39 Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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Welcome to the November 2018 Mental Capacity Report, including from the newest recruit to the editorial team, Katherine Barnes. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; sex, risk and public anxiety; and a slew of significant decisions relating to medical treatment;

(2) In the Practice and Procedure Report: Sir James Munby addresses the LAG Community Care Conference and updates from the Court Users Group;

(4) In the Wider Context Report: relevant developments from around the world, including an important decision from Australia reflecting back on practice under the MCA;

(5) In the Scotland Report: a report from the World Guardianship Congress, and the impact in Scotland of an important case concerning disability discrimination and autism.

There is no Property and Affairs Report this month as our editor is having a well-earned break; but he would relay to you if here the frustrating news of the delay to the Law Commission's project on wills.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

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

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Sir James Munby's address to LAG

Sir James Munby's address to the LAG Community Care Law Conference is now available online.[1] The address is separated into two main parts. First, Sir James considers "the continuing fall-out" from the Supreme Court's decision in *Cheshire West*, particularly in respect of children. Secondly, he identifies various challenges which arise from the approach outlined in *N v A Clinical Commissioning Group and others* [2017] UKSC 22.

Fall-out from Cheshire West for children

Sir James' first main observation was the difficulty (yet importance) of applying Lady Hale's "acid test" from *Cheshire West* to children. In other words, in what circumstances is a child subject to a deprivation of liberty within the meaning of Article 5?

With reference to his decision in *Re D* [2017] EWCA Civ 1695, and stressing that the Supreme Court's judgment in the case was pending, Sir James reiterated his view that whether there has been a deprivation of liberty in a child case will turn on the age of the child in question.

As for the age at which the "acid test" bites, Sir James relied on his observations in *Re A-F* [2018] EWHC 138 (Fam).at paragraph 43:

> *One has to proceed on a case-by-case basis having regard to the actual circumstances of the child and comparing them with the notional circumstances of the typical child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability". Little more than "rule of thumb" suggests:*
>
> *(a) A child aged 10, even if under pretty constant supervision, is unlikely to be "confined".*
>
> *(b) A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion.*
>
> *(c) Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion."*

In light of this, Sir James went on to stress that the resource implications of having to deal with such cases on a "case-by-case" are very considerable, and this is in the context of a system which is already under great pressure.

Sir James then addressed another "fall-out" of *Cheshire West*, and the question at the heart of *Re D*: whether parental power extended to giving

[1] Sir James was unable to deliver the address on the day due to illness. This summary was prepared without input from Alex, Tor or Annabel, given their involvement in *Re D*.

consent to the "confinement" of a child who is 16 or 17 years old. He explained that – in his view – the answer lies in the House of Lords decision of *Gillick*.[2] Therefore, in a case where the child has not yet acquired "Gillick capacity," the parents are able to provide consent for a deprivation of liberty beyond the child's sixteenth birthday. He speculated that the confusion in this area, and failure to appreciate the relevance of *Gillick*, had arisen because these sorts of cases lie at the intersection of three different fields of domestic law, each served by a different set of legal specialists: [t]*he existence of these institutional and professional silos has bedevilled this area of the law*."

Challenges arising from N v A Clinical Commissioning Group

As for *N v A Clinical Commissioning Group*, Sir James reminded us the Court of Protection cannot direct that resources be made available or that services be provided; it can merely seek to persuade. As to the correct approach to be taken by the court in this regard, Sir James referred to the principles set out when the case was before the Court of Appeal ([2015] EWCA Civ 411):

> *34. …the court, if it seeks to alter the local authority's care plan, must achieve its objective by persuasion rather than by compulsion.*
>
> *35. The said, the court is not obliged to retreat at the first rebuff. It can invite the local authority to reconsider its care plan and, if need be, more than once… How far the court can properly go down this road is mater of some delicacy and difficulty. There are no fixed and immutable rules. It is impossible to define in the abstract or even to identify with any precision in the particular case the point to which the court can properly press matters but beyond which it cannot properly go. The issue is always one for fine judgment, reflecting sensitivity, realism and an appropriate degree of judicial understanding of what can and cannot sensibly be expected of the local authority."*

That is all very well in principle, but as Sir James pointed out with reference to some of his recent cases, the application can be highly problematic. In particular, Sir James was concerned that cases involving vulnerable children being inadequately supported by the State were being transferred "up" to senior judges in the hope that such judges are more "persuasive." In so doing, however, he suggested, the line between persuasion and compulsion became increasingly blurred. Further, there were no menas of ensuring that the most needy cases were prioritised.

Sir James concluded, however, that this is the lesser of two evils:

> *…what is one supposed to do? What is the alternative? Wash one's hands and wait for an inquest, followed by much hand wringing, "we have all learnt lessons, it will not happen again"? I think not. There are occasions, and surely Re X*[3] *was one, where, pace Lord Sumption, a judge in a family court or in the Court of Protection is duty-bound to act even if the prime*

[2] *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112.

[3] *Re X (A Child) (No 4)* [2017] EWHC 2084 (Fam).

responsibility lies elsewhere. I am unrepentant.

Comment

The Supreme Court's decision in *Re D* is much anticipated, with many hoping that it will provide valuable clarity in respect of the way in which the law on deprivations of liberty applies to those under 18. As Sir James suggests, however, clarity of principle is one thing, but, in an area of law where the "correct" approach is often inextricably tied to an assessment of the individual facts, challenges for judges, decision-makers and practitioners are set to remain. Of course, the challenge is further heightened by inadequate resourcing of a system which is under ever increasing pressure.

Court User's Group October meeting

The Court of protection users group met on 17 October 2018. The minutes can be found here. Of note:

- There has been an 8% increase in applications and a 10% decrease in disposals compared to the last 12 months.
- For urgent applications, a COP 9 can be submitted which will be dealt with by the Urgent Business Judge (UBJ) who will deal with it if it is truly urgent.
- Bundles must be removed from the Court after hearings, otherwise they are treated as abandoned and reported to the Information Commissioner.
- In order to comply with GDPR a new system for the appointment of ALRs has been in place since 28 August, whereby HMCTS go to the Law Society to approach an individual ALR for consent to disclose their details. [We note that there seem to be, at a minimum, teething problems with ALRs: we would be particularly interested in any positive practice experiences that can be shared by those solicitors who have been appointed ALRs so that, if possible, these teething problems can be sorted out].
- If an ALR is requested or appropriate, the case is referred to the Urgent Business Judge (UBJ) and if it is agreed, an ALR is identified and approached. The ALR then has 24 hours to respond. Concern was raised that since the end of August only 7 ALRs have been appointed.
- Section 16 and 21A applications should be issued in regional hubs. All property and affairs cases should be issued in First Avenue House.
- The new President of the Court of Protection is likely to make a decision about whether counsel should be robed in public hearings before tier 3 judges (i.e. High Court judges) in the New Year. He has indicated that he is likely to take the view that counsel should be robed. We thought it would be interesting to obtain the views of practitioners on this topic and so Katie Scott is collating responses on this topic, so please send any comments or views to ks@39essex.com

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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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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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

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 December. 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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