39 Essex CHAMBERS

MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY
November 2019 | Issue 99

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

(1) In the Health, Welfare and Deprivation of Liberty Report: two deprivation of liberty cases making clear what should (and should not) happen before the court; two important cases about reproductive rights and capacity, and capacity under stress in different contexts;

(2) In the Property and Affairs Report: welcome clarity as to how to make foreign powers of representation effective; and capacity and the financial implications of marriage;

(3) In the Practice and Procedure Report: two important judgments from the Vice-President highlighting different aspects of case management and confirmation as to the procedural rules governing inherent jurisdiction applications in relation to adults;

(4) In the Wider Context Report: news from the National Mental Capacity Forum (and a survey they need completing); an important case about the intersection of capacity, the inherent jurisdiction and the Mental Health Act 1983 in the context of force-feeding; and when you can rely upon your own incapacity to your benefit.

(5) In the Scotland Report: four important publications from the Mental Welfare Commission.

You can find all our past issues, our case summaries, and more on our dedicated sub-site 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, where you can also find clear guidance as to the (non) place of mental capacity in relation to voting, ahead of the deadline for registration in the General Election of 26 November.

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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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Deprivation of liberty and proper scrutiny

DL v LB Enfield [2019] EWCOP B1 (Senior Judge Hilder)

Article 5 ECHR – DoLS authorisations

In this case, a local authority respondent sought to challenge the jurisdiction of the Court of Protection in relation to s.21A applications, "*to challenge what might colloquially be called 'a gravy train'. Mr Holbrook* [Counsel for the local authority] *said today, 'I am challenging the accepted wisdom of what goes on in the Court of Protection.'*" It appears that the local authority sought, in essence, to limit the circumstances under which an application could be brought and the case management directions that the Court of Protection should make before determining it. The argument was based upon a partial selection of passages from the judgment of King LJ in *Director of Legal Aid Casework & Ors v Briggs* [2017] EWCA Civ 1169 (concerning the scope of legal aid in s.21A proceedings).

Senior Judge Hilder rejected the arguments advanced by the local authority, and observed that:

> *39. However large the numbers of a local authority caseload of persons being provided with care in the circumstances of their liberty being deprived it is imperative that those responsible for such conditions are never allowed to become cavalier about the significance of deprivation of liberty to the individual concerned and to society as a whole. In my judgment Article 5 rights do not become less precious because of the administrative burden of cases reliant on them.*
>
> *40. Mr McKendrick QC has reminded the court of the generous ambit of Article 5.4 which entitles a person to speedy consideration by a court and in particular has referred to the case of Waite v the United Kingdom ECHR 2002. Article 5.4 is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of*

detention. An applicant is not required as a precondition to enjoying that protection to show that on the facts of his case he stands any particular chance of success in obtaining his release. When I put that to Mr Holbrook he also, and I quote, "entirely endorsed this" proposition.

41. Closer to home, the Court of Protection's own Vice-President has recently had cause to restate this approach in the case of CB v Medway Council [2019] EWCOP 5 at paragraph 33. He said:

> *"What is involved here is nothing less than CB's liberty. Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage any circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases."*

42. So, bearing in mind that these proceedings are brought pursuant to section 21A and that it is very clear from the paperwork that the qualifying requirements being scrutinised may include capacity and definitely include best interests, I have no doubt that it is appropriate for the court to go on to consider now […] what are the appropriate case management decisions to progress this matter.

Perhaps not very surprisingly in light of this, Senior Judge Hilder departed from the general rule in welfare cases, to order that all the costs incurred by the applicant detained person should be paid by the local authority to reflect that they had been incurred because the local authority had failed to take a "*sensible and appropriate approach to these proceedings*."

Comment

It is clearly important that cases before the Court of Protection are managed proportionately, but the approach taken by the local authority in this case was – to put it mildly – striking. It welcome that Senior Judge Hilder took the opportunity to make clear that it was simply wrong to seek to prevent proper consideration of the question of whether the standard authorisation in DL's case should be upheld.

As a secondary – but important – point, it should be noted that Senior Judge Hilder had cause to consider the proper use of s.49 reports. As she noted (at paragraph 44), they are:

> *a vital tool in the armoury of the Court of Protection but the court is also aware that the very usefulness of that tool comes as a burden to other public services, in this case the NHS. Practice Direction 14E sets out the circumstances to consider when the court is being invited to make a section 49 order and I emphasise that it is important that the court and the parties follows those requirements.*

How not to make an application to authorise deprivation of liberty

LB Barnet v JDO & Ors [2019] EWCOP 47 (Senior Judge Hilder)

Article 5 ECHR – Deprivation of Liberty

Summary

This frankly astonishing case reads as an object lesson in how **not** to make an application to the Court of Protection to authorise deprivation of liberty.

It concerns a young man, JDO, with diagnoses of cerebral palsy, autism, learning disability and epilepsy. He had been living at supported living placement in arrangements amounting to deprivation of liberty. There were ongoing civil proceedings claiming damages for JDO on the basis of clinical negligence. The Official Solicitor acted as JDO's litigation friend in those proceedings. In June 2017, a Re X order was made under the streamlined procedure, authorising the deprivation of his liberty at the placement, and requiring the London Borough of Barnet to make an application to the court 'no less than one month before the expiry of the review period', in accordance with any Rules or Practice Directions then in effect. The local authority did not make an application (on a COPDOL 11 form) until November 2018, some six months late.

The COPDOL 11 form has a box on the first page which tells the applicant to "Give any factors that ought to be brought specially to the court's attention (the applicant being under a specific duty to make full and frank disclosure to the court of all facts and matters that might have an impact upon the court's decision)." The local authority wrote 15 lines of text, including the following:

> *"The Local Authority is aware that [JDO] has separate clinical negligence proceedings in which the Official Solicitor is instructed. The Official Solicitor, who is not instructed in relation to [JDO's] care and placement, has shared its view that, going forward, renting a flat with a private package of care might work for [JDO] with a view of a flat purchase in the future. No firm proposal has been seen and in any event none of the parties consider that this is in [JDO's] best interests at the present time (certainly for the duration of this order) and all parties consider that the current supported living and care package remain in [JDO's] best interests."*

The application was supported by a statement apparently by his mother, OD, "*typed and couched in formal language*," including the following provisions:

> *"4. I have been advised about and I am in agreement with the London Borough of Barnet making an application to the Court of Protection to authorise the deprivation of liberty in the supported housing for my son. This includes the fact that there is no less restrictive option for my son other than to continue to reside in his current accommodation….and the restrictions in place are a proportionate response to the significant risks and harms he would be subject to if he were anywhere less restrictive….*
>
> *9. I can confirm that I do not consider there is a need for an oral hearing as I am in full agreement of the proposed arrangements under the Deprivation of Liberty Safeguards for my son [JDO]."*

In January 2019, the court received a handwritten letter from JDO's parents raising concerns about the care being provided to him. On 1 February 2019, solicitors instructed by the Official Solicitor rang the court to ask whether it had received an application from the Local Authority in respect of JDO, whether a hearing had been listed, and whether letters from the Official Solicitor had been

put before the court. The call was followed up by a letter from the solicitors. Two weeks later, the court received a COP9 application from the local authority asking for further time to submit the requested statement and that the court "*consider the local authority's view that an independent person be appointed as litigation friend in this case*" because "*The local authority is concerned about the Official Solicitor having a potential conflict between* [JDO's] best *interests in the clinical negligence claim and taking a view on the level and type of care and support that he currently requires*." The matter then left the streamlined procedure, and was listed for a case management conference, the Official Solicitor being invited to act as litigation friend. The local authority made a further application for an independent person to be appointed as JDO's litigation friend, rather than the Official Solicitor, again citing the potential conflict of interest that it asserted that arose from the fact that "*already acts as litigation friend for JDO in his clinical negligence claim and the level and cost of care and support JDO receives is of direct consequence to the amount of award JDO would receive in his clinical negligence case*."

That application was dismissed, and matters finally reached a hearing before Senior Judge Hilder. Before Senior Judge Hilder, the local authority set out three propositions:

(1) That the streamlined procedure set out in PD11A only required persons with *immediate* concern about P fall within the categories of persons to be consulted, and from those categories it was up to the applicant to choose whom it wishes to consult;

(2) That the duty of full and frank disclosure was a limited one, not requiring "*the Applicant to disclose different opinions when those opinions are not, in the Applicant's view, based on fact. The Applicant only has to highlight paragraph 33(b)* [suggesting that the arrangements in relation to which authorisation is sought may not in fact be in the best interests of the person the application is about, or the least restrictive option] *if it considers the DOL is not 'in fact' in P's best interests.*"

(3) The consultation requirement in PD11A was limited to the persons who offer an alternative to the Applicant's proposal.

The local authority accepted that: "*a lot of the initial confusion in this application could have been avoided" if letters from the Official Solicitor had been annexed to the application*;" and that the Applicant "*was distracted by considering whether or not the Official Solicitor, as litigation friend to P in other proceedings, had the status of a party for the Re X application*." The local authority argued that there was no reason to state in the application paperwork that its proposed placement may not in fact be in JDO's best interests "*because there were no other available options at the time of the application to call that into question*" and "[t]*here was no prospect that in the period of the DOL authorisation sought in the application, up to November 2019, that there was any other available option for JDO…*"; and that the Official Solicitor was not listed as a person to be consulted because "*it did not appear to the Council that the Official Solicitor was interested in JDO's current welfare*."

Senior Judge Hilder, it was fair to say, was not overly impressed with either the arguments as to the construction of PD11A or the explanations given by the local authority as to its approach. As she noted:

44. The streamlined procedure was conceived and implemented with full acknowledgment of its dependence on the conduct of the party who makes the application – as demonstrated by the express inclusion of the duty of full and frank disclosure in the Practice Direction. This duty is foundational to ensuring the 'reliability and completeness' of information put before the court, and therefore foundational to compliance with Article 5. It must be understood as such by any person or public body who avails themselves of this procedure.

45. The duty of full and frank disclosure is a serious and onerous obligation that applies to litigants and their legal advisers alike. As far as I am aware, this duty has not previously been the subject of judicial scrutiny in the context of deprivation of liberty authorisations but in other contexts the applicable principles are well settled.

[Having set out the principles in an extract from *Fundo Soberano de Angola & Ors v. Jose Filomen dos Santos & Ors* [2018] EWHC 2199 (Comm), she continued

Paragraph 33 of PD11A reflects these principles in simpler terms. In particular:

it specifies that the duty extends to "all facts and matters that may have an impact on the court's decision whether to authorise the deprivation of liberty";

it directs the applicant to "scrutinise the circumstances of the case" and "clearly identify" factors needing particular judicial scrutiny or suggestive that proposed arrangements may not be in P's best interests or the least restrictive option or otherwise indicative that the order should not be made; and

it specifically includes a requirement to explain why persons of a relevant category have not been consulted.

Senior Judge Hilder found nothing in *N v ACCG* that justified the submission that the requirement for full disclosure is limited to circumstances where there are "*other actual competing alternatives available*." "*If anything,*" she noted:

the recognition of the "creative" possibility of proceedings (also at paragraph 35 of the judgment) goes against it. In my view, cases which considered authorisations of deprivation of liberty (albeit not by the streamlined procedure) offer more insight into the approach to be adopted to the duty of full and frank disclosure:

a. in Re Briggs (Incapacitated Person) [2017] EWCA Civ 1169 at paragraphs 94 – 95 King LJ was clear that

"… Proper consideration of those cases by the assessor in compliance with the guidance in the DOLS Code, requires far more of an extensive consideration of the relevant circumstances than that which is suggested by Mr Nicholls, namely simply ensuring a care plan and needs assessment is in place without further consideration as to the content.

95. Contact, for example, is an issue capable of going to the heart of whether being detained is in a person's best interests; it may be that in an ideal world P's best interests

> *would be served by a deprivation of liberty in the form of her living in a care home properly looked after, where the appropriate medication regime will be adhered to and P will have a proper balanced diet. Desirable as that may be, and such a regime may well provide the optimum care outcome for P, but it may also be the case that unless, regular contact can be facilitated to a particular family member, the distress and confusion caused to P would be such that it would be no longer in her best interests to be detained, and that what might amount to sub optimum physical care would ultimately be preferable to no, or insufficient contact…."*

b. in CB v. Medway Council [2019] EWCOP 5 at paragraph 33, Hayden J Vice-President of the Court of Protection emphasised that

> *"what is involved here is nothing less than CB's liberty. Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and **proper enquiry.**" (emphasis added)*

As to the local authority's arguments upon the law:

> *48. Dealing with the legal submissions first, in my judgment the Applicant's scope of consultation argument is misconceived. Paragraph 39(d) of PD11A is expressed in ordinary plain language and should be understood accordingly. The description of "anyone engaged in caring for the person" is plainly not limited to primary carers but is wide enough to include those who give care only for part of P's living arrangements, including care during contact periods; and the description of anyone "interested in his or her welfare" does not import any limitation only to concerns about "P's immediate welfare or near-future welfare." I agree with Mr. Hallin that Mr. Paget's suggestion otherwise artificially denies the obvious link between P's long-term and immediate interests. Moreover there is nothing in paragraph 39 which limits the consultation to three people – "if possible, at least three" people in categories (c) and (d) should be consulted. It would clearly not meet either the letter or the spirit of paragraph 39 for the Applicant to "decide" whom to consult in such a way as to "bypass" those most obviously within the required categories. Mr Paget's exposition of "apparent tensions" in paragraph 39(d) and how its requirements can be met in practice is, in my judgment, a strangulation of the plain language of the Practice Direction.*
>
> *49. I further agree with Mr. Hallin that the Applicant's subjective view argument is a fundamental misunderstanding of the duty of full and frank disclosure. If it were to be up to the Applicant to determine whether a view which differs from its own is valid and therefore to be brought to the attention of the court or not, the duty of disclosure would be neither full nor frank. As set out in paragraph 46(2) above, it is a well-established principle of a duty of full and frank disclosure that the materiality of relevant information is to be determined by the court. If a person sensibly within the categories of person*

who ought to be consulted holds a view which is contrary to the Applicant's, the Applicant must make that clear in the application, irrespective of its own view of the merits of that other view. In the context of a procedure designed for non-contentious applications, such factors clearly include indications that the proposal is in fact disputed, irrespective of the applicant's view of the merits of that dispute. If explanation is needed as to why this is so, the Court of Appeal has set it out: the validity of the streamlined procedure as a mechanism for compliance with the obligations of Article 5 depends upon it.

50. The Applicant's alternatives-only argument overstates the ordinary meaning of the Practice Direction and the import of N. v ACCG . The suggestion of a literal meaning which requires consultation with "anyone, except the most insensitive person, who has met P" is an unattractive resort to reductio ad absurdum which fails to give credit to the professionalism, experience and judgment which may reasonably be expected of social workers and best interest assessors. If the duty of disclosure extended only to concerns where alternative options were already identified, inactivity on the part of person under the duty would be rewarded and opportunity for proper enquiry denied. There is no threshold for bringing a challenge to a deprivation of liberty and any applicant for authorisation under the streamlined procedure must proactively inform the court of contrary views.

When it came to the facts of the case before her, Senior Judge Hilder was scathing as to the conduct of the local authority, finding (inter alia) that the placement, at the time of filing the COPDOL could not reasonably have been considered by the local authority to be non-contentious, that it was in breach of its duty of its full and frank disclosure in relation to the Official Solicitor's position because:

in fact the Applicant did recognise that the Official Solicitor was an appropriate person to consult about the application in this case – as demonstrated by the fact that the Applicant did actually consult her (paragraph 3(g) of [the social worker]*'s statement). However, having received a response which was not to the Applicant's liking, the Applicant then failed to put the result of the consultation before the court fully or indeed at all. Such as was included in the COPDOL11 form reflects the Applicant's position, not the Official Solicitor's. Thereafter, the Applicant went to extraordinary lengths to seek to avoid the Official Solicitor's participation in proceedings, including apparently choosing an alternative solicitor for JDO.*

Senior Judge Hilder also emphasised that:

it is not appropriate for the body with consultation obligations to "present" OD (or any person in her position in the proceedings) with a pre-prepared statement. The purpose of consulting with OD is to ascertain her views, so that they can be relayed to the court. It is not to put words into her mouth, or to persuade her to adopt the Applicant's views. The contrast between the statement ostensibly made by OD and the letter written by DD is stark. There is significant distance between assisting a lay person to write their statement, and presenting them with a pre-prepared document for signing. The latter approach is highly unlikely to elicit

> *genuine views. In this matter it amounts to a breach of the duty of full and frank disclosure.*

Importantly, Senior Judge Hilder highlighted that:

> *the period spent working out whether the application had appropriately been made represents a delay in the progress towards final judicial determination. I have no doubt that had the application in November 2018 been made on form COP1 as a disputed welfare issue, it would have been put before the Urgent Business Judge (as is usual procedure at the central registry) and would have been listed for Case Management Conference within something like 28 days of issue. Instead, its first listed hearing was not until 21 st March 2019. The very real consequence of the Applicant's approach was delay and a longer period of unauthorised deprivation of JDO's liberty.*

Senior Judge Hilder will consider any applications arising out of her conclusions, and it is not difficult to anticipate what those will be.

Comment

Senior Judge Hilder noted that the fact that the serious deficiencies in the local authority's application had been identified was "*some testament to the robustness of the streamlined procedure itself.*" However, the fact remains that the approach taken by the local authority was extremely troubling – and one anticipates that the court may of its own motion be examining some of the other "*50 assessments*" which the social worker in question said in her witness statement had "*passed through the court of protection without any issues.*" If any silver lining is to be found in this otherwise very grim cloud, it is that any shred of doubt as to the nature of both (1) the consultation requirement under COPDOL11; and (2) the duty of full and frank disclosure has been comprehensively dispelled.

Practical guidance on how to make COPDOL11 applications can be found here, and how to comply with the duty of full and frank disclosure here.

Best interests and contraception

An NHS Foundation Trust v AB and [2019] EWCOP 45 (MacDonald J)

Best interests – contraception

Summary

This is the latest chapter in the long running case of AB, first heard before Lieven J on whether or not a termination was in AB's best interests (see *Re An NHS Trust v AB* [2019] EWCOP 26). The first instance decision was then overturned by the Court of Appeal (see *Re AB (Termination of Pregnancy)* [2019] EWCA Civ 1215).

The question for the court at this hearing was whether it was in AB's best interests to be fitted with an intrauterine contraceptive device (IUD) at the same time as she underwent a caesarean section under spinal anesthetic.

At the start of the hearing both the local authority and the Official Solicitor opposed the application. By the end of the hearing neither actively opposed the application but nor did they consent to it. CD, AB's adoptive mother, remained opposed.

AB is a 25 year old woman who has been diagnosed with moderate learning disabilities and who is 38 weeks pregnant. She was the

adopted daughter of CD, a midwife and native of Nigeria. AB came to the United Kingdom when she was 13 years old, having previously been raised by relatives in Nigeria. AB speaks both English and Igbo. AB had been assessed as lacking capacity to consent to sexual intercourse.

The local authority had not been able to ascertain the circumstances in which AB had become pregnant, but the dates of her pregnancy suggested that it had happened while she was on a trip to Nigeria.

It was agreed by all parties that AB currently lacked the capacity to consent to and/or use contraception.

The local authority and the Official Solicitor's position was that (i) AB could gain capacity with appropriate education and (ii) the risk of AB getting pregnant in the future was virtually nil because the local authority now had in place a complete, comprehensive and effective support plan[1] to safeguard AB from the risk of unplanned pregnancy. This plan, it was argued negated the need for contraception and would allow for a further period of work to be done with AB to increase her ability to participate in decisions concerning contraception.

The court was particularly concerned about what it termed "the purported safeguarding plan" because it had been formulated in a situation of continuing uncertainty as to the care plan for the new born child. The most that could be said by the local authority in evidence was that the learning disability team were *hoping* that CD would be the carer for AB's daughter and AB following the birth.

The following factors weighed heavily with the court:

- It remained unclear how AB had got pregnant in the first place.
- It was likely that she was at the time in the care of one of her three female relations who the local authority were proposing as the primary supervisors who would safeguard AB from risk of further unplanned pregnancy.
- There was evidence from a number of sources that suggested that AB had been involved in other sexual activity and may have been the victim of sexual abuse or sexual exploitation.
- The supervision plan contained no information at all regarding how the risk of unplanned pregnancy would be managed for AB if and when she returns to visit Nigeria.
- Neither the local authority nor the police had completed their investigations into the circumstances of AB's pregnancy and so the local authority was unable to state definitively the precise nature and extent of the risk to AB of further unplanned pregnancies.

MacDonald J rejected the local authority and Official Solicitor's submission that the risk of AB becoming pregnant in the future as being

[1] The plan was that AB would never be left at home alone, would never be left unsupervised with a male, would be accompanied in the community and would be with CD, a trusted family member or support worker at all times.

virtually nil and held that '*it is plain that in the short term there is an appreciable risk that AB will be sexually active or exposed to sexual activity whilst she remains in the United Kingdom, or indeed if and when she visits her family in Nigeria. Further, as a young women, the chances of AB conceiving are high and, accordingly, the risk of AB being sexually active or exposed to sexual activity translates to a concomitant appreciable continuing risk of unplanned pregnancy. In the medium to longer term, given AB's age this appreciable level of risk will continue for at least a further ten years, during which time I am satisfied that it is likely that AB will return to Nigeria to visit her family*.'

On the issue of AB's capacity to make decisions about contraception the Judge accepted the evidence from the Trust that it was extremely unlikely that AB would ever gain capacity, particularly as she had already had 15 educational sessions on mode of delivery of her baby and made no progress towards capacity at all.

The judge also accepted the evidence from the Trust that the most appropriate method of contraception for AB was an IUD, and that to insert it at the same time as the cesarean was performed would mean that it could be inserted painlessly with minimum risk of infection and minimum risk of perforation of the uterus. By contrast the insertion of an IUD at a later date would be extremely painful for AB.

With respect to best interests the court concluded that it was not possible to ascertain AB's wishes on the issue of contraception and no cogent direct evidence of AB's beliefs and values regarding the use of contraception.

It is worth setting out in full what the Judge said about best interests (at paragraph 42):

> *In the assessment of best interests, the question of risk must be weighed, including the risk of future pregnancy and the risks to mental and physical health associated with pregnancy, childbirth and/or the removal of the child. For the reasons set out above, I am satisfied that there is an appreciable risk that AB will have a further unplanned pregnancy unless steps are taken to prevent this. The history of litigation in this matter demonstrates eloquently the devastating impact that a failure to protect AB from the appreciable risk of further unplanned pregnancy that I am satisfied subsists in respect of AB. Further, I have given weight to the opinion of Dr N, endorsed by Professor X, that in light the features of a mood disorder displayed by AB, she is at greater risk of mental health difficulties, including puerperal psychosis following the delivery of a child. There is no reason to believe that this risk would cease to pertain in respect of a further unplanned pregnancy. Finally, I have born in mind the careful evidence of Ms T regarding the upset and distress that AB has experienced as the "dry run" for the upcoming caesarean section has been completed.*

The judge therefore concluded that it was in AB's best interests to have an IUD fitted and the least restrictive and proportionate method of doing this was to do it after her cesarean section when it would cause her no pain and would negate the need for a further separate, distressing procedure to be undertaken.

On the issue of Article 8 ECHR, MacDonald J said this (at paragraph 47):

> *Finally, in circumstances where the insertion of an IUD will prevent AB from having children and making a significant choice regarding her own body, AB's Art 8 rights are engaged. As I have noted above, proper consideration of P's Art 8 rights is achieved through the best interests appraisal under s 4 of the Mental Capacity Act 2005. Within this context, I have had regard to the fact that, whilst it is the case that for the duration of its insertion the IUD will prevent AB from conceiving, the evidence before the IUD can be removed at any time should AB's position change in terms of capacity to consent to sexual relations. Having regard to the risks I have identified, and to the consequences for AB of those risks becoming manifest, I am satisfied that the interference in AB's Art 8 rights constituted by the court decision to authorise the insertion of an IUD as being in AB's best interests is one that is necessary and proportionate for the purposes of Art 8(2).*

Comment

This careful and clear judgment emphasizes the importance of public bodies considering the issue of future contraception while P is still pregnant so as to be able to protect P from future pregnancies if this is in P's best interests, in the least restrictive and proportionate way. Anecdotally this does not often happen because while the local authority is responsible for putting in place a care plan that guards against the risk of P having sex if she lacks capacity to consent to it, they do not consider themselves the decision maker on decisions about contraception. This is considered to be the GP's domain.

Sex (revisited)

A Local Authority v H [2019] EWCOP 51 (Sir Mark Hedley)

Mental capacity – contact – sex

Summary

This is the latest judgment concerning the life of H, for whom protective orders were previously made when she was 29 years old: *A LA v H* [2012] EWHC 49. Seven years later, H had moved from a care home to a supported living arrangement which the court had been authorising. She had made considerable progress. She lived in her own flat inside a large house subdivided into flats, one of which was given aside to care and support staff, one of whom slept there at night. She was able, effectively, to organise her own life within that flat. She worked two days a week and was able to go out from time to time, but the reality was that there were still significant restrictions on her liberty engaging Article 5 ECHR.

Sir Mark Hedley was asked to reconsider the previous declarations of incapacity in light of H's progress. The court agreed with the parties following an expert's reassessment that H had capacity to engage in sexual relationships and to deal with issues of contraception, but lacked capacity as to residence, care and contact. Accordingly, his Lordship observed, "*the court has no jurisdiction whatever to determine matters relating to consenting to sexual relations or contraception because H has capacity and she is entitled, as any citizen of this country is entitled, to make her own decisions for good or ill in relation to those matters*" (para 17).

H met the judge in his chambers, accompanied by a care assistant, and her counsel and solicitor. She was keen for the restrictions to be withdrawn in due course but wanted "*to take it slow*", and appreciated the security and support from her accommodation and care arrangements. In particular, she wanted to be able to choose with whom she had relationships and who became guests to her property. The judge focused therefore on the contact arrangements and made five general observations.

1. The court was being asked to grant to the local authority coercive powers: "*granting certain coercive powers in respect of some incapacity may well involve those powers trespassing into areas in which the person does have capacity. This case will be a classic illustration of that. It is very difficult to devise powers in relation to those with whom H is to have contact that do not intrude on her ability to practice the freedom of consenting to sexual relations*" (paras 25-26). She should have the maximum freedom that consenting to sexual relations is intended to bestow but, at the same time, the court was obliged to remember its protective role (para 28).

2. Any restrictions must be necessary and proportionate "*because they involve significant inroads into the Article 8 rights of H and, therefore, put her in a less favourable position than other people in the community would be in*" (para 30).

3. The court should confine its focus to those areas where compulsory powers are needed: "[a]*lthough of course the court must approve the whole of the care plan, it is not the function of a Judge to tell the social worker how to do their job nor is it usually remotely helpful if they try to do so*" (para 31).

4. Any coercive powers should always be framed within the limitations of the area where P lacks capacity. So, in this case, "*the coercive powers must not make any mention of the question of how sexual relations or anything else are exercised. They are simply not the court's business. The court's business is simply to deal with best interests arising out of the fact that H lacks capacity to decide with whom she should come into contact*" (para 32).

5. The intention of the MCA is not to dress P in forensic cotton wool but to allow them as far as possible to make the same mistakes that others are at liberty to make. So "[i]*t is not the function of the court, it is not the function of the local authority to ensure that H lives a moral life. That is her business. It is only the function of the court and the local authority to regulate who it is she comes into contact with*" (para 33).

It followed from the course of action endorsed by Sir Mark Hedley the local authority has the power to maintain or monitor the list of welcomed visitors to H's flat. They may provide for those times when a visitor should be in and out of the flat, but "*once that visitor lawfully enters the flat and the front door is shut, the local authority have no further responsibilities for what then takes place. Those are matters entirely for H and the person who is in the flat with her*" (para 34), unless of course H demonstrated distress. As for contact outside the flat:

> *Again, it is important to say that the local authority may decide whether that is a*

> *person with whom H should have contact and they may decide where it is appropriate for H to have contact with such a person. What they may not decide is how H then behaves once that contact is authorised. That is for her and it is for her to make her own decisions for good or ill as to how she then conducts herself*." (para 37)

Comment

This is a useful, practical illustration how of things might work on the ground when carers and public bodies are faced with a situation where someone has capacity to consent to sex but lacks capacity to make decisions in relation to contact. The court rightly calls a spade a spade in terms of coercive powers. After all, the law provides a defence to legal liability when acting in a person's best interests. His Lordship stated: "[t]*here is a great tendency in social work terms to hide coercion behind the façade of encouragement and, whilst that is no doubt very sensible in terms of talking to clients, in terms of the actual powers that the local authority have, coercive powers should be specified as such and identified as such and authorised as such*" (para 39).

There was an issue as to whether the measures that cut across areas of capacity ought to be considered under the inherent jurisdiction (para 29). But it seems the decisions in this case were taken very much in the Court of Protection. That seems sensible as incapacitated best interests arrangements often cut across areas where the person has capacity. Having the capacity to manage day to day finances but lacking capacity as to contact with others is but one example. In this case, the judge was open as to whether the case should continue before a District Judge or otherwise (para 41).

Capacity, the inherent jurisdiction and self-neglect

London Borough of Croydon v CD [2019] EWHC 2943 (Fam) (Cobb J)

CoP jurisdiction and powers – interface with inherent jurisdiction – mental capacity – care

Summary

The local authority brought a case before the court seeking orders to enable them to provide care to CD for his own protection. CD was not present at the hearing and nor was he represented, but the Official Solicitor accepted the invitation to act as Advocate to the Court.

Cobb J set out the dire situation in which CD was in, finding unsurprisingly that it was quite proper for the matter to be brought before the court:

> *CD is diabetic and also epileptic and has poor mobility, incontinent of urine and faeces and unable to maintain his home environment. CD's condition is further complicated by excess alcohol use and he is mostly inebriated at home. This has led to frequent incidents of falling in his flat, non-concordant with medication, severe self neglect, inability to manage his personal care, activities of daily living, his health and wellbeing. Recently his home environment deteriorated to a stage that a care agency commissioned via Croydon Council were unable to access the flat to support him with his care needs for fear of cross contamination and infection. Due to this lack of support occasioned by his poor and unhealthy home environment, CD*

frequently called the London Ambulance and Police… he attended the Accident and Emergency [department] of the Princess Royal Hospital in Bromley and Croydon University Hospital in Croydon regularly. CD lives alone and he has limited positive support network, he socialises with friends in the same block of flats who equally have alcohol misuse problems.

CD is unable to safely complete most activities of daily living without help and support from his carer. Due to his restricted mobility he is unable to manage his living environment and his personal care or complete most activities of daily living. His flat has been 'blitz cleaned' on many occasions and support care package commissioned but this has failed on all occasions. All professionals working with CD are of the view that community care has failed and te housing department is not able to meet his needs.

By the time the matter came before the Court CD's flat was soiled with human waste, putting him and anyone who accesses his flat at high risk of infectious diseases. He was continuing to drink alcohol and soil himself. His entire house from the hallway, lounge, bedroom and kitchen, including all his furniture, had faecal and urinal stains making it odorous and uninhabitable to live and preventing carers from going to his flat to provide the personal care CD required.

Cobb J found that CD was disinclined to change his ways and was not willing to be moved to a safe environment where he could be supported with his personal care.

The applicant local authority commended a twenty point care plan to the court which allowed its staff to gain access to CD's accommodation in order, first of all to provide appropriate care for CD himself and secondly to make his accommodation safe for human habitation.

The Official Solicitor, acting as Advocate to the Court, accepted that this plan appropriately met the needs of the case.

There was disagreement however as to the jurisdictional basis upon which the Court was being invited to impose care on CD against his will as being in his best interests. The local authority sought orders pursuant to the court's inherent jurisdiction, while the Official Solicitor submitted that the court should take the safer jurisdictional route of the MCA by making the orders pursuant to s.48 MCA 2005.

Cobb J held that CD was both a vulnerable adult within the meaning of *Re: SA* [2005] EWHC 2942 and so therefore amenable to the inherent jurisdiction, and also someone in respect of whom there was reason to believe he lacked capacity to make decisions about this care. Cobb J therefore made the order pursuant to the MCA 2005 (on the basis that where there is a statutory route it is more appropriate to use it it), while recording in the order the finding that CD was a vulnerable individual so the inherent jurisdiction route was an alternative available to the local authority on the particular facts of this case.

Cobb J sounded a note of caution in relation to the question of deprivation of liberty. Whilst he identified that Munby J had, in *Re PS* [2007] EWHC 623 held that the court had the power under the inherent jurisdiction to direct that an adult could be placed at a specified place and deprive them of their liberty there, he noted that: "[t]*his was, importantly qualified by what he goes*

onto say at [23] namely that (i) the detention must be authorised by the court on application made by the local authority and before the detention commences and (ii) subject to the exigencies of urgency or emergency the evidence must establish unsoundness of mind of a kind or degree warranting compulsory confinement, in other words there must be evidence establishing at least a prime facie case that the individual lacks capacity and that confinement of the nature proposed is appropriate." Cobb J noted that he was not being asked to consider the question of deprivation of liberty on the facts of the case before him, but alerted the local authority and the Official Solicitor to his provisional view on the subject.

Comment

It is entirely understandable that the local authority brought this case to the court, and entirely understandable why Cobb J granted the relief that he did. We suggest that Cobb J was well-advised to proceed down the route of s.48 MCA 2005, because to use the inherent jurisdiction in this situation would appear to us to have been problematic. There was no suggestion that CD's will was being overborne by another, such that the inherent jurisdiction could be used to secure his autonomy by removing that other person's influence – i.e. the approach that the Court of Appeal commended in ***Re DL*** as "*facilitative, rather than dictatorial, approach of the court* [aimed at] *the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their ECHR Article 8 rights*." Although we do not have the precise order that Cobb J made, its effect is clear, as it would enable the local authority lawfully to effect entry to CD's house even in the face of his refusal. If that refusal is capacitous within the meaning of the MCA 2005, then it would be difficult to see why (in the words of Lieven J in *JK*, handed down subsequently to CD, and discussed elsewhere in this report) this would not be a situation in which the inherent jurisdiction would be being used to reverse the outcome under the statutory scheme of that Act. Further, what would be the consequence if CD refused entry – would he be in contempt of court for frustrating the effect of the order? Cobb J had previously in *Re PR* sounded a note of caution in relation to the use of injunctive relief against a vulnerable adult; we suggest that this note would equally sound in relation to CD's position under the inherent jurisdiction.

Finally, we note that Cobb J again reiterated his view that the inherent jurisdiction can only be used to deprive a person of their liberty if they **both** are 'of unsound mind' of a nature and degree warranting confinement **and** lack the relevant decision-making capacity. Baker LJ in *Re BF* had expressed the view (in refusing permission before the Court of Appeal, so therefore, strictly, not in a decision with precedent value) that the inherent jurisdiction could be used to deprive a person **with** capacity of their liberty so long as they satisfied the criteria of 'unsoundness of mind,' at least on an interim basis whilst investigations are being undertaken. Baker LJ was undoubtedly correct that, for purposes of Article 5(1)(e) ECHR, deprivation of liberty does not require proof of incapacity (as otherwise the MHA 1983 would be incompatible with the ECHR). But insofar as recourse is being had to the inherent jurisdiction as an extra-statutory detention mechanism, we would respectfully suggest that its use should be as limited as possible, and that it would be intensely problematic were it to be routinely used

in relation to those with unimpaired decision-making capacity.

Capacity and palliative care

University Hospitals Bristol NHS Foundation Trust v RR [2019] EWCOP 46 (Cobb J)

Mental capacity – best interests – medical treatment

Summary

RR was a 20 year old man who had been afflicted by aplastic anaemia for five years, and treatment, including a bone marrow transplant, had not been successful – partly due to RR not following the recommended care and treatment plan. The Trust applied to the court for a declaration that RR lacked capacity to make decisions about palliative care provision, and to approve a palliative care plan for him. At the time of the court hearing, RR was thought likely to die within days or weeks. The basis for the application was that the Trust did not consider it was in RR's best interests for a further bone marrow transplant to be attempted primarily on the basis that he would not comply with the treatment plan, and as RR was thought to lack capacity to make relevant decisions for himself, the Trust wanted a court to confirm that its decision was correct.

RR was said to have been diagnosed with a range of conditions – autism, Asperger's syndrome, dyspraxia and traits of an emotionally unstable personality disorder. He had been subjected to significant harm while in the care of his birth parents as a young child, prior to being adopted at the age of 7 or 8. The court found that he lacked capacity to make decisions about his medical care, noting that the issue of his capacity had only been raised within recent days or weeks, as it became apparent that RR was nearing the end of his life. Cobb J relied in particular on an assessment by a court-appointed independent psychiatrist, who concluded that RR did meet the diagnostic criteria in s.2 MCA 2005 due to "major problems of emotional dysregulation due to childhood trauma, compounded by Asperger's syndrome". This made it difficult for RR to weigh information and communicate a decision, as his poor ability to manage his emotions, his maladaptive coping strategies and his inability to think about aspects of the past would prevent him from reflecting on aspects of his treatment that cause him particular distress. In particular, he could take into account information about the previous failed bone marrow transplant. However, Cobb J noted that it had not been an easy decision, not least as there was evidence of RR apparently making informed and reasoned decisions previously, and since the fear and anxiety about his state of ill health might have affected his decision-making irrespective of his mental disorder.

Cobb J approved the palliative care plan, noting that there was no real prospect of a second bone marrow transplant, in view of the recent deterioration in his health, the standard risks accompanying that treatment and the low prospect of success generally (around 1%), and the need for RR to remain in isolation for 4 weeks after the transplant, which RR had said he could not do and to comply with an ongoing programme of monitoring.

RR had previously expressed the wish to have a second transplant, but on discussion with the court-appointed psychiatrist, appeared to

consider that there were no options available for him, and he said that he could not cope with a further period of inpatient treatment. His father and girlfriend wished him to have a bone marrow transplant. RR died 48 hours after the court hearing.

Comment

It must be assumed from the fact that the Trust issued these proceedings in the Court of Protection, that the doctors were willing to attempt a second bone marrow transplant despite the risks and the very low prospects of success. In those circumstances, and given RR's previous wish to receive such treatment against the views of the treating doctors, it is not surprising that proceedings were brought. This is precisely the scenario encompassed by the Supreme Court's edict in *NHS Trust v Y* [2018] UKSC 46 that life-sustaining treatment decisions (including best interests decisions not to treat) require the sanction of the court if at the end of the process of decision-making, "*the way forward is finely balanced, or there is a difference of medical opinion, or a lack of agreement to a proposed course of action from those with an interest in the patient's welfare*" – which must, self-evidently, include from the person themselves, either at the time, or at the point when they had capacity to make the relevant decision.

The judgment also illustrates the difficulty of assessing capacity in people who have diagnoses such as autism and personality disorder, and where queries about their capacity are only raised in the context of a treatment dispute with clinicians. Whether or not RR lacked capacity at the time of the court hearing, however, it seems the outcome would have been the same, as RR was too ill to undergo further treatment and was not willing to agree to a long admission to hospital.

Capacity, diabetes and refusal of treatment

The Hospital vs JJ [2019] EWCOP 41 (Cobb J)

Mental capacity – best interests – medical treatment – deprivation of liberty

Summary

JJ was 23 and lived with his parents. Months earlier he had been diagnosed with type 1 insulin dependent diabetes which he was struggling to come to terms with. Not taking daily injections, he collapsed in a GP surgery and was admitted to hospital. Close to requiring intensive care, the hospital sought authorisation from the court to, as a last resort, use physical restraint to administer the insulin in his best interests. Shortly before the hearing, he accepted a subcutaneous injection of rapid acting insulin which helped to avert a crisis. But without continued treatment, he would die within a week or so from diabetic ketoacidosis.

One of the issues was whether he had the necessary mental impairment for the purposes of the MCA 2005. Previous compulsory treatment had probably led to longer-term psychological consequences and made JJ quite distrustful of some of the staff. A consultant liaison psychiatrist confirmed that JJ had experienced "*a psychological reaction*" and another healthcare professional said he was "*so medically unwell that there is a clear clouding of his thinking*" and he was barely able to engage in conversation. On an interim basis, Cobb J was satisfied that there was reason to believe JJ lacked capacity to refuse the treatment and that

the injections were in his best interests. Physical restraint to administer the insulin was very much to be a last resort, and the deprivation of liberty was authorised. Finally:

> *26. As JJ's father pointed out, (and if I may say so, I am sure he is right about this), JJ desperately needs help to come to terms with this condition. JJ is obviously a bright, thoughtful, engaging, loving young man who his mother said wanted to look top to bottom of the diagnosis of dyslexia when he was a younger person and he will, for his part, want to fully understand, investigate, and familiarise himself, and significantly and perhaps most difficulty accept this condition of diabetes if he is to maintain stable life in the community. That is a longer-term project, long beyond the remit of today's hearing or the immediate issues that confront us all, but I give voice to them because IJ having articulated them, they resonate very loudly and clearly with me.*

Comment

This case illustrates the elasticity of the concept of 'impairment or disturbance affecting the functioning of the mind or brain', particularly in urgent matters. It resonates with the argument that the key issue ought to be whether someone is proven to be unable to decide. That is what matters. Whether it is because of a mental impairment or for some other reason is, one might argue, increasingly irrelevant in practice, although critical of course at present in terms of whether the MCA is available. Perhaps a Capacity Act rather than Mental Capacity Act is the way forward – and we will watch with interest to see how the Assisted Decision-Making (Capacity) Act 2015 in Ireland operates in practice when it comes into force, dispensing as it does with the 'diagnostic' element.

Capacity assessment research – help wanted

As part of the Wellcome-funded Mental Health and Justice Project, a metacognition workstream is looking at the interfaces between mental capacity and cognitive science. One of their main goals is to understand how capacity is assessed in practice and how best to support assessors from various backgrounds. To look further into this, they are surveying legal, health and social care professionals in England & Wales. It is a short, 2-page online document which should take between 2 and 10 minutes to complete. The results will help the group and the wider MHJ project to tailor their future research to the concerns raised. If you would like to take part or share, please click here. The researchers are particularly interested to hear from lawyers as to their perspectives as they are currently under-represented amongst respondents.

Medical treatment and 16/17 year olds – joining the dots

Prompted by work done for the case of Re D, which highlighted the disconnection of the courts (and indeed commentators) in relation to the position of medical treatment in relation to 16-17 year olds, Alex has written a working paper highlighting some key questions that seem to require consideration and resolution. It is deliberately (if pompously) described as a working paper because it contains thoughts that are still in train; Alex very much welcomes comments upon its contents, and reserves the right entirely to change his mind about anything contained within it upon the basis of further

reflection and/or in the light of observations received.

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Conferences

Conferences at which editors/contributors are speaking

Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, 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 – the 100th – 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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