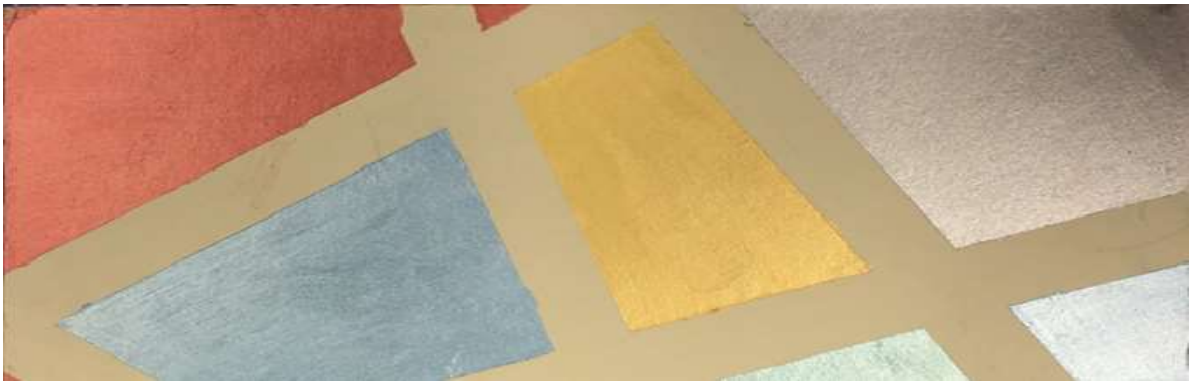
MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

May 2020 | Issue 104



Welcome to the May 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Protection, COVID-19 and the rule of law; best interests and dying at home; and capacity and silos (again);

(2) In the Property and Affairs Report: further guidance from the OPG in relation to COVID-19 and an unusual case about intestacy, minority and the Court of Protection;

(3) In the Practice and Procedure Report: the Court of Protection adapting to COVID-19; remote hearings more generally; and injunctions and persons and unknown;

(4) In the Wider Context Report: National Mental Capacity Forum news, and when can mental incapacity count as a 'status?';

(5) In the Scotland Report: further updates relating to the evolution of law and practice in response to COVID-19. We also note that 9 May 2020 was the 20th anniversary of the Adults with Incapacity (Scotland) Act 2000 receiving Royal Assent.

You can find our past issues, our case summaries, and more on our dedicated sub-site here. Chambers has also created a dedicated COVID-19 page with resources, seminars, and more, here.

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

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

Contents

Court of Protection and HIVE update

On 4 May, Hayden J published a letter providing an update upon the steps taken by the Court of Protection to respond to the pandemic, and, in particular, the work of the HIVE group since its establishment in late March 2020 across the full spectrum of the Court's work.

The HIVE mailbox (hive@justice.gov.uk) is now live, and can be used as the first point of contact to raise specific issues relating to the operation of the Court of Protection during the pandemic. It is not to be used for issues relating to specific cases (for instance case progression or appeals).

The members of the HIVE group are:

- Hayden J
- HHJ Carolyn Hilder
- Sarah Castle (the Official Solicitor)
- Vikram Sachdeva QC
- Lorraine Cavanagh QC
- Nicola Mackintosh QC (Hon)
- Alex Ruck Keene
- Joan Goulbourn (Ministry of Justice)
- Mary MacGregor (Office of Public Guardian)
- Kate Edwards

Separately, in a letter from the Vice-President published on 11 May 2020, he has emphasised that "[s]t*riving to achieve a transparent process in the Court of Protection, whilst sitting "remotely", remains an important objective*." To that end, he has made:

> *a small practical suggestion to improve access to the business of the Court when press or other members of the public join a virtual hearing. Whilst the judge and the lawyers will have read the papers and be able to move quickly to engage with the identified issues, those who are present as observers will often find it initially difficult fully to grasp what the case is about. I think it would be helpful, for a variety of reasons, if the applicant's advocate began the case with a short opening helping to place the identified issues in some context.*

Remote hearings

In two recent cases the Court of Appeal has given guidance on the circumstances in which it is appropriate to hold a "remote" hearing (as opposed to a "live" hearing) in the context of the COVID-19 pandemic. Although the cases in question (*Re A (Children) (Remote Hearings)* [2020] EWCA Civ 583 and *Re B (Children) (Remote*

Hearing: Interim Care Order) [2020] EWCA Civ 584) were family cases involving children, the principles are just as applicable to Court of Protection cases.

In *Re A* the court began by identifying the following "cardinal points":

> *i) The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.*
>
> *ii) Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance or illustrations aimed at supporting the judge or magistrates in deciding whether or not to conduct a remote hearing in a particular case.*
>
> *iii) The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered. This will become all the more apparent once the present restrictions on movement start to be gradually relaxed. From week to week the experience of the courts and the profession is developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa. For example, it is the common experience of many judges that remote hearings take longer to set up and undertake than normal face-to-face hearings; consequently, courts are now listing fewer cases each day than was the case some weeks ago. On the other hand, some court buildings remain fully open and have been set up for safe, socially isolated, hearings and it may now be possible to consider that a case may be heard safely in those courts when that was not the case in the early days of 'lockdown'.*

As for the factors that are likely to influence the decision whether to proceed with a remote hearing, these "will vary from case to case, court to court and judge and judge" (paragraph 9). However, they will include:

> *i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?*
> *ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;*
>
> *iii) Whether the parties are legally represented;*
>
> *iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity withthe necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;*

> *v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;*
>
> *vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;*
>
> *vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?*
>
> *viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;*
>
> *ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;*
>
> *x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.*

On the facts of *Re A* the issue was the lawfulness of the judge's decision to list the final hearing in care proceedings (at which long-term care arrangements for the Appellant's children would be determined) in "hybrid" form, such that only the children's parents were expected to attend court in person (and not their legal representatives). The court allowed the appeal against this decision due to: (i) the Appellant's inability to engage adequately with remote evidence (either at home or in the courtroom) (the court having found that the Appellant had "*limited abilities, and some disabilities, which render him less able to take part in a remote hearing*"); (ii) the imbalance of procedure in requiring the parents, but no other party or advocate, to attend before the judge; (iii) the need for urgency was not sufficiently pressing to justify an immediate remote or hybrid final hearing.

Re B, in which the court referred to the above principles from *Re A*, is a troubling example of the remote process leading to errors and ultimately an unlawful decision (the imposition of an interim care order removing a child from his grandmother's care). The court reiterated the benefits of remote hearings, but stressed the need to remain alert to their dangers so that:

> *…the dynamics and demands of the remote process do not impinge upon the fundamental principles. In particular, experience shows that remote hearings place additional, and in some cases, considerable burdens on the participants. The court must therefore seek to ensure that it does not become overloaded and must make a hard-headed distinction between those decisions that must be prioritised and those that must unfortunately wait until proper time is available.*

Subsequent decisions have shown Family Division judges grappling with the implications of the Court of Appeal's decision. The decisions are self-evidently fact-specific, but are of importance as examples of judicial calibration to the changing situation.

In *SX* [2020] EWHC 1086 (Fam) Lieven J considered *Re A* and *Re B* in the context of a case management decision about whether to continue a trial remotely in relation to care proceedings (the medical evidence having been heard remotely), or whether to adjourn so that the lay witnesses, notably the relevant child's parents, could give live evidence. Drawing on the Court of Appeal's observations in *Re A*, Lieven J gave a helpful summary of the factors that are relevant to whether it will be appropriate for lay witnesses to give evidence remotely, observing that there is nothing inherently objectionable to the giving of evidence in this manner:

> *43. In respect of the lay evidence there are a number of different factors. The first and most important must be whether it is just to the parties to proceed with them giving their evidence remotely. They must be able to follow the questions and be able to give their best in the answers. If the technology works, and they are in a position to understand the documents, then in principle a remote hearing is capable of being fair. As Mr Goodwin and Mr Verdan have pointed out, vulnerable witnesses routinely give evidence remotely in the family and criminal courts. Subject to all the protection in PD3AA, the assumption must be that such a process is capable of being fair and meets the requirements of Article 6. A judge will have to be astute in a remote hearing to ensure the witness is following the question and where appropriate has the relevant document. It is easier to do this in a live hearing because one can see more easily what the witness has in front of them, and sometimes tell by their body language if they are completely lost. However, it is perfectly possible with a little sensitivity to do the same task remotely.*

On the facts of the case, Lieven J was satisfied that both the child's mother and father would be able give evidence and participate in the hearing remotely. However, the judge stressed that she would keep this under careful review, especially in relation to the father who had complained that his mental state was deteriorating as a result of the proceedings (an expert having been instructed who advised that although the father was finding the trial difficult, he was nonetheless coping).

In *A Local Authority v The Mother & Ors* [2020] EWHC 1233 (Fam), Williams J addressed the question of whether a fact-finding hearing in relation to the death of a three year old girl should continue either remotely or semi-remotely or whether the case should now be adjourned until an in-person hearing of pre-Covid 19 format can take place; possibly in September or possibly later.

Expert evidence from seven witnesses had been heard remotely. No party sought that police or social work witnesses give oral evidence. The only evidence remaining was the oral evidence of the mother, the father, the paternal grandmother and possibly the maternal grandmother.

Williams J gave a very detailed analysis of the position, finding that the least bad outcome would be to adjourn the hearing until June to enable the mother to participate in person at that hearing albeit without the physical presence of her leading counsel. He concluded that "[t]*hat hearing can be a fair one to the mother and to the other parties. That will then enable the facts to be determined which will lead to a final welfare hearing*

in September and will avoid a further 3 to 4-month delay, which acceding to the mother's submissions would inevitably require."

Research from the Nuffield Family Justice Observatory

Shortly after the judgments of the Court of Appeal were handed down, the Nuffield Family Justice Observatory published research on the use of remote hearings in the family court arising from the COVID-19 pandemic. The research comprised a consultation exercise with over 1,000 parents, carers and professionals in the family justice system across England and Wales. The main findings of the research are summarised below:

- Consultees were evenly balanced in terms of their overall positive and negative reactions to remote hearings, although most consultees considered that remote hearings were appropriate for certain cases in the circumstances.
- Concerns were raised about the fairness of remote hearings in certain cases. In particular, concerns related to cases where the lack of face-to-face contact made it difficult to read reactions and communicate in a human and sensitive way, difficulties ensuring a party's full participation in the hearing, and issues of confidentiality and privacy.
- Specific concerns were commonly raised in relation to specific groups, such as parties in cases involving domestic abuse, parties with a disability or where an intermediary or interpreter is required.
- Respondents observed considerable variations in the types of cases being heard remotely, indicating that some national guidance would be valuable.
- Video hearings were considered more effective than telephone hearings.

The Court of Protection, injunctions and persons unknown

Re SF (Injunctive Relief) [2020] EWCOP 19 (Hayden J)

COP jurisdiction and powers – injunctive relief

Summary

In *Re SF (Injunctions)* [2020] EWCOP 19, Keehan J was concerned with a young woman, SF, who had a diagnosis of Autism Spectrum Disorder and also had learning disabilities. She resided in a supported living establishment where she received 1:1 support 24 hours per day. In September 2019 the care and support provider became aware that SF was communicating with a number of men via social media and the internet. Further, it became apparent that some of these men were attending her placement and having sexual relations with her. Only one of those men had been identified, as VK.

On 28 January 2020 the local authority applied for an injunction against VK to prevent him from attending SF's accommodation. On 5 February 2020 the local authority applied for an injunction in the same terms against 'persons unknown'.

Keehan J had not, initially, been persuaded that the Court of Protection had the power to grant an injunction against either a party or a non-party. He convened a hearing on the specific point, and

this judgment contains his reasons for concluding that it **does** have the power, in summary because:

> *i) s.47(1) of the 2005 Act is drafted in wide and unambiguous terms;*
>
> *ii) it must follow that the Court of Protection has the power which may be exercised by the High Court pursuant to s.37(1) of the 1981 Act to grant injunctive relief;*
>
> *iii) this conclusion is fortified by the terms of s.17(1)(c) of the 2005 Act which permits the court to prohibit contact between a named person and P;*
>
> *iv) it is further fortified by the terms of ss. 16(2) & (5) of the 2005 Act. The provisions of s.16(5) are drafted in wide terms and enable the court to "make such further orders or give such directions…….as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order…….made by it under subsection (2)";*
>
> *v) finally, the 2017 Rules, r.21 & PD21A, make provision for the enforcement of orders made by the Court of Protection including committal to prison for proven breaches of court orders.*

Whilst the judgment is a careful analysis of the position, it is (with respect) a little odd in 2020 for it even to have been a question-mark over whether the Court of Protection had such a power. The chapter in the Court of Protection Handbook addressing enforcement notes – for instance – the case of *W v M* in 2011, in which Baker J had observed that there was "*no doubt about the power of the Court of Protection to make injunctions*." Indeed, until recently suspended by COVID-19, the entire approach of the transparency Practice Direction depended upon the making of injunctions in the transparency order in each case against identified individuals/categories of individuals.

What is more interesting, but tantalisingly not addressed in detail in SF's case, is the power to make an injunction against persons unknown. This power has not to date been addressed in a reported case, although in *EXB v FDZ* [2018] EWHC 3456 (QB), Foskett J, sitting both as a High Court judge and a judge of the Court of Protection, was asked in the context of a case as to whether an individual should be told the size of their personal injury award to consider making "*an order – effectively in the form of an injunction – preventing any person who knows of the size of the award from disclosing that information to the Claimant. It would be akin to an order for possession against 'persons unknown' in possession proceedings*." Foskett J declined to do so, because whilst he could "*see the attractions of a mandatory order such as that suggested* […], *I am not at all sure how such an order could be policed and how anyone in breach of it could be dealt with. An order with a penal notice attached seems somewhat disproportionate and draconian in the circumstances and an order without teeth is arguably an order that should not be made*" (paragraph 42). Foskett J made an order (under both s.16 and s.15(1)(c) MCA 2005) to the effect that "[i]*t shall be unlawful for any person (whether the Claimant's deputy or any other person who has knowledge of the amount of the Settlement) to convey by any means to the Claimant information about the amount of the Settlement, save that this declaration does not make unlawful the conveyance of descriptive information to the Claimant to the effect that the*

Settlement is sufficient to meet his reasonable needs for life." However, because of his previous analysis, what Foskett J did not then do was then go one stage further and consider whether he could, in fact, seek to back such an order by way of an injunction.

The order against VK could clearly be made as a step required to enforce the decision of the Court of Protection (permitted by s.17(1)(c) MCA 2005) to permit contact between VK – as a named individual – and SF. That would not apply in relation to the injunction against 'persons unknown.' However, as a matter of logic, if the Court of Protection has the same 'powers, rights and privileges' as the High Court, it is necessarily to look back up the line to the High Court for the answer. The Supreme Court has relatively recently considered the position – by reference to civil litigation – in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6. Lord Sumption, on behalf of the Supreme Court, identified that that there are conceptual difficulties in relation to the bringing of a claim in relation to those who are not only anonymous but cannot even be identified. However, where, as in a case such as the present, the potential respondents are potentially identifiable (and could also, in principle, be served with the application form – by a person waiting at the placement and giving it to them), these difficulties do not arise, proceedings can be brought, and injunctions then granted to enforce the relief granted in those proceedings (see also *Canada Goose UK Retail Ltd & Anor v Persons Unknown & Anor* [2019] EWHC 2459 (QB)).

Mental capacity – international aspects

The Law Society has updated, and made more easily accessible, guidance on the international aspects of mental capacity for solicitors who do not regularly give advice to clients who are:

- moving or retiring abroad
- returning from living abroad
- owners of property or other assets overseas.

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

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

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

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

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Conferences

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

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

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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