that there will be a consultation on the draft Code in 2022, it appears likely that professionals will be stuck operating two out of date Codes for some time.

Whilst professionals have to have regard to the Codes, they can – and should – depart from them where they have been superseded by case-law which makes clear what the Act itself, the source of the law. Alex, Tor and Neil have prepared an **entirely unofficial** guide to those

parts of the two Codes which are most obviously out of date.

Capacity to refuse treatment while on a CTO

Re Q [2022] EWCOP 6 (Hayden J)

Mental capacity - medical treatment

Medical treatment – advance decisions

Mental Health Act 1893 – Interface with MCA

Summary

Q was a 50 year old woman with longstanding bulimia nervosa, and diagnoses of various mental health disorders including EUPD and recurrent depression, arising from childhood sexual abuse and trauma. She had been detained under the MHA 1983 at the start of 2021 and discharged from hospital 8 months later under a Community Treatment Order (CTO). One of the conditions of the CTO was that she attend hospital for treatment for extremely low potassium levels, which were caused by her eating disorder. The CTO also required Q to 'engage constructively with all health professionals in the management of the consequences of the eating disorder' and gave examples of the sort of treatment that might be required including weekly blood tests, oral medication, and if that was not sufficient, admission to hospital for further treatment.

The applicant trust, who were providing this treatment, sought declarations in the Court of Protection as to her capacity to make decisions about the treatment and as to whether Q had capacity when she created an Advance Decision to Refuse Treatment (ADRT) for low potassium levels, even if that meant her life would be at risk. The ADRT had been signed prior to the CTO being put in place.

The court held that Q had capacity to make relevant medical treatment decisions and that her ADRT was valid. Q accepted that she was only alive because of the requirements of the CTO, and that she complied with them under duress. There was no question that Q was able to understand and retain the relevant information – the question was whether she could use or weigh the information. The independently instructed psychiatrist, Dr Glover, was of the view that she could not, because of her *"pervasively low self-esteem and hopelessness"*. Q's treating doctors were less persuaded that her sense of worthlessness was as pervasive as Dr Glover had found.

When interviewed, Q rejected the proposition that three short visits to A&E in the space of 5 months to keep her alive was a relatively small price to pay for her continued existence, and the things in life which gave her pleasure.

The court also held that Q had capacity to conduct the proceedings, and that there was no inconsistency in the possibility that Q might have litigation capacity but lack subject matter capacity. Hayden J cast doubt on the view expressed by Mostyn J in *An NHS Trust v P* [2021] EWCOP 27 (echoing sentiments first expressed by Munby J in *Sheffield City Council v E* [2005] Fam 326) that it would be virtually impossible to have capacity to conduct proceedings about a matter in respect of which a person lacked capacity.

Comment

It is unfortunate that this judgment does not explain the legal frameworks of the MCA and MHA and their application in the context of advance decisions to refuse treatment.

As a community patient, should Q at any stage lose capacity to make relevant treatment choices, the ADRT would have effect even though it arguably refuses treatment for a mental disorder. Paragraph 24.54 of the MHA Code of Practice states that *"treatment cannot be given to CTO patients who have not been recalled to hospital (part 4A patients) contrary to a valid and applicable advance decision."* Q could nevertheless be recalled to hospital to receive life-saving treatment under the MHA powers.

As a detained patient, she would not be able to refuse treatment for her mental disorder through an ADRT, and there is caselaw which suggests that treatment of the sort Q required is properly viewed as treatment for her mental disorder, even though it is treatment for a physical manifestation of the disorder (see for example *Nottinghamshire Healthcare NHS Trust v RC* [2014] EWCOP 1317). The validity of the ADRT would be strictly irrelevant if Q was recalled to hospital.

Given that Q presently has the relevant decision-making capacity, the ADRT is irrelevant in any event. The CTO conditions cannot be forced upon her against her wishes while she remains a community patient, in any event.

The purpose of the Trust's application may have been to seek a declaration that it was lawful not to impose treatment on Q, notwithstanding that it could in principle be provided under the Mental Health Act. The overall conclusions of the judgment would not be determinative of future decisions by Q's responsible clinician, but would likely be relevant in considering the use of discretionary powers under the MHA. The court's judgment that Q had capacity and her ADRT was valid would likely also inform future decisions by clarifying that there is no option to force treatment on her outside of an MHA detention.

Deprivations of liberty for children

Re AB (A Child: human rights) [2021] EWFC B100 (Mr Dexter Dias QC, sitting as a High Court Judge)

Article 5 ECHR – Children and Young Persons

Inherent Jurisdiction

Summary

AB was 13 and a special guardianship order was made in favour of his paternal grandmother as his parents were unable to care for him. He was diagnosed with autism, oppositional defiant disorder and attachment issues, and further problems developed leading to an interim care order by which he was placed in foster care. Those carers were similarly unable to care for him due to his complex needs and emotional dysregulation, so he was placed in a privately run care home. He was unlawfully deprived of liberty for 4 months because no application was made by the local authority despite repeated request by the Children's Guardian:

> *4. I have emphasised in proceedings that this historic illegality is a matter of the gravest concern to the court. This court exercises its inherent jurisdiction not as a mere technicality, but as a constituent part of the rule of law. To have a person confined without lawful authority, and particularly a child, and particularly an exceedingly vulnerable child, is a matter of the utmost seriousness. It is a fundamental interference with the child's rights under the European Convention on Human Rights and the UN Convention on the Rights of the Child.*

Following the delay, an application to authorise AB's deprivation of liberty was made but issues arose regarding the placement. He had been physically restrained 17 times whilst there and a scathing report was produced by two Ofsted inspectors. AB was in a neglected, chaotic and unsafe environment, whose living conditions shocked even senior managers of the company that operated the home. Its registration was immediately suspended, action was taken against staff, and the children were moved out.

In relation to the new placement, the local authority applied for the following restrictions to be authorised for AB under the inherent jurisdiction of the High Court:

1. Inability to have access to gaming technology except for devices and games that are agreed by staff, and except during times agreed by the staff for AB to engage in gaming.
2. Not being allowed in a peer's room without being supervised for the safety of both AB and his peers.
3. Inability to leave the placement on his own due to his age and his limited understanding of safety and his local area.
4. AB to receive 1:1 support where he is supervised by a member of staff for 8 hours a day.

Looking at the three elements of a deprivation of liberty, the judge held that these restrictions far exceeded what would be imposed on a non-disabled 13-year-old and therefore amounted to confinement. He was not satisfied that AB validly consented to it, with serious concerns as to whether he was *Gillick* competent to a meaningful level. With the State being responsible, the circumstances therefore amounted to a deprivation of liberty. As to whether to authorise it in AB's best interests, after the turmoil of the previous placement, the judge found that the current one met his welfare needs and authorised the arrangements to protect AB from significant harm. The local authority no longer sought authorisation to restrain, there having been no incidents at the new placement.

Comment

The judgment, which only recently appeared on Bailii, contains a helpful and comprehensive summary of the relevant jurisprudence, and the various regulations and inspection provisions relating to children. The liberty deprivation was authorised under Article 5(1)(d) ("educational supervision") on a best interests basis (para 80), double checked by a necessity and proportionality test (para 93). The judge emphasised the positive obligations on not just the local authority but also on the Children's Guardian to take proactive steps, such as to restore the matter to court, to prevent avoidable safeguard lapses if others failed to do so (paras 177-179). There is also a set of conclusions in an Appendix to the judgment which may helpfully provide a roadmap of issues for parties and judges in similar cases:

> *Stage 1. AB's Art. 5, Art. 8 and Art. 3 ECHR rights and Art. 3 and 37 UNCRC rights are engaged.*
>
> *Stage 2. The necessary conditions for a s.25 Children Act 1989 order are not satisfied, therefore the appropriate legal pathway to seek authorisation of the deprivation of AB's liberty is the inherent jurisdiction of the court.*
>
> *Stage 3. The two conditions for invoking the inherent jurisdiction are satisfied:*
>
> *Condition 1: the circumstances of AB's placement at Ford Cottage constitute a deprivation of liberty: he is unable to consent to his confinement; he is subject to continuous supervision and control; he is not free to leave. Further, the circumstances meet the Storck test:*
>
> *(a) The confinement is for a not negligible period of time;*
>
> *(b) AB cannot and does not validly consent to the confinement, nor is there anyone who shares parental responsibility for him who can;*
>
> *(c) The confinement is attributable to the responsibility of the State.*

Condition 2: the deprivation is in AB's best interests considering his welfare holistically, in light of his complex presenting needs and how the arrangements can support and promote his welfare and development.

Leave: The statutory leave conditions under s.100(4) Children Act 1989 are satisfied and the court grants the local authority leave because:

(a) No other order would succeed in keeping AB safe;

(b) There is reasonable cause to believe that without exercising the court's inherent jurisdiction, AB is likely to suffer significant harm.

Proportionality: The deprivation sought is necessary and proportionate:

(a) Protecting AB from significant harm is a sufficiently important and legitimate aim to justify significant curtailment of his Art. 5 ECHR rights;

(b) The measures sought by the local authority are rationally connected to and further the protection of his safety and promotion of his welfare;

(c) Less intrusive measures would unacceptably compromise his personal security and welfare, rendering the measures necessary;

(d) The balance between liberty and welfare has been struck in a proportionate way: the benefit of safeguarding AB's welfare outweighs the intrusion into his protected rights.

PROPERTY AND AFFAIRS

Testamentary capacity: when to get a medical assessment of capacity

Skillett v Skillett [2022] EWHC 233 (Ch) (Philip Mott QC, sitting as a Deputy High Court Judge)

Mental capacity – Testamentary capacity

In this case, the court (Philip Mott QC sitting as a deputy High Court judge) had to determine issues relating to testamentary capacity and knowledge and approval.

As regards the former, the case is a good example of how the court approaches the issue, in particular the question of what approach the court should take to the evidence of a solicitor who has seen the testator, prepared a will and supervised its execution.

The solicitor was a private client solicitor of many years standing and the testator was 78 and suffering from Parkinson's disease. The solicitor found no reason to doubt T's capacity and did not ask for a medical practitioner to witness or approve the will having assessed T's capacity.

In the end, having heard from lay and joint expert witnesses, the court held T capacitous but remarked that the litigation may have been avoided if that step had been taken (see para 32).

A separate issue arose regarding knowledge and approval. It was said that the aim of the will was to achieve equality between the siblings. One was left a piece of land, said to be worth £50,000, the others £50,000 each and the residue split equally.

The land had increased in value so the sibling who got the land benefitted more than the others. One of the disappointed siblings, who opposed the grant, argued that T had not the required knowledge of the consequences of the disposition.

The court rejected that saying that an oversight or change in circumstances is not sufficient to invalidate a will (see para 72). As a practice point, a will drafter might want to point out to T the possibility of changes in circumstances undermining assumptions and record the response.

PRACTICE AND PROCEDURE

Naming P

Manchester University NHS Foundation Trust v Verden and McClenan [2022] EWCOP 4 (Arbuthnot J)

Media – Anonymity

Summary

This was the ex tempore judgement arising from an application made by Ms McLennan to vary the Reporting Restriction Order made in this case not to name the subject matter of the proceedings (P), her son, William Verden.

William is a 17 year old boy who suffers from steroid resistant nephrotic syndrome. He is in end stage renal failure and needs ongoing dialysis or a transplant to stay alive. William has diagnoses of moderate to severe learning difficulties, autism and ADHD with accompanying behavioural disturbances.

The matter came before the court as a result of a dispute between the Trust and Ms McLennan as to whether it is in William's best interests to have a kidney transplant. An RRO was made on the papers on 31 December 2021. Neither the Court nor the Official Solicitor knew at the time that order was made that there had been significant media coverage about William and his medical situation in the four to six weeks before the Trust made its application.

Ms McLennan made the application because she wishes to launch a public appeal to find a living kidney donor for William and so wishes to be able to publicise his case to encourage an altruistic donor to step forward.

The Court carried out a balancing exercise between William's article 8 rights (in circumstances where he was in favour of media coverage and publicity if it means he will get a new kidney), and article 10 rights (in circumstances where there has already been media coverage of William's 'story'). The Court held that it was proportionate to accede to the application.

Comment

While this decision is perhaps unsurprising given the facts, it is worth noting as a point of practice that the Court now expects those who make applications for RROs in the future to include details of any media coverage that has taken place.

Public or private hearing?

Kent County Council v P & NHS Kent & Medway Commissioning Group [2022] EWCOP 3 (Lieven J)

Media – Private hearings

Summary

The issue for determination by the Court was whether the Court of Protection proceedings which had since they first come before the Court been heard in private, should now be heard in public, and whether a judgement should be published.

The case concerned P, a 21 year old woman who was found by the police in a state of extreme neglect. It is not made express in the judgment, but it can be inferred that she was at the time in the care of her parents. More than two years later, the police have still not made a decision as to whether or not to bring charges (presumably against the parents). P has since been moved to her own accommodation where she is supported by a team of carers.

The local authority supported the continuation of the Court's decision to hear the case in private on

the basis that there was a risk that P would be identified relatively easily were the matter to be heard in public because of the 'almost unique nature of the case'. There was also said to be evidence that P becomes upset if she considers that people are talking about her, and that she appears to be concerned about her privacy. This position was supported by the Official Solicitor, who emphasised the personal and intimate information which was before the Court.

Representations and evidence were received by the Kent Police, who also submitted that the proceedings should remain in private. They argued that to allow any public reporting would interfere with the "integrity" of any future trial. Mrs Justice Lieven considered that these concerns were 'significantly overstated'.

In carrying out the balancing exercise between the public interest in holding the proceedings in public (protected by article 10 of the ECHR) and the countervailing factors (here, P's privacy protected by article 8 of the ECHR and a potential impact on any future criminal trial), the Judge concluded that the balance came down in favour of allowing the public to attend the proceedings, and the press to report on them. A factor that appears to have been of significant in this process is the fact that (contrary to what the Judge had hoped for P at the start of proceedings), P had not engaged very much with the outside world, and so the chances of her hearing any reports on the proceedings were slim.

Comment

There are not many judgments on the question of whether a hearing should be in private or in public. What is interesting about this one, is the specificity with which the Court analysed the impact on P of the proceedings being in public, taking account of the changing way in which P presented.

Judicial Visits to P

Official Judicial Visits to P (Guidance) [2022] EWCOP 5 (Hayden J)

Following the case of *AH*, in which the Court of Appeal expressed the "pressing need" for guidance in relation to judicial visits, the Vice-President of the Court of Protection has issued guidance on 10 February about such visits. In it, he sets out principles to apply and practicalities required to give effect to those principles. He has also taken the opportunity to re-issue guidance previously issued by the former Vice-President in 2016, which covers a wider range issues relating to participation of P and vulnerable persons in the Court of Protection.

The guidance applies generally to cases in the Court of Protection (health and welfare, property and affairs and serious medical treatment). The Vice President noted that in cases where P is unlikely to be conscious or communicate effectively and there are no available means of improving this situation, *'a visit by the Judge was generally regarded as unlikely to yield any forensic value and perhaps even cause avoidable delay.'* [2]

A decision to visit P is always a matter for the individual judge, and the guidance is 'suggestive only' and not *'intended to be a comprehensive checklist of the matters which need to be considered. It is not in any way to be taken as an indication that judicial visits will ordinarily be necessary.'* [4]

The guidance sets out the key principles for judicial visits at [6]:

I. S.4(4) Mental Capacity Act requires a best interests decision maker to '*so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.'* The guidance *'emphasise[s] the mandatory nature of this obligation.'*

II. A decision to meet P is one which must be taken by the judge, having listened to any representations made on behalf of the parties. In particular, there should be discussion directed towards identifying a clear understanding, of the scope and ambit of the visit.

III. However, it is in the nature of such visits that the parameters may become unsettled or expanded by events and exchanges. It is, important to emphasise that:

i. a judge meeting P will not be conducting a formal evidence-gathering exercise;

ii. a visit may serve further to highlight aspects of the evidence that the Judge has already heard, in a way which reinforces oral evidence given by either the experts or family members;

iii. a visit may sometimes lead the Judge to make further enquiries of the parties, arising from any observations during the visit;

iv. at any visit the Judge ***must*** *be accompanied, usually, by the Official Solicitor or her representative (at Tier 1 and 2 this will usually be the instructed solicitor);*

v. it will be rare for a member of P's family to be present at a Judicial visit. In principle, this should usually be avoided;

vi. a note ***must*** *be taken of the visit and quickly made available to the Judge for his or her approval. That note should be circulated to the parties for them to consider and where appropriate to make any representations arising from it;*

vii. where the Judge considers that information from, or the experience of, visiting P may have had or might be perceived to have had an influence on the 'best interests' decision, the Judge must communicate that to the parties and, where appropriate, invite further submissions

The guidance also sets out a number of practical issues on which the parties should assist the court by providing [7]:

i. ***information helping to inform the judge*** *as to whether a visit to P (remotely or otherwise) is likely to be required;*

ii. ***what practical steps require to be taken to facilitate a visit****. Where an in-person visit is canvassed, any relevant risk factors should be identified, and measures thought necessary to mitigate risk. Most judicial visits at Tier 3 are to hospitals which will have their own protocols in place. These have been amended regularly during the course of the pandemic. The formal HMCTS sanctioned risk assessment process, where it is applicable, should apply to Tier 3 judges;*

iii. ***whether there is any specific assistance that can be given to the judge*** *to facilitate communication with P most effectively. In this*

> *respect, it will always be helpful to have regard to Charles J's guidance at para. 14 …*
>
> *iv.* ***who will attend the visit*** *with the judge? Where the Official Solicitor is appointed as litigation friend for P, the expectation is that the attendance would be by a representative from the office of the Official Solicitor. In any other case, the parties should consider, with the judge, who should attend; and*
>
> *v.* ***who will take the note of the visit*** *(audio- or video-recording will not be used to assist in the production of the note unless specifically sanctioned by the Judge).*

Litigation capacity in personal injury proceedings and in the Family Court

Meric v Navis [2022] EWHC 221 (QB) (Robin Knowles J)

Practice and Procedure – other

Summary

In *Meric v Navis* [2022] EWHC 221 (QB), a claimant in a complex personal injury case on whose behalf the Official Solicitor no longer felt able to act, was found to retain the necessary capacity to conduct proceedings on his own behalf.

Meric v Navis was an appeal and a series of applications heard before Mr Justice Robin Knowles, all on behalf of or concerning the Official Solicitor, seeking to terminate her appointment as the Claimant's litigation friend.

The underlying case concerned a £750,000 damages claim arising out of a road traffic accident for which liability had been admitted. Both parties had made allegations of dishonesty in the course of proceedings. The claimant had at times had legal representation, at other times he had been a litigant in person. At the time the Official Solicitor agreed to act, the claimant had had experienced personal injury solicitors acting on his behalf; by the time of the applications, the claimant had parted company with his solicitors and the Official Solicitor felt unable to instruct replacements with the necessary experience in personal injury. [23]

On the conduct of proceedings, Knowles J observed that it was "unusual, even inappropriate" [13] for a third-party insurer to be present at an application to appoint a litigation friend, such matters being the concern purely of the individual said to lack capacity and the prospective litigation friend.

The Official Solicitor made clear to the court that she did not have the resources or skill to represent parties in complex personal injury cases. Despite an individual offering his services and attending court, Knowles J noted that no appropriate alternative litigation friend had been found. As he observed [27-8]

> *This of course leaves the wider issue of what becomes of a litigant who lacks capacity but where the Official Solicitor is not in a position to continue to be litigation friend, and no other litigation friend is available. To this the only answer currently offered is that the litigation cannot proceed; that is, that the person lacking capacity is effectively deprived of the opportunity of establishing their claim. It is possible to imagine a case where the claim was central to the person's long term wellbeing or livelihood.*
>
> *That this should be the only answer currently offered to that wider issue is beyond unsatisfactory. As an answer it would plainly require testing by reference*

to Article 6 of the European Convention on Human Rights and Fundamental Freedoms."

Fortunately, given his observations above, having had the benefit of seeing the Claimant present his case live in person over the course of a day, Knowles J felt able to reach the conclusion that the Claimant in fact *had* litigation capacity [34]. This was despite two previous findings that the Claimant lacked capacity to conduct proceedings. With the caveat that capacity is a time-specific assessment which could change over time, Knowles J noted that in the present circumstances he felt able to discharge the Official Solicitor as litigation friend and the case was able to proceed.

Richardson-Ruhan v Ruhan [2021] EWFC 6 (Mostyn J)

Practice and Procedure – other

In *Richardson-Ruhan v Ruhan* [2021] EWFC 6 Mostyn J revisited a case which had been running for some five years ([2017] EWHC 2739) concerning whether the former husband of a divorcing wife remained "vastly rich" as she alleged, or had in fact lost all of his money to fraudsters. Mostyn J had then concluded that, rather than being worth nothing, the husband should be treated as having £12m for the purposes of a distributive award. In the 2021 judgment, Mostyn J considered the question of the wife's capacity to conduct proceedings in circumstances where she had become mentally unwell, was seeking treatment and had parted ways with her previous legal representatives. This issue of the wife's capacity arose in the context of a number of linked applications regarding the distribution of her former husband's assets.

Mostyn J considered the application of the classic common law test of Chadwick LJ in Masterman-Lister *v Brutton & Co* [2002] EWCA Civ 1889. He noted:

25. *In this case Mr Walker has confirmed that there is no possibility of completing the engagement of the wife's new legal team in time for her to be represented next Thursday. Therefore, she would be acting in person and on the evidence of Dr Bell would be incapable of making rational decisions or dealing with complex legal issues.*

26. *A literal interpretation of the test propounded by Chadwick LJ would suggest that in the absence of legal advice and representation she would be legally incapacitated and the court would be obliged to appoint a litigation friend. Such an interpretation is replete with problems.*

27. *First, it creates circular reasoning. If the lack of representation generates incapacity, and that incapacity is addressed by the appointment of a litigation friend, and that litigation friend secures representation, then the incapacity disappears, and the appointment of the litigation friend comes to an end, leading, possibly, to the wife once again being unrepresented.*

28. *Second, it means that in relation to the capacity to conduct litigation, that capacity does not have an absolute quantum, but rather varies depending on the presence, or otherwise, of legal advice and representation. If this were so the quantum would further vary, surely, in response to the quality of legal advice, which is very difficult factor to investigate.*
29. *Therefore, Mr Sear and Mr Lord QC [counsel for the husband] argue that Chadwick LJ's dictum should not be*

read literally. Rather, it should be read to mean that if the party is capable of understanding with the assistance of proper explanation from legal advisers the issues on which her consent or decision is likely to be necessary in the course of the proceedings, then she will have the requisite capacity, whether or not she actually receives such assistance.

30. *This reading is brutally pragmatic because it may have the effect, as here, of leaving someone who is actually incapacitated representing herself alone, in what may transpire to be a damaging and traumatic experience. However, that worrying scenario is, as Mr Lord QC rightly says, addressed by granting an adjournment in order for representation to be secured, rather than by the protracted and elaborate procedure of appointing a litigation friend.*
31. *The interpretation espoused by Mr Sear and Mr Lord QC is consistent with the judgment of Baroness Hale DPSC in Dunhill v Burgin [2014] UKSC 18, [2014] 1 WLR 933 at [17]:*

    "Equally, of course, those words [of Chadwick LJ at [75]] could be read in the opposite sense, to refer to the advice which the case required rather than the advice which the case in fact received. In truth, such judicial statements, made in the context of a different issue from that with which we are concerned, are of little assistance. But they serve to reinforce the point that, on the defendant's argument, the claimant's capacity would depend on whether she had received good advice, bad advice or no advice at all. If she had received good advice or if she had received no advice at all but brought her claim as a litigant in person, then she would lack the capacity to make the decisions which her claim required of her. But if, as in this case, she received bad advice, she possessed the capacity to make the decisions required of her as a result of that bad advice. This cannot be right."

32. *Thus, the capacity to conduct proceedings cannot depend on whether the party receives no legal advice, or good legal advice or bad legal advice. If the party would be capable of making the necessary decisions with the benefit of advice then she has capacity whether or not she actually has the benefit of that advice.*
33. *This interpretation is also consistent with section 3(2) of the Act, which provides that*

    "A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means)" (my emphasis).

34. *The use of the conjunction "if" presenting the conditional clause that follows clearly means that the explanation in question does not actually need to happen in order for capacity to be found. If the draftsman had intended otherwise he would have used "where" or "provided that". So, the provision may be held to be satisfied even where the person flatly refuses to receive an appropriately simple explanation of the information, provided that there was evidence that had she received it, she would have understood it.*
35. *It is true that section 3(2) is only concerned with the ability to understand information relevant to a decision, when under section 3(1) there*

is more to making a decision than that. However, if the wife is deemed to be able to understand the relevant information if it were presented appropriately to her by advisers, and therefore by reference to that factor, has capacity, then it is hard to see how the other factors within section 3(1) could lead to a different conclusion.

36. *I therefore conclude that the wife is to be treated as having the capacity to make the necessary decisions to deal with the forthcoming hearing of the husband's variation applications. The three-stage analysis referred to at paragraph 21 above ends at the first stage. I declare, accordingly, that the wife retains capacity to conduct this litigation and specifically to conduct the husband's variation applications…."*

Having reached these conclusions Mostyn J adjourned proceedings to enable the wife's new legal team to prepare,

COMMENT

Neither of these judgments provides a wholly satisfactory answer on how capacity is to be determined in the absence of legal assistance. There is undoubtedly a symbiotic relationship between parties and their solicitors and the ability of the former to conduct proceedings: assessing mental capacity in a vacuum void of legal representation will undoubtedly continue to be problematic.

Third-Party Disclosure Orders

Re L (Third Party Disclosure Order: Her Majesty's Prison and Probation Service) [2022] EWHC 127 (Fam) (Cobb J)

Practice and Procedure (Court of Protection) - Other

Summary

In *Re L (Third Party Disclosure Order: Her Majesty's Prison and Probation Service)* [2022] EWHC 127 (Fam), Cobb J was considering care proceedings relating to four children, ranging in age from 7-17. Their parents were Ms J and Mr K, who remained married. In 2015, Mr K had been convicted of several offences under the Terrorism Acts 2000 and 2006. He was incarcerated until April 2021 and had been released from prison on licence. The key issue in the care proceedings related to the risk Mr K posed to the children, as he wished to return to living in the family home. The court wrote that *'Mr K's current religious/political ideology will be critical to the assessment of any ongoing risk he may pose to his children.'* [3]

In a case management hearing, the court had directed the production of documents Her Majesty's Prison and Probation Service (HMPPS) relating to Mr K. This disclosure was provided, but a jointly-instructed expert psychologist request further information contained in documents generated for the criminal proceedings. The Secretary of State for Justice indicated a willingness to comply, but he wished to make submissions to the court regarding the process by which disclosure had been ordered.

The court noted previous guidance which had been issued in respect of these issues, and in particular, "*Radicalisation Cases in the Family Courts*" (October 2015). This guidance stressed the need to *'avoid inappropriately wide or inadequately defined requests for disclosure of information or documents by the police or other agencies'* and to consider the effects of disclosure which might compromise ongoing investigations. The guidance also emphasised the need for coordination between the family and criminal justice systems. [9]

The necessity of the documents required, and consideration of what specific documents are required was emphasised by the SSJ. The SSJ

stressed that particularly for cases where there are considerable documents held on the person, *'specific rather than general requests for documents are encouraged.'* [11] Redaction may also be time-consuming and challenging.

The SSJ made several proposals for how future applications to HMPPS and similar bodies should be made [13]:

a. Service of an application for third-party disclosure should be on the SSJ via the Government Legal Department.
b. Service should also be affected on the intended recipient (HMPPS);
c. Any request for 'rolling disclosure' should be explicit and clear on the application and order;
d. Correspondence other than court orders and application should be on the intended recipient;
e. Requests for disclosure not accompanied by an application or order should not be sent to the GLD, but to the intended recipient.

The SSJ also proposed that requests for third-party disclosure be accompanied by a short summary of the issues the court is considering, to allow for the SSJ to suggest what may documents be relevant (even if they have not been requested). Cobb J indicated that the parties should obtain explicit permission from the court to provide such a summary, and that it may be necessary for a reporting restriction to be made to prevent further publication of the summary.

The SSJ also proposed a detailed list of information to be sent to the recipient of a third-party disclosure order at [16]. These were endorsed by the court.

Finally, the court endorsed the submission of the SSJ that without notice applications for third-party disclosure should best be avoided, save in cases of genuine emergency.

Comment

While this matter was considered in the family court, it is of considerable relevance for COP practitioners. Many applications for third-party disclosure are made without notice and with few of the procedural steps described in the application above. This case sets out a useful roadmap for making such applications and securing the engagement of the relevant third-party organisation.

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THE WIDER CONTEXT

'Safe care at home review' launched

The Home Office and DHSC have commenced the Safe Care at Home Review.The aims of the review are:

- *To review the scope and accessibility of the existing protections for adults at risk of or experiencing abuse in their own home by people providing their care*
- *To review the availability and accessibility of the support for adults abused in their own home by people providing their care*

The announcement states that the review will be seeking to engage with experts by experience, people with lived experience and *'experts involved in delivery of the existing criminal and safeguarding system (including local authorities and social work professionals, police, Crown Prosecution Service)'.*

The review will not include those in care homes, but does appear to include those in supported living accommodations.

The review will consider:

Protections:

1. *Reviewing access and barriers to justice for adults at risk of or experiencing abuse by people providing their care in their own home where that behaviour amounts to a criminal offence, and access to civil orders such as injunctions and non-molestation orders.*
2. *Reviewing whether existing safeguarding legislation (adult safeguarding provisions in the Care Act, s.20 and 21 Criminal Courts and Justice Act) prevents and protect against this abuse, and how it is applied and accessed in practice.*

Support:

1. *Reviewing the support in place for adults abused in their own homes by people providing their care, which government provides, commissions or funds, including services provided for in legislation (for example, Domestic Abuse Act support services) and victim support services.*
2. *Assessing whether all victims of this abuse receive timely and appropriate support, regardless of protected characteristics in line with the Equality Act 2010.*

Supreme Court grants permission to appeal in case of Jacqueline Maguire

The Supreme Court has granted permission to appeal the decision of the Court of Appeal in the case of *Jacqueline Maguire v HM Senior Coroner for Blackpool and Fylde* [2020] EWCA Civ 738.

Voting rights and disability

Anatoliy Marinov v. Bulgaria (application no. 26081/17)

Summary

Mr Marinov was placed under partial guardianship in 1999 after he had been diagnosed with psychiatric disorders. His partial guardianship had been approved by a court. As a result, his right to vote was automatically removed due to the Constitutional ban on voting rights for anyone under guardianship.

Mr Marinov brought a challenge in 2015 for restoration of his legal capacity in the Bulgarian domestic courts. Following a number of procedural difficulties in his application, he was ultimately successful in obtaining a judgment restoring his legal capacity in December 2017.

As a result of the guardianship having been in place, Mr Marinov was unable to exercise his voting rights during the March 2017 Bulgarian Elections.

The ECtHR held that there had been a violation of Article 3 of Protocol No. 1 (the right to free elections) to the European Convention on Human Rights ('ECHR').

The court noted that the essence of the complaint was that Mr Marinov had been barred from participating in any form of election while under partial guardianship. The position taken by the Government was that the removal of voting rights from those under guardianship ensured that only those capable of making informed and meaningful decisions could choose the country's legislature.

While the ECtHR was satisfied that the government's position amounted to a legitimate aim, it noted that the blanket restriction on voting did not distinguish between total and partial guardianships. Consequently, the proportionality of the Constitutional restriction had not been considered in relation to the exercise of the right to vote, nor was it possible to assess the proportionality of the restriction within the legal framework.

The ECtHR reiterated that because Mr Marinov lost his right to vote on the basis of a blanket restriction, and that such restrictions were questionable, the indiscriminate removal of Mr Marinov's voting rights without an individual review and solely on the basis of his mental disability could not be considered proportionate to the legitimate aim for restricting the right to vote. Accordingly, the court found a violation of Article 3 of Protocol No. 1 to the Convention.

The court held that Bulgaria was to pay the applicant EUR 3,000 in respect of non-pecuniary damage and EUR 1,926 in respect of costs and expenses.

Sufficiency of care and Article 8

Jivan v Romania (application no. 62250/19) [2022] ECHR 125 (Fourth section)

Article 8 ECHR

Summary

The European Court of Human Rights ("ECtHR") considered an alleged violation of (inter alia) Article 8 in the context of an elderly, disabled man who had become bedridden. The complaint arose from the domestic authorities' classification of his disability as "medium-level", which meant he was not entitled to a personal assistant. Only if his situation was categorised as a case of severe disability, pursuant to Romanian law, would he qualify for a personal assistant.

The applicant was in his late eighties in 2017 and had had his leg partially amputated in 2015. He had a range of medical conditions, including cataracts, hearing loss and incontinence. He had recently become bedridden because he had lost his strength to move his wheelchair; and he lived on the fourth floor of a building. He was supported by his son. It was noted, in 2015, that he weighed 40-45 kg. He died in 2020 and his son pursued the application on his father's behalf.

He had been assessed by social services as being totally dependent and requiring a personal assistant to meet his most basic needs. The Commission for the Assessment of Adults with Disabilities had, however, classified his disability as medium-level. At first instance, the domestic court had determined that he had a severe disability but that was overturned on appeal.

The complaint was that by denying him the benefit of a personal assistant – a right which he should have been entitled to in accordance with Romanian law – his Article 8 rights had been

breached because he had been deprived *"of his autonomy and of access to the outside world, thus forcing him into isolation"*. [28]

The court determined that Article 8 was applicable to the case. His conditions were severe: *"he was old, immobilised, partially incontinent, and needed help for his daily activities"*. [34] The authorities' assessments had impacted on his personal autonomy and dignity.

The court reiterated that Article 8 is principally concerned with protecting the individual against arbitrary interference by public authorities. There are positive and negative obligations pursuant to Article 8 – the latter may involve the adoption of measures to ensure respect for private life. In considering those obligations, regard must be had to the fair balance between the competing interests and a state's margin of appreciation.

In this case, the court was concerned with funding for care and medical treatment: the relevant obligation was therefore the positive obligation. Generally, the margin of appreciation is wide in issues of healthcare and economic policy (*McDonald v. the United Kingdom*, no. 4241/12), but where the restriction impacted a particularly vulnerable group, such as the elderly and persons with disabilities, the margin is significantly narrower.

The court acknowledged that that establishing a person's level of disability involves a personalised and complex evaluation and that it does not, in accordance with the principle of subsidiarity, fall on the court to substitute its views for those of the national authorities. However, the state's obligation requires that the domestic courts interpret domestic law in a manner that is compliant with the Convention. The domestic court focused on the partial amputation and failed to engage with his broader situation, both medical and social, particularly his autonomy and dignity.

The court concluded that the domestic authorities act reasonably in the circumstances to ensure the effective protection of his right to respect for private life. There had been a violation of Article 8. The court awarded, on an equitable basis, the applicant EUR 8,000 for pecuniary and non-pecuniary damage.

Comment

The facts of this case are extreme. Indeed, the court specifically noted that (para 31):

> *Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life (see Zehnalovà and Zehnal v. the Czech Republic (dec.), no. 38621/97, ECHR 2002-V).*

The court's approach in this case was informed, in particular, by the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"). The CRPD specifically recognises:

1) the equal right of people with disabilities to live independently and be included in the community (Article 19);

2) that states shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities (Article 20); and,

3) the right of persons with disabilities to an adequate standard of living and social

protection (Article 28).

Furthermore, the court considered that this case was not a choice between basic care or additional, more expensive care (which would fall within the state's margin of appreciation because it concerns resource allocation) but ensuring the applicant had the appropriate level of care and dignity. Thus, a violation of Article 8 was established.

Article 2 inquests, children and detention

R (Boyce) v HM Senior Coroner for Teesside and Hartlepool [2022] EWHC 107 (Admin) (HHJ Belcher)

In June 2018, fifteen-year-old Grace Peers moved to a placement just south of Middlesbrough, subject to a care order under the Children Act 1989. On 5 September she started a new school year, and was almost immediately excluded. Five days later, she was dead by suicide.

The inquest into her death had to grapple with the question of whether Grace was in 'state detention', such that the investigative obligation in Article 2 ECHR was automatically engaged. Any inquest has to ascertain the answer to four factual questions: who the deceased was; how they came by their death; when; and where. In many cases 'how' means 'by what means'. However, where the procedural obligation under article 2 is engaged, there is an enhanced investigative duty, and it means 'by what means and in what circumstances'.

The coroner concluded that Grace was not in state detention at the time of her death, and her mother launched a judicial review.

In *R (Boyce) v HM Senior Coroner for Teesside and Hartlepool* [2022] EWHC 107 (Admin), the Administrative Court concludes that the suicide of a child in care in a placement such as Grace's does not engage the Article 2 procedural obligation. Per *R(Morahan) v HM Assistant Coroner for West London* [2021] EWHC 1603, the enhanced investigative duty arises automatically: (a) where there is an arguable breach of the state's substantive Article 2 duties; and (b) certain categories of case will always give rise to a legitimate suspicion of state responsibility. Examples are killings by state agents, unlawful killings or suicides in custody, and suicides of involuntary mental health patients. In all these categories of case, any death will always give rise to a suspicion that the state was in breach of its substantive obligation under Article 2.

In Grace's case, the court considered the fact that she was living in a placement not of her own free will but as a result of being subject to a care order. It noted that she was not subject to a secure accommodation order, and that she went to school where she was free to leave. Her room at the placement had a lock on the inside. Considering *P v Cheshire West,* the court found that this factor was inconsistent with being under continuous supervision and control. While if she left police assistance would have been sought to find and return her, she was in a very different position from a child in secure accommodation. Her position was not analogous to state detention (a concept which the court noted was expressed in *Ferreira* to have some overlap with deprivation of liberty without being synonymous with it).

Comment

The court also held that even Grace she had been deprived of her liberty and/or detained at the placement, it would have concluded that this would not be attributable to the state because the placement was not a public authority for the purposes of the Human Rights Act 1998. This part of the judgment (although strictly obiter) will no doubt be interesting reading for those concerned with the public/private divide more generally.

National Mental Capacity Forum Report Published

The National Mental Capacity Forum Chair's Annual Report 2020 – 2021 has been published. The report sets out the findings of a series of webinars held in 2020-2021, most of which dealt with issues arising for people with disabilities during the pandemic. The report highlights several issues that will inform the future work of the Forum, and sets out several proposals for 'investing to save': projects in which small investment is considered likely to avoid greatly increased expenditure in the future:

- *The Court of Protection urgently needs a modernised IT system that can cope with the workload, allow tracking of cases and ensure information is generated through proper system reports. During the pandemic the Court managed to continue to function remotely, but the absence of a modern IT system meant that paper files had to be couriered out to judiciary and court staff who were working from home. This was an avoidable expense, created potential security risks as these files contain highly confidential information, and meant that tracking of work was made more difficult. It is to the credit of the Court staff that they managed to maintain a service during lockdown, but the situation needs urgent attention with a modernised information system in place and overall computer upgrades.*
- *The Office of the Public Guardian needs to ensure that all those appointed to hold a Lasting Power of Attorney (LPA) are appraised of their duties to support the person for who they make decisions, and that their responsibilities only take legal force for making a decision on behalf of the person, when the person (donor of the LPA) lacks capacity for that particular decision (unless otherwise specified in the LPA). The donee (holder of the LPA) must undertake a best interests process and ensure that all decisions are taken solely in the best interests of the person who lacks capacity, and not in the interest of others.*
- *All involved in providing services to others need core mandatory training in the five principles of the MCA, and in awareness of pointers to abuse, particularly domestic abuse. Staff and volunteers alike need to know who to contact if they have concerns and need to know that their concerns will be heeded with sensitivity and confidentiality observed as appropriate.*
- *The Government - needs to provide straightforward guidance to Special Educational Needs staff in all sectors to prepare parents and guardians for the watershed of age 18, where the legal status of the person changes from 'child' to 'adult'. This should include encouraging parents and guardians to take early action to consider whether the young person has capacity to appoint their own LPA, or whether the Court of Protection will need to be involved. Failure to establish legal protection for the young person via one of these two routes leaves them particularly vulnerable in emergency situations, both for decisions relating to their health and welfare, and for financial decisions.*

Book review: Memoirs of an Incapacity Judge: "In the right place at the right time"

Memoirs of an Incapacity Judge: "In the right place at the right time" (Gordon Ashton; available in paperback/Kindle via Amazon, 2022). Review by Alex Ruck Keene.

I should start this book with a declaration of interest: I have known Gordon Ashton for many years now, and (as he records) was recruited by him to work on the Court of Protection Practice, now published by LexisNexis. When still a judge, he was notable for his willingness to challenge orthodoxy; now in retirement, his characteristically brisk approach is even more notable, and this book makes powerful reading for anyone concerned both with the securing the rights of those with cognitive impairments, and the Mental Capacity Act 2005. I would go

almost so far as to say that the chapter on life as an incapacity judge, and the appendices gathering relevant writings (including the introductions to a number of editions of the Court of Protection Practice) should make compulsory reading for Court of Protection practitioners. I say this because, from an uniquely informed perspective, Gordon questions whether the dream he has had of "a jurisdiction which would resolve the vacuum in decision-making for those who lack capacity […] become a reality or is it turning into a nightmare?" I will leave readers of the book, of whom I hope there are many, to discover his conclusions in this regard, but it is a vital question.

Gordon's memoirs are also of no little interest for the light that they shed on the "coal face" of the law – the courtrooms presided over by District Judges, who hear the vast majority of cases before both the Court of Protection and civil cases more generally, but whose judgments are rarely reported and about who too little is perhaps known. But the book should not be taken to be either to be a dry legal text, or a recital of legal achievements (although the achievements noted, in understated fashion, are extraordinary). It is motivated by a driving passion the source of which is explored in a chapter that is nearly as painful to read as it must have been to be write, above his beloved son Paul, who was learning disabled and died aged 28 in deeply troubling circumstances "due to failures of supervision" by those charged with his care. It is not surprising that some of the most challenging questions Gordon asks in this book are those directed at the safeguards that might be thought to protect those in Paul's situation.

All proceeds go not to Gordon, but to the Parkinson's Society. But that this charity will benefit from your purchase is the least of the reasons for considering buying it.

[Full disclosure: Alex was provided with a review copy by Gordon. He is always happy to review books in the field of mental capacity and mental health law (broadly defined)]

SCOTLAND

Scottish Mental Health Law Review: Consultation

The Scottish Mental Health Law Review, which commenced in May 2019, will publish its final report with recommendations during September 2022. A 2019 consultation, workstream advisory groups, Lived Experience and Practitioners Reference Groups, and meetings with stakeholders and national and international experts, have already helped inform our work. We are now going out to consultation again in the second half of March and the consultation period will run until 27th May 2022.

The consultation paper will provide an overview of the Review Team's current thinking on certain areas of its remit and invite feedback on this. These areas are: the purpose, principles and rights based approach to mental health and capacity law, which includes economic, social and cultural rights; a new approach involving human rights enablement assessments and voluntary decision-making tests; supported decision-making; adults with incapacity; reducing coercion, including involuntary treatment and other non-consensual interventions; children and young persons; whether the term 'mental disorder' is appropriate; unified mental health and capacity law; accountability and scrutiny of the operation of mental health and capacity law.
Further information on the consultation and how to respond can be found on the Review's website.

Jill Stavert, as member of the Scottish Mental Health Law Review Executive Team

Centre for Mental Health and Capacity Law (Edinburgh Napier University) webinar on the Scottish Mental Health Law Review on 23rd March 2022, 2-4pm

In May 2019 the Scottish Government Minister for Mental Health announced an overarching review of mental health and incapacity law in Scotland and John Scott QC was appointed as its Chair.

Its Terms of Reference included:

'*making recommendations that give effect to the rights, will and preferences of the individual by ensuring that mental health, incapacity and adult support and protection legislation reflects people's social economic and cultural rights including UNCRPD and ECHR requirements and….the review will involve consideration of what is required to achieve the highest attainable standard of mental health.*'

The announcement was clear that persons with lived experience and unpaid carers should be at the front and central to the Review which will report in Autumn 2022

At this webinar members of the Review's Executive Team will provide an update on the Review and how it has been addressing its Terms of Reference, as well as information on the Consultation it will launch in March 2022.

Attendance is free but you must register via Eventbrite to attend Scottish Mental Health Law Review Tickets, Wed, Mar 23, 2022 at 2:00 PM | Eventbrite

Any enquiries to cmhcl@napier.ac.uk

7th World Congress on Adult Capacity 7-9 June 2022

Against the odds, preparations and involvements from across the world are moving strongly forward to assure the success of the 7th World Congress on Adult Capacity in Edinburgh International Conference Centre on 7th–9th June 2022. Speakers from 29 countries across five continents (at latest count) have committed to attend personally (subject to any remaining

controls affecting their individual journeys) to contribute to plenary and parallel sessions of the Congress. For Scotland and the UK, it will combine major involvement of Scotland's law reform process, led by the Scott Review Team, and eminent contributions from across the UK, with a once-in-a-lifetime worldwide perspective, with both contributions and interactions from far and wide. The event has by now been allocated to every inhabited continent except Africa, but this will be only the second time in Europe. The event is a must for everyone with an interest in mental capacity/incapacity and related topics, from a wide range of angles and backgrounds, including people with mental and intellectual disabilities themselves, and their families and carers; professionals, legislators, administrators, providers of care, support and advocacy services, and others. The event will provide:

- a focus for developments of human rights-driven provision for people with mental and intellectual disabilities,
- a powerful springboard for future research, reform and practical delivery,
- an opportunity to share and discuss worldwide practical experience and initiatives across the huge range and variety of relevant disabilities, in many cultural settings,
- as the first Congress since the start of the pandemic (the 2020 event having been postponed until 2024), a unique opportunity to consider the impact of the pandemic on human rights across the world,
- for professionals and workers in all relevant disciplines and services, an essential understanding of the rapidly evolving practicalities, possibilities and expectations that now set the standards of best practice, and
- in particular for practising lawyers and other professionals, an enhanced understanding of current law, its proper interpretation, and forthcoming developments.

Certificates for CPD purposes will be provided to all who request them.

Amid the difficulties and threats of the pandemic and now war, but with excellent support and best advice, the organising committee opted for a live, in-person event, to a huge welcome from intending participants weary of life by online communications and platforms – helpful though they have all been in the absence of alternatives. Despite the difficulties, the organising committee has also been able to ensure financial viability through any uncertainties that may remain, with hugely valued support from both Scottish and UK Governments, and others, led by the Law Society of Scotland, and including supporters such as the National Guardianship Association of the United States, and with more promised in the pipeline, all to be duly acknowledged in the near future. Further such support continues to be welcome, from any who still wish to commit to contributing to the success of the event.

In terms of the programme, well over 100 abstract submissions (several of them multiple submissions by teams) from across the globe, each to be presented personally at the Congress, and all of a high standard, have been rigorously reviewed and accepted. The line-ups for the plenary sessions now appear to be largely settled, though with some potential contributors still to be confirmed. At time of going to press, the confirmed elements in the plenary sessions are as follows:

PLENARY 1: CONGRESS OPENING, ADULT CAPACITY – THE PRESENT AND FUTURE

CONGRESS OPENING AND WELCOME – Adrian Ward, President, WCAC 2022

SESSION CHAIR – Lord Jim Wallace of Tankerness, Member of House of Lords (attending in A Private Capacity)

SPEAKERS
Kevin Stewart MSP

Her Honour Judge Carolyn Hilder, Senior Judge of the Court of Protection
Prof Dr Makoto Arai, Chuo University, and founder of the World Congress series, President of WCAG 2010
Prof Jonas Ruskus, Vice Chair of the CRPD Committee

PLENARY 2: LAW REFORM – BALANCING PROTECTIONS AND FREEDOMS

SESSION CHAIR – Adrian Ward, President, WCAC 2022

SPEAKERS
John Scott QC, Chair, Scottish Mental Health Law Review
Prof Volker Lipp, Full Professor of Law, University of Göttingen, and President of WCAG 2016
Prof Gerard Quinn, UN Special Rapporteur on the Rights of Persons with Disabilities
Ray Fallan, Network Growth and Development Officer, tide

PLENARY 3: SUPPORTED DECISION-MAKING

SESSION CHAIR – Prof Jill Stavert, Chair, WCAC 2022 Academic Programme Committee

SPEAKERS
Aine Flynn, Director of the Decision Support Service
Prof Israel Doron, Dean – Faculty of Social Welfare and Health Sciences, University of Haifa
Dr Michael Bach, Director, Canadian Centre for Diversity and Inclusion

PLENARY 4: WCAC 2022 AND BEYOND

SESSION CHAIR – John Scott QC, Chair, Scottish Mental Health Law Review

SPEAKERS
Prof Wayne Martin, Director, The Autonomy Project, University of Essex
Mary-Frances Morris, Alzheimer
Adrian Ward, President of WCAC 2022
Prof Dr Isolina Dabove, Main Researcher and Professor, National Scientific and Technical Research Council – Argentina and President of WCAC 2024

Separate review of 2007 Act

The Adult Support and Protection Team at Scottish Government held two similar consultation events, the second of them on Monday 7th February 2022, on possible reform to the adult support and protection provisions of the Adult Support and Protection (Scotland) Act 2007. It was understood that the purpose would be limited to amendments to legislation required by the transfer of functions from local authorities to the National Care Service. However, the consultations extended to proposed amendments to substantive parts of the provisions. It was discussed, for example, that the definition of "mental disorder" be altered. That of course would have had major implications for both mental health and adult incapacity legislation. It was not explained how this work would be coordinated with that of the Scottish Mental Health Law Review.

The consultations appear to have been limited to relevant local authority personnel. There has not yet been any open consultation on proposed reforms. If in due course any takes place, we shall endeavour to report it. One must hope that by then appropriate coordination with SMHLR will have been established.

Adrian D Ward

The PKM litigation

In the December 2021 and February 2022 Scotland sections we reported as best we could from available information on the course of the litigation between PKM's Guardians ("the Guardians") and Greater Glasgow Health Board ("the Board"). Last month we confirmed that the second action remains live, following determination by the Inner House of an appeal against an interim order by the sheriff at first instance, following upon which the Inner House issued a "Statement of Reasons". We noted that the Statement of Reasons did not narrate any participation by the safeguarder who had been appointed to PKM. We are now advised that the safeguarder did in fact make both written and oral submissions. We wrote that it was understood that Mental Welfare Commission had entered, or was about to enter, the process. We are advised that the Commission has done so.

We are also advised that the case returned to Dumbarton Sheriff Court for a hearing on 24th February, when a proof before answer was fixed. We shall continue to follow the progress of this important case.

Adrian D Ward

Guardians' remuneration

In the February 2022 Scotland section, we reported on action taken by OPG following upon the initial furore caused by the proposal to reduce professional guardians' remuneration, withdrawn as reported in the November Report. In particular, we reported last month that OPG planned to work with professional guardians to review their "uplifts" process this year. OPG emailed all members of their Professional Guardians' Scheme seeking volunteers for the proposed "Uplifts Working Group". From those who volunteered, OPG selected four "at random, based on the size of firm/number of cases they have" with a view to ensuring a representative cross-section. It is the intention that other professional guardians provide feedback either to one of those four selected professional guardians, or to the Public Guardian, Fiona Brown, herself. It is understood that although the names of the selected guardians have been circulated, at time of going to press not all have accepted, and it is not clear whether they have yet consented to publication of their contact details, so in this issue we are not yet naming them. Fiona Brown herself is however happy to receive enquiries and feedback from professional guardians to her own email address fbrown2@scotcourts.gov.uk.

We are not yet in a position to provide any clarification about the puzzling statement from OPG that "*We will seek a remedy to this lacuna around VAT and professional appointments, when the legislation is reformed"*, which for the reasons given in the February Report seemed to be unnecessary. We have also still not received any clarification of the basis on which OPG claimed to have been advised that it was appropriate to impose a reduction in professional guardians' remuneration. We have previously described the reported concerns of local authorities about how to meet their obligations if the issue of guardians' remuneration results in the withdrawal of their services. It would appear that there is no local authority representation on the working group.

We understand that it is not within the remit of the working group to address the issue of how to provide necessary services to people who are vulnerable, including financially vulnerable, in cases where this is necessary, and a local authority obligation, but not financially viable under current arrangements.
Adrian D Ward

Discriminatory impact of Legal Aid constraints on vulnerable people

It has been reported in Scottish Legal News that solicitors from the Aberdeen Bar Association have withdrawn from the Criminal Duty Scheme in consequence of severe under-funding by Scottish Legal Aid Board, and their concerns that vulnerable people in particular will suffer from this. Following upon the withdrawal, accused persons are being offered Legal Aid assistance from the Public Defence Solicitors Office, but only remotely, which will not achieve standards of representation required for compliance with the European Convention on Human Rights (and in particular Article 6 of that Convention) for many vulnerable people, for whom Scottish Legal Aid Board have hitherto fulfilled their obligations by funding a Duty Solicitor Scheme whereby Legal Aid was paid to private law firms who would take part in a rota to represent people appearing from custody. Remuneration for the system was such that "the system effectively involved solicitors subsidising the criminal justice system from their own pockets". There are no PDSO offices in the north east of Scotland, meaning that all consultations will be attempted to be undertaken remotely – which, it has been asserted on behalf of the Aberdeen Bar Association, is "attempting the impossible, which is to try to act as a duty solicitor remotely". People in that situation "are experiencing one of the scariest and most anxious periods of their lives". Many have significant mental disorders, may require interpreters, and as anyone with experience of acting for vulnerable people, whether in court or chamber practice, and whether in civil or criminal matters, is well aware, the demands and challenges of doing that are considerable. In many cases, they cannot be met remotely.

Adrian D Ward

"Memoirs of an Incapacity Judge" by Gordon R. Ashton

Please see the review of this book by Alex Ruck Keene in the Wider Context section of this Report. This item supplements that review, with which I entirely concur, from a Scottish viewpoint.

Gordon has lived all of his life, and practised as a solicitor, in what is now Cumbria. It probably seemed natural to him to want to take account of Scotland, Scots law, and Scottish practice in his writing and other work. From a Scottish viewpoint, he did so to a remarkable and most valuable extent, even although it apparently still seems so obvious to him to have done so that specific examples in his text are sparse, but of course accurate. Not until page 151, under the heading "Dual jurisdictions", does he mention his commitment to ensuring that "Mental Handicap and the Law" covered the Scottish position. I must declare an interest in that, as noted in the passage referred to, I was the Scots lawyer recruited for that purpose. It was for me an intense and most valuable and educative experience. It also founded a friendship that has endured. As a result, the book was said to be the first that sought to cover both jurisdictions fully and adequately in relation to the same topic. That in fact is what motivated Lord Mackay of Clashfern to write the Foreword: read it to see why!

Gordon does not mention at all that he carried that theme forward into introducing a chapter on Scotland, thereafter developed into an international section, in all of the annual volumes of "Court of Protection Practice" from 2010 onwards, as well as the 3rd and 4th editions of "Mental Capacity Law and Practice". Again, his instinct for inclusiveness resulted in me also being included in those.

I am not in a position to narrate how often he actually came to Scotland to assist us with his wisdom and experience, one way or another. I am sometimes amused to see the Scottish adaptations of his precedents still appearing unamended in recently drafted Scottish documents: one sometimes wonders if those using them are aware where they originally came from!

The book is a good read, and I would recommend to Scottish practitioners to acquire it and read it, when they have time to do so. In the meantime, they should look at least quickly at some of the material towards the end of the book, which has a universality, including all that he writes about "the new approach to disability" from pages 180 onwards; the narratives under "working at the coalface" from page 182 onwards, and for those aspiring to write about the law the "novel approach to writing" explained in the Appendix.

Adrian D Ward

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a 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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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

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

Centre for Health, Law, and Society Symposium: Redrawing the Boundaries of Mental Health and Capacity Law The University of Bristol Law School is holding an online conference on Wednesday, 9 March from 2:00-5:00PM. The online event will be split into three sessions, and include Dr Camillia Kong as keynote speaker, and a response from Dr Lucy Series. The link to the event is here and registration is via eventbrite: https://www.bristol.ac.uk/law/events/2022/chls-symposium-2022.html

UK Mental Health Act reform: Can it deliver racial justice and ensure the rights and wellbeing of people with mental health problems? A free conference is being held online on 9 March, co-hosted by Race on the Agenda and Mind, the tile being: For more details, and to register, see here.

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 The world is coming to Edinburgh – for this live, in-person, event. A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on "Programme": including scrolling down from "Programme" to click on "Plenary Sessions" to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at "Registration". An early bird price is available until 11th April 2022.

The Judging Values and Participation in Mental Capacity Law Conference
The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the British Academy (10-11 Carlton House Terrace, London SW1Y 5AH), on Monday 20th June 2022 between 9.00am-5.30pm. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King's College London). The conference fee is £25 (including lunch and a reception). If you would like to attend please register on our events page here by 1 June 2022. If you have any queries please contact the Project Lead, Dr Camillia Kong: camillia.kong@bbk.ac.uk.

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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