Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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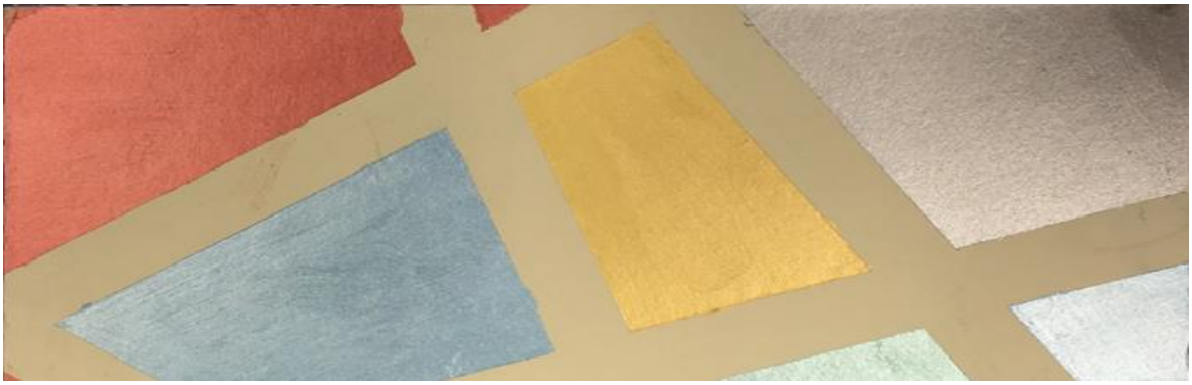

Welcome to the May 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; reproductive rights and the courts; capacity to consent to sexual relations; and one option in practice.

(2) In the Property and Affairs Report: an attorney as witness; barristers as deputies and a range of new guidance from the OPG;

(3) In the Practice and Procedure Report: the need to move with speed in international abduction cases; executive dysfunction and litigation capacity, and a guest article on meeting the judge;

(4) In the Wider Context Report: new capacity guidance; a fresh perspective on scamming the Irish *Cheshire West* and the CRPD and life-sustaining treatment;

(5) In the Scotland Report: two judgments in the same case relating to anonymity and the 'rule of physical presence' in the context of the Mental Health Tribunal.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our capacity assessment guide), and as promised, an updated version of our best interests guide is now out.

We trust we are also allowed to with some pride that no fewer than 5 of the editors have recently been appointed or reappointed to the Equality and Human Rights Commission panel of counsel, along with 3 other members of Chambers: see here.

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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

Short note: seize the day, or lose the person

In *FT v MM and RM* [2019] EWHC 935 (Fam) Russell J highlighted a real – and problematic – difference between the ability of the English courts to protect adults abroad and children. In 2016 a child with profound learning disabilities, RM (a US citizen), had been removed by his father from this jurisdiction to the United States in face of an order to the contrary from the Family Court. In proceedings started shortly before RM turned 18, his mother sought his return to England & Wales; his father participated sporadically but made clear that he would not bring him back as he believed it to be in RM's best interests to remain living in the USA. Permission had not yet been granted to bring proceedings in the Court of Protection, so matters were considered by the High Court under its inherent jurisdiction.

Russell J accepted that the High Court should take the same approach to the determination of RM's habitual residence as had been taken by Munby J in *Re PO* [2013] EWHC 3932 (COP), i.e. that the doctrine of *perpetuatio fori* does not apply, even in the case of wrongful removal, and that habitual residence fell to be at the point when the matter was before the court, as opposed to how they might have stood at the point of removal. She therefore accepted that RM was, now, habitually resident in the United States. She also noted that, as RM was a US citizen, it was not obvious what jurisdiction the High Court could be said to retain in light of the finding of the change of habitual residence (by contrast with the position in *Al-Jeffery v Al-Jeffery (Vulnerable Adult: British Citizen)* [2016] EWHC 2151 in which Holman J confirmed for the that the High Court can exercise its inherent protective jurisdiction over a vulnerable British adult on the basis of their nationality, even if they are not habitually resident in England and Wales).

Even were RM to be habitually resident in England and Wales, Russell J found, there was no readily available legal mechanism to seek to compel his return, the US authorities being neither willing nor able to take steps to return a US citizen to the UK in such circumstances. Directing herself by reference to *Re MM (A Patient)* [2017] EWCA Civ 34, she noted that "[f]*urther court orders would appear to have little or no prospect of success, and in any case, there are good grounds for finding that a return to this jurisdiction are not in RM's best interests unlike MM in the above case*."

The case therefore stands as a fresh reminder that where an adult has been abducted from the

jurisdiction – including across the border to the 'foreign' jurisdiction of Scotland – it is vitally important to ensure that the court (the Court of Protection if they lack capacity, the High Court if they have capacity and are vulnerable) is approached as soon as possible so that consideration can be taken as to what steps should be taken without the added complication of a potential loss of jurisdiction through simple loss of time.

Executive dysfunction under the judicial spotlight

TB v KB and LH (Capacity to Conduct Proceedings) [2019] EWCOP 14 (Macdonald J)

Mental capacity – litigation

Summary

In this case Macdonald J had cause to consider the phenomenon of executive dysfunction in the context of the question of capacity to conduct proceedings both before the Court of Protection and the High Court under its inherent jurisdiction.

The issue arose in the context of concerns as to financial abuse by a friend and carer of a 75 year old man with longstanding difficulties with alcohol consumption, which he dated to the breakdown of his marriage but which his family contended subsisted prior to that time and were responsible for the same. The consequences of his alcohol use included public urination, inappropriate and anti-social behaviour and consequential bans from a number of national institutions. P also had a number of medical issues. He suffered from back problems, suffered a minor cardiac event a number of years previously and had been diagnosed with prostate cancer, with secondaries in his lungs and bones. He had a permanent urinary catheter in place. He had limited mobility and used a stick or a wheelchair. During the course of the proceedings, P decided to cease providing instructions to his solicitors and to seek to conduct proceedings as a litigant in person.

Macdonald J reviewed the authorities on capacity to conduct proceedings In light of P's decision to seek to conduct the proceedings in person, he noted (following *White v Fell* (unreported) 12 November 1987, quoted by Kennedy LJ in *Mastermann-Lister v Brutton & Co* at [18] that "*where a litigant in person does not, in their own right, have capacity to conduct proceedings, the question remains whether they have the capacity to instruct others to conduct those proceedings on their behalf. This is consistent with the principle that an individual who, by themself, lacks capacity on the subject matter in issue should be facilitated to make a capacitous decision on that subject matter by the taking of all practicable steps to help them to do so. Where a litigant in person lacks capacity to conduct proceedings absent advice and assistance and lacks capacity to instruct advisers, he or she will lack capacity to conduct proceedings. A question remains as to the position where a litigant in person lacks capacity to conduct proceedings in his or her own right but has capacity to instruct advisers to conduct those proceedings and chooses not to do so*." On the facts of the case, however, it was not necessary ultimately for Macdonald to answer it.

Macdonald J also observed that:

> *the nature of the dispute is not the only component of the relevant subject matter required to be considered in the context of determining whether a litigant has*

capacity to conduct proceedings. More fundamentally, the nature of legal proceedings themselves, and in particular the specific demands they make on litigants, also fall to be considered. I accept Dr Barker's characterisation of legal proceedings as not being simply a question of providing instruction to a lawyer and then sitting back and observing the litigation, but rather a dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, potentially on a number of occasions over the span of the proceedings as they develop.

Having set the legal and evidential context, Macdonald J was:

36. […] *satisfied that I must attach significant weight to Dr Barker's view that the defects identified in P's memory and executive function mean that he would not be able to retrieve relevant information and would not be able to use and weigh relevant information in that context. Dr Barker made clear to the court that these are features that are typical of disorders of short-term memory and executive function clearly identified in the neuropsychological testing by Professor Kapur, stating in cross examination that:*

> *"People with executive functioning deficits and deficits in their short-term memory may be okay, but they may have difficulty in electing the right bits of information and using them in the right context. There are glaringly obvious occasions when [P] has not been able to bring to mind information that it is important to know in the moment to make the relevant decision."*

37. During the course of his cross-examination of Professor Kapur, Mr Glaser [Counsel for P's, friend, LH] *explored with that expert witness the steps that could be taken to assist P to overcome the neuropsychological difficulties identified with a view to helping him make capacitous decisions on the matters in issue. Professor Kapur was clear that whilst a limited number of compensatory strategies could be deployed to address the deficits in P's memory identified by the neuropsychological testing, in the case of the executive functioning difficulties identified, there was far less by way of compensatory strategies that could be deployed.*

38. In the circumstances, and notwithstanding the careful efforts of Mr Glaser, I am satisfied that the expert evidence in this case provides a sound basis for the court to conclude that P is not able to understand, with the assistance of such proper explanation from legal advisors, the issues on which his consent or decision is likely to be necessary in the course of these proceedings, as the result of an inability to retain information, by his short-term memory issues, and an inability to use or weigh that information as part of the process of making the decision, by reason of deficits in his executive function. Further, I am satisfied that the expert evidence in this case provides a sound basis for concluding that that situation results from an impairment of,

> *or a disturbance in the functioning of, P's brain. I am also satisfied that my conclusions in this regard are reinforced by other aspects of the information before the court beyond the expert evidence.*

As noted above, P had sought to dispense with his lawyers and conduct proceedings himself:

> *40. During the course of the hearing P presented as agreeable and charming, at one stage enquiring after the short adjournment whether I "had had a good lunch" (in an ebullient tone that left me with the strong suspicion that P's idea of the judicial luncheon is a long way from the modern reality) and, as I have noted, at one point telling me that the best way I could make him more comfortable in the courtroom was "to be quick about" delivering my judgment. Beyond this, and whilst in no way determinative, my exchanges in court with P left me with doubts about his understanding of the proceedings. He made no real contribution on the question of an adjournment in light of the absence of certain witnesses. It is, of course, not reasonable to expect a litigant in person to articulate in detail the legal merits of an adjournment such as ensuring an Art 6 compliant hearing, or to deploy exhaustive arguments as to the lack of relevance of particular witnesses to the issue in hand in an effort to avoid one. I also consider that P's case appeared broadly co-terminus with that of LH and that Mr Glaser made extensive submissions. However, I was nonetheless left with the distinct impression that P's lack of contribution was borne out of a paucity of understanding. The same impression was given by his lack of engagement in the process of questioning witnesses who were stating things with which, on the face of it, he plainly disagreed, notwithstanding the offer of having those questions put through me. Again, whilst I take into account that Mr Glaser asked many questions that were also supportive of P's stated position and that the court environment can be an intimidating one, and whilst in no way determinative of my decision, this situation reinforced for me the observations of the experts that I have set out above and had the effect of adding colour to those expert opinions.*

P had not been joined previously as a party to the proceedings before the Court of Protection, so Macdonald J had to apply the 'menu' for participation set out in COPR r.1.2. He was clear that the appropriate manner of securing P's participation in these proceedings is to join him as a party to the same. Pursuant to COPR r 1.2(4) P's joinder as a party will only take effect on the appointment of a litigation friend. In the circumstances, he further confessed himself to be somewhat puzzled by the contents of the letter from the Official Solicitor declining a previous invitation to act as litigation friend was it was "not clear what value he can bring to the proceedings (particularly at this late stage)". The letter further observes that, in the assessment of the Official Solicitor, 'The issues are not legally complex'." Macdonald J observed that:

> *Having regard to the matters set out above, the answer to the question of what value the Official Solicitor can bring to the proceedings as a litigation friend for P might perhaps be thought to be plain on the face of the papers. Namely, to identify and advance, independently and objectively by the fair and competent*

> *conduct of proceedings, the best interests of an elderly protected party who is caught up in a contentious dispute between his putative carer and his son as to the proper administration of his financial and personal affairs and, in circumstances where both his putative carer and his son have potentially vested interest in the outcome, where he has no one to identify, articulate and champion his best interests before the court (or to put it in the language of the role of Solicitor to the Suitors, the precursor to the Official Solicitor of the High Court of Chancery, has no 'natural protector'). The Official Solicitor's assessment of the issues as "not legally complex" is also somewhat difficult to understand in the circumstances that I have articulated during the course of this judgment and in the context of the inherent complexity of retrospective assessments of capacity.*

Comment

In addition to containing a useful review of the law and authorities relating to capacity to conduct proceedings, the case is of no little interest for adding to the (so far) very small stock of authorities considering executive dysfunction. This can be difficult to capture with the four walls of the MCA 2005: this case shows how it can be addressed within the context of a series of ongoing decisions, and the care that needs to be taken before reaching a finding that a person is unable to use and weigh relevant information on the basis of executive dysfunction. Importantly, Macdonald J had before him evidence from Dr Barker of "*glaringly obvious occasions when [P] has not been able to bring to mind information that it is important to know in the moment to make the relevant decision*." In other words – and as we made clear in our capacity guide – it is crucial before making a determination of incapacity on this basis that there is not mere speculation that P might not be able to bring to mind relevant information at the point that it was necessary, but of repeated occasions when this has been the case. Further, and importantly, Macdonald J had had explored before him support strategies that might enable P to overcome the deficits, but also evidence these would not be effective in overcoming the problems with P's executive function.

Rules of engagement in the Court of Protection (and the parallel universe of children meeting judges in the Family Court)

[*Editorial note: we are very pleased to include here a guest article by Dr Paula Case of the University of Liverpool drawing upon her recent article in Legal Studies. We are always happy to publish such articles to bring to the attention of practitioners research that is otherwise hidden behind paywalls (free research is to be found in our research corner in the Wider Context report).*]

The post-*Aintree* emphasis on P's 'point of view' in best interests jurisprudence becomes empty rhetoric, if that point of view is obscured by being theoretically or structurally excluded from engaging directly with the decision maker. Indeed, the importance of the subject of proceedings being able to tell their story *directly* to the decision maker is now reflected in Article 6 jurisprudence, generating what Lucy Series

has termed a rule of 'personal presence.'[1] In *Wye Valley v B* Mr Justice Peter Jackson (as he was then) stressed the merits of Court of Protection (CoP) judges meeting with P:

> *I did not feel able to reach a conclusion without meeting Mr B myself. There were two excellent recent reports of discussions with him, but there is no substitute for a face-to-face meeting where the patient would like it to happen.*[2]

However, despite these words and similar encouragements from other CoP judges[3], such meetings have been rare and the *direct* voice of P has often been absent from these life changing judgments. The limited evidence available suggests that in published health and welfare judgments from the CoP (in cases where there has been no obvious reason for P not to engage directly with the judge) that engagement has happened in less than twenty per cent of cases.[4]

When CoP judges find themselves with no clear steer on how to deal with a particular issue, they not infrequently reach across to Family Court judgments for guidance.[5] The parallels of these jurisdictions are clear and the practice of judges meeting children has been the subject of both extensive discussion in the case law and detailed interrogation by researchers. Child and adult jurisdictions have shared concerns that the professional relaying of the subject's wishes and feelings offers a 'filtered' and sometimes 'misinterpreted' account.[6] The Court of Appeal, for example, in *Re W* referred to the child's account being 'finessed away' by the CAFCASS officer's 'own analysis.'[7]

In these proximate (adult:child) jurisdictions which share personnel on both sides of the bench, some transplanting of rules is inevitable, but whilst transplanting may be 'socially easy,'[8] it can risk the mirroring of problematic approaches and their mutual reinforcement. For example, the current *Guidance for Judges Meeting Children* follows the 'non-presumptive' model set out in by Baroness Hale in *Re W*.[9] In other words, it leaves the matter of whether the meeting happens in the hands of the judge, and there is no explicit presumption that it should happen in every case where P desires it.[10] Amendments to the CoP Rules in 2015 signalled a bold attempt to focus attention on the participation of those

[1] L. Series, *Briefing Paper: The Participation of the Relevant Person in Court of Protection Proceedings.* (September 2014).
[2] [2015] EWCOP 60.
[3] *Re CD* [2015] EWCOP 74 at [31]*; Re M* [2013] EWCOP 3456, [42].
[4] For more on this project see P. Case, 'When the judge met P: the rules of engagement in the Court of Protection and the parallel universe of children meeting judges in the Family Court' (2019) *Legal Studies* (First View).
[5] E.g. *LBX v TT* [2014] EWCOP 24, [39] and *Re AG* [2015] EWCOP 78, [26] adapting guidelines from *Re W* [2008] EWHC 1188 on when to hold finding of fact hearings.
[6] P. Parkinson and J. Cashmore, 'Judicial Conversations with Children' in *The Voice of a Child in Family Law Disputes* (OUP, 2008) at 162 and see also J. Caldwell, 'Common law judges and judicial interviewing.' (2011) 23 CFLQ 41.
[7] *Re W* [2008] EWCA Civ 538.
[8] See P. Legrand's work on legal transplanting in comparative law: 'The impossibility of legal transplants' (1997) 4 MJ 111 referring at 112 to A. Watson, *Legal Transplants* 2nd ed. (University of Georgia Press, 1993).
[9] *Re W* [2010] UKSC 22 [26]-[28]
[10] [2010] 2 FLR 1872. A wish to meet the judge should be communicated to the judge, but representations may be made as to whether this is appropriate.

at the centre of hearings[11] but, emulating the guidance offered to judges meeting children, the option of a meeting with the judge outside the courtroom was framed as a matter of 'discretion'.[12]

Another distinctive factor of Family Court practice in this area is that it draws an uncompromising distinction between different forms of direct engagement. Where additional information emerges from a 'meeting' between the judge and a child (as opposed to the giving of 'evidence'), the information cannot be given any weight. This is because a 'meeting' without the lawyers being present is regarded as putting fundamental adversarial norms at risk, namely that the case should be decided on the 'evidence,' which must be presented in open court, and that the parties should be given the opportunity to test that evidence by way of cross-examination.[13] The author's survey of CoP judgments suggests that the spectre of this 'gathering evidence' rule (as applied to judges meeting children) may well have played a part in deterring such meetings from taking place.

Caldwell observed that the 'culture of the court system will be highly influential' in determining the extent to which judges meet with children.[14] If P wishes to meet the judge, or indeed, give evidence in their own case, the non-presumptive culture from Family Court jurisprudence should be departed from and the starting point should be that it should happen, unless the presumption is rebutted by convincing evidence of potential harm. This may very well emerge from future practice in the CoP, but we are far from a definitive statement on the matter.

[11] CoP Amendment Rules 2015 (SI 548/2015) inserting a new Rule 3A into the CoP Rules 2007.
[12] See also A. Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard.* (Brill, 2018), 199.
[13] E.g. *MB v Surrey CC* [2017] EWCOP B27, [8]: '…the Court is the servant of the evidence that is provided by the parties.'
[14] J. Caldwell, 'Common law judges and judicial interviewing.' (2011) 23 CFLQ 41, 60.

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

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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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Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see here.

Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information and to book, see here.

Advertising conferences and training events

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

Our next edition will be out in June. 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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