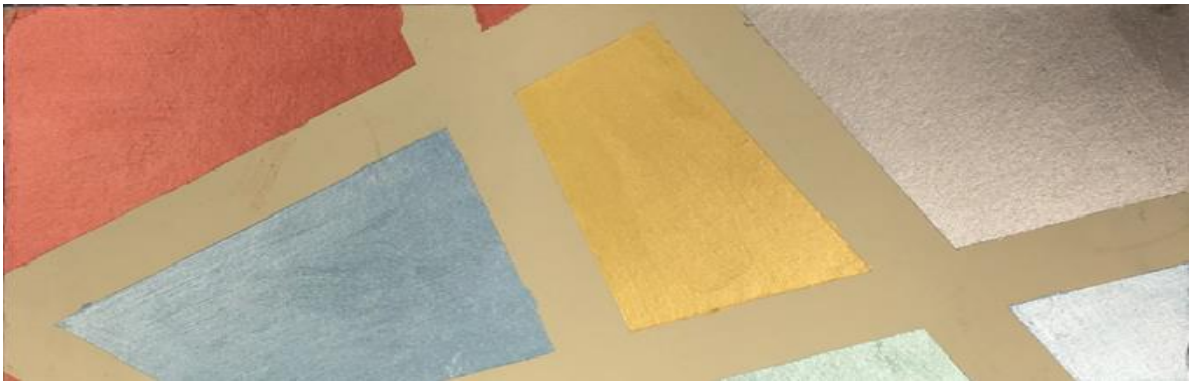
MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE
March 2022 | Issue 120



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

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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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 **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.

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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