Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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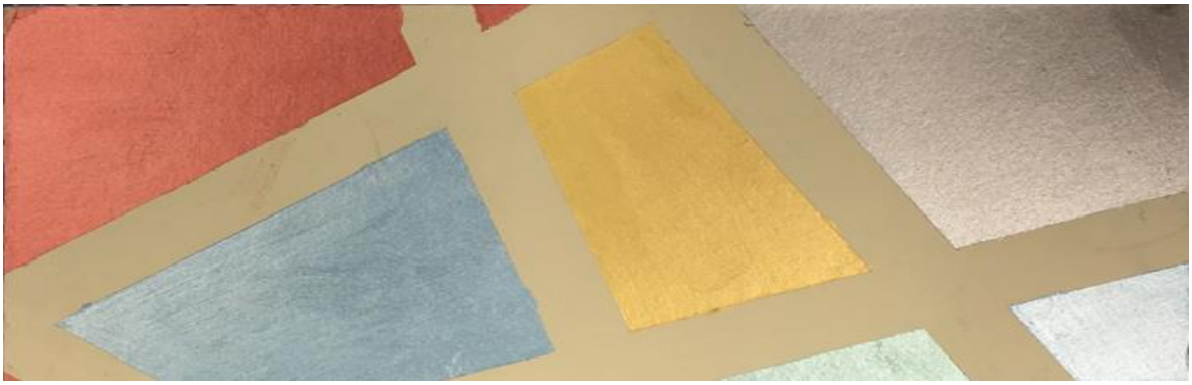

Welcome to the October 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill, a further appreciation of Alastair Pitblado and a report on a seminar on the new law at the end of life;

(2) In the Property and Affairs Report: deputies, costs and security bonds, and dealing with impermissible directives in powers of attorney;

(3) In the Practice and Procedure Report: two important decisions on costs and a seminar on improving participation in the Court of Protection;

(4) In the Wider Context Report: the new NICE guideline on decision-making and capacity, capacity and the Mental Health Tribunal, coverage of developments relating to learning disability and an CRPD update;

There is no Scotland report this month as our Scottish contributors are entirely tied up with projects both domestic and foreign, about which we hope to bring you news in the next Report.

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

Editors
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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

Deprivation of liberty, court review and costs

LB Harrow and AT & DT [2017] EWCOP 37 (Senior Judge Hilder)[1]

CoP jurisdiction and powers – costs

Summary

This judgment was handed down on 14 May 2018, but only appeared on Bailii some months thereafter. They relate to proceedings were issued to seek court authorisation of the deprivation of liberty of a man called AT (it is not entirely clear whether this because the arrangements for AT were being carried out in the community). An authorisation was given by the court in 2016 with a requirement for the local authority to apply for a review no later than 12 months later. The matter was not however returned to the court by the local authority for more than 15 months and even then, the application made was not for a review.

The Official Solicitor brought an application for his costs to be paid by the local authority on the basis that:

(i) the local authority had been late in returning the matter to court in circumstances where the family had been raising concerns about the placement for almost a year.

(ii) having brought the matter before the court, it failed to ask for a review of the deprivation of liberty, and no evidence was filed.

(iii) The local authority then failed to serve the case papers on the Official Solicitor as required by the court, leading to a directions hearing having to be vacated.

(iv) the local authority had acted unreasonably in failing to agree the terms of a court order following a hearing and had tried to re-open issues that had been determined at the hearing by the judge.

HHJ Hilder held that (i) a failure to apply for a review of the DOLS authorisation within the requisite period and (ii) (having belatedly made an application) making the wrong application, were sufficient reasons to depart from the general rule as to costs in welfare costs of no order being made. She considered that the explanations for the failures – namely human error and 'holiday season' – were wholly inadequate. HHJ Hilder further held that the conduct of the local authority in failing to serve case papers in a timely manner, and then its

[1] Note, it would appear that the [2017] citation is incorrect, as it is clear that the judgment was handed down on 14 May 2018.

approach to finalising an order did have a negative effect on the efficiency of the proceedings. She ordered that the local authority should pay half of the Official Solicitor's costs.

Comment

The most significant aspect of this judgment is what the Senior Judge had to say about public bodies failing to bring cases back to the court for review of orders authorising deprivation of liberty in a timely fashion. She rightly emphasised that the purpose of the review requirement is to provide procedural safeguards against arbitrary deprivation of liberty and so avoid a violation of the State's positive obligation under the ECHR, and that the failure to apply for a review seriously undermines the effectiveness of any safeguards. Of significance is the sentence "*Such conduct on the part of a public body cannot be overlooked*." This is particularly significant given the (growing) number of cases where public bodies are reliant upon a court order to render lawful a deprivation of liberty for which they are directly and indirectly responsible. It is likely that this case is going to be relied upon in future to justify departures from the general rule where those public bodies have not taken timely steps to ensure that those orders are reviewed.

Costs out of all proportion – and the problem for litigants in person

LB Hounslow v A Father and A Mother [2018] EWCOP 23 (District Judge Eldergill)

CoP jurisdiction and powers – costs

Summary

The sound of toys leaving the judicial pram at high speed can be heard when reading the judgment in this decision on costs from DJ Eldergill, arising out of an application that the LB Hounslow made in February 2017 to be appointed property and affairs deputy for a young man, arising out of financial safeguarding concerns relating to his parents. The father was legally represented, the mother acting as a litigant in person. As is – depressingly – often the way, things then got out of hand before, ultimately, the mother provided bank statements and notes regarding withdrawals and items of expenditure, and a final hearing took place on 2 February 2018 at the commencement of which the local authority withdrew its application without oral evidence being heard. That only left the matter of costs to be determined.

As DJ Eldergill asked:

> *24. Why didn't the matter settle at an earlier stage? The substantive application was founded on alleged misuse of benefits but the prolonged and wholly disproportionate nature of the litigation increasingly turned not on this issue but on costs. The son had no savings and so the usual rule regarding costs — that the costs be paid from his estate — was not an option unless his solicitor and counsel were willing to waive their by then substantial costs. Despite the father's solicitor's attempt to persuade me otherwise, costs was the stumbling block and became the reason why the case did not settle. The correspondence recently copied to me makes that crystal clear. On 10 August 2017, Scott-Moncrieff & Associates Ltd wrote to the local authority stating, 'We will seek payment of our costs by Hounslow as a condition of the*

application being withdrawn'. On 22 September 2017, the local authority stated that, 'The LA has indicated that it may be willing to withdraw the application, on the basis the respondents are in agreement to another [sic, presumed to be 'a number'] of conditions'. The first condition was financial monitoring. 'The second condition is that the application [sic] will not agree to pay the first respondents costs'. Thus, the litigation continued and the litigation costs continued to rise.

25. I am not going to write a lengthy judgment, or give lengthy reasons, because in my view these proceedings have already taken up a wholly disproportionate amount of court time and been conducted with insufficient proportionality. The initial allegation was misuse of DLA by the partner of the DWP appointee. All that was required was that the mother provide the local authority with the relevant bank statements showing payments of DLA and out-going expenditure on the account. The local authority could then ask questions about particular items of expenditure and, if appropriate, question the mother on the expenditure at a short hearing. The outcome would either be that the applicant could prove misuse of funds on the balance of probabilities or it could not do so. If there was no evidence in the bank statements and no oral evidence to support misuse of funds then the local authority case failed, regardless of whether or not the identity of their informant was known.

26. What happened instead was that the local authority's legal department and Scott-Moncrieff & Associates Limited on behalf of the father bombarded each other with hundreds of pages of unnecessary and often tetchy or bad-tempered correspondence, witness statements, position statements and emails into which the court was often copied. By the time they had finished litigating an alleged misuse of Disability Living Allowance benefit that could have been resolved by looking at bank statements and asking questions, the amount of claimed costs incurred amounted to approximately £50,000 + VAT in respect of Scott-Moncrieff's costs and £15,000 in respect of the local authority's costs. That is an astronomical figure and in my view wholly out of step with the following provisions of the Court of Protection Rules 2007 and 2017.

Directing himself to the question of the conduct of the parties, DJ Eldergill noted:

31. In terms of the conduct of the applicant, an allegation of dishonesty was made based on an anonymous report. In my view, the respondents did not have a fair opportunity to deal with that allegation at the time, within the safeguarding investigation. The local authority was so concerned to protect the identity of its anonymous informant that it decided not to share the minutes and 'aspects' of the safeguarding investigation with the respondents (Local Authority Position Statement, 7 July 2017, para 5). This made it difficult for them to provide a satisfactory response or explanation. The local authority then sought to rely on Public Interest Immunity in the proceedings, which was incorrect. When the bank statements were made available, the local authority was bound to conclude that it could not prove the alleged dishonesty and withdrew its application.

32. The local authority therefore did not succeed with its case and, for the reasons given, the manner in which the application and pursued was unsatisfactory.

33. Having regard to the fact that an allegation of dishonesty was made, which in my view a citizen is entitled to defend vigorously if unsubstantiated, the manner in which the application was pursued and the fact that the application was only withdrawn at the beginning of the hearing, my starting point would be that the local authority should pay all of the reasonable costs of the application.

34. However, I also find that the way in which the litigation was conducted on behalf of the First Respondent was unsatisfactory. In my view, the litigation was conducted disproportionately by both sides and there was a failure to focus on the simple central issue of whether the bank statements into which the DLA was paid evidenced any misuse of funds. The amount of claimed costs incurred of approximately £50,000 + VAT is, to my mind, a staggering sum given the relative simplicity of the central issue and the son's lack of means. Counsel's position statement dated 27 September 2017 on behalf of the First Respondent is in general terms, in particular the financial tables at (internal) pp.10-12, and involved giving evidence rather than merely setting out a position based on evidence. The correspondence is full of generalised assertions, of applications being misconceived, requests for summary judgment, etc, and both legally-represented parties made basic procedural errors (filing lengthy documents electronically despite what the rules say and including references to discussions at a DRH).

DJ Eldergill initially had in mind that the local authority be ordered to pay two-thirds of the respondent's assessed costs, but ultimately considered it necessary to separate a reduction intended to reflect conduct issues and the proportionality issue, directing the detailed assessment of the father's costs by the Supreme Court Costs Office, the local authority then being required to 90% of those costs, the 10% reduction reflecting the court's finding on the litigation conduct of the other party.

DJ Eldergill also had to consider the difficult question of the costs recoverable by the mother as litigation friend. Having examined relevant (and, he found in some cases, irrelevant) statutory provisions he reached the conclusion that:

52. [t]*he intention of the* [Court of Protection Rules] *is that a litigant in person is entitled to be reimbursed for their reasonable expenses but is not entitled to a fee or to remuneration. The intention of the rules seems to be that expenses but not fees, charges and remuneration are permitted and this is consistent with the disapplication of both CPR Rule 46.5 and the Litigants in Person (Costs and Expenses) Act 1975.*

53. Given a general rule in financial proceedings that costs are payable from the incapacitated person's estate, the intention underlying the rules seems to be that litigants in person such as family members who have not incurred any legal costs should not charge a fee for assisting an incapacitated person and the court, for example to cover loss of

> *earnings for attending court, reading documents and preparation. In many cases, such as statutory Will, LPA and disputed deputyship applications, several family members may wish to participate and join the proceedings as parties without being represented. The record I have seen, in a statutory Will case, is nineteen. If all of them were entitled to, for example, loss of earnings for attending and preparing for court, the additional costs would be significant.*

He noted, however, that

> *54.* [This is an] *unfortunate finding in the mother's case and one which, in my view, leads to an injustice. A serious allegation was made against her which necessarily she was bound to defend. It proved to be an unfounded allegation. Her conduct has been reasonable and I have no reason to doubt that her loss of earnings in defending her reputation is real. Naturally I am tempted to hold that section 55(1) is sufficiently broad that I have a discretion to award her costs but the section is subject to the rules and in my view the intention of Rule 19(1) is that litigants in person, like family member deputies, cannot charge or recover loss of earnings or hourly fees.*
>
> *55. I would invite the mother to seek to agree with the local authority a sum covering her reasonable expenses. I would also invite the local authority to consider making an ex gratia payment to her and, if that cannot be agreed or done, that she gives consideration to whether the Ombudsman might provide a remedy. The rules also need to be reviewed and revised so that the court can award a litigant in person costs in a case such as this.*

Comment

The disproportionality between the costs and the substantive issues at stake in this case is depressing but not entirely unfamiliar (although more striking, perhaps because it is in a publicly funded case – in our experience, the truly astronomical disproportion mostly comes in family feuds with wealthy individuals working out their grievances using P as a pawn). More important, perhaps, is the gap identified by DJ Eldergill in this case in relation to the ability for the mother to be recompensed for the financial costs she had incurred in defending herself. Hopefully, with a new Vice-President, the Rules Committee can be brought back to life and can add this to its task list.

Improving participation in Court of Protection proceedings

[*We are very pleased to publish here a guest article by Dr Jaime Lindsey on the recent event she coordinated at Essex Law School*]

In September 2018, Essex Law School hosted an event on 'Improving participation in Court of Protection (CoP) proceedings'. This ESRC funded workshop aimed to bring academics, practitioners and policy makers together to think about the ways that participation (particularly of P) could be improved in CoP proceedings. The one-day workshop was timely given current debates around the Mental Capacity (Amendment) bill and the recent Joint Committee on Human Rights report stating that the right to participate in proceedings should be

codified[2] The day was split into themed sessions and provoked stimulating debate about the ways in which we might improve P's participation. These discussions will hopefully lead to a number of suggestions being taken forward to improve participation in CoP proceedings.

The themed sessions

The event was split into four sessions, each with individual presentations followed by discussion. The first session focused on the current position with regards to P's participation in CoP proceedings. Key issues discussed included P's limited presence at court or participation in proceedings, as well as the ways that participation might be facilitated. Dr Jaime Lindsey (University of Essex) started the discussion off with a presentation about her qualitative research on the CoP, exploring some of the assumptions that underpin the lack of participation and how those assumptions can be addressed to encourage P to give evidence more often. [3] This was followed by Helen Curtis (Garden Court chambers) speaking about the practicalities of P's participation, specifically her own experiences of taking steps to facilitate participation and the role of special measures. The session concluded with Dr Lucy Series discussing her quantitative research into participation, [4] particularly focusing on the importance of P's ability to bring a case to court as a key aspect of participation. A number of important points raised by the speakers were picked up in the discussions. First, the assumptions that underpin P's lack of participation. For example, the assumption that P would not make a good or credible witness can create tensions for lawyers (particularly those representing P) who may feel conflicted at putting P before the judge. Second, the length of time that CoP cases take to reach a resolution can impact on P's ability to participate, particularly for Ps who might have degenerative conditions. Finally, concerns were raised that P's limited participation in the CoP simply reflected the troubling reality that disabled people face in accessing justice more broadly.

In the second session of the day, we were given a judicial perspective on participation from Professor Anselm Eldergill, District Judge of the Court of Protection. His judicial insights into the issue of participation were fascinating, particularly in light of his mental health tribunal experience. Professor Eldergill noted how slow progress in this area can appear but, when put in context, many important improvements have been made. One issue he noted as a future area of interest was participation in relation to property and affairs applications given that a deputy order deprives the individual of their property rights and often authorises a third-party to sell their house, dispose of their possessions and make gifts of their property. There is also a potential for financial abuse if the person is not sufficiently involved in the decision-making process. Given that the focus of discussions so far had been on welfare cases, it was an

[2] para 61, Joint Committee on Human Rights report (2018) The right to freedom and safety: Reform of the deprivation of liberty safeguards.

[3] J Lindsey, (Forthcoming, 2018), 'Testimonial injustice and vulnerability: A qualitative analysis of participation in the Court of Protection', *Social and Legal Studies*.

[4] L Series, P Fennell and J Doughty, The participation of P in welfare cases in the Court of Protection (Cardiff 2017).

important reminder of the wide-ranging nature of mental capacity law. He also emphasised that it is not only P's participation that is an important issue but the ability of family members and others to participate. In fact, anybody whose rights are affected by the decision should have some involvement in the process, albeit he noted that securing representation for them is not always easy.

Participation as justice for disabled people was the theme for the next session. Gillian Loomes (University of Leeds) started with an engaging presentation on voice and mental capacity based on her mixed methods research at the CoP. Gillian emphasised the role that the court room has in giving voice to certain people as well as her own experiences of being an observer of CoP proceedings. The session concluded with a joint presentation from Andrew Lee (People First Self Advocacy) and Svetlana Kotova (Inclusion London) discussing access to justice for disabled people. A key message that came through, reinforcing something highlighted by Dr Lucy Series earlier, was the importance of accessible information. They emphasised that most people will not know what the CoP is or does, unless or until they are in court themselves. Furthermore, the inaccessibility of the system for disabled people can lead to confusion about who is making the decision and why. The personal experiences of those speaking in this session came through powerfully and reminded us why participation is such an important issue.

Finally, the day concluded with a session on the relationship between mediation and participation. First up Dr Timea Tallodi (University of Essex) provided a detailed account of the international research on mediation. She highlighted that whilst mediation will not solve the problem of participation, it can provide important insights and be a learning exercise for those involved, which can have positive effects on their ongoing relationship. Katie Scott (39 Essex Chambers) provided a useful overview of the proposed new CoP mediation scheme, which is intended to make mediation available to everybody who has issued a welfare or property and affairs case in the CoP. On the issue of participation, Katie emphasised that if there is no way of securing P's participation in the mediation then it is not a matter that should be mediated. Concluding the presentations for the day was Charlotte May (Wiltshire Council) who presented on her research into mediation in the CoP.[5] Her 25 mediation case studies provided insights into the ways that mediation can facilitate agreement as well as the cost savings of mediation contrasted with proceedings. In the discussion that followed, concerns were raised about what 'agreement' really means in mediation and the extent to which P would agree with a mediated outcome. However, many of the benefits of mediation were also highlighted such as the flexibility it provides in terms of timing and venue and the wider scope of issues that can be addressed through mediation.

Discussion

The workshop brought together a range of participants and provided a valuable opportunity

[5] See C May, (2012), Elder and guardianship mediation: A review of the Canadian EGM report and its relevance in the UK, 4(2) *Elder Law Journal*, available at: http://www.adultcaremediation.co.uk/profile.html (accessed: 14 September 2018).

to discuss ways of improving participation. Potential issues to take forward following the workshop include: improving the accessibility of information about mental capacity law and the CoP; ensuring funding is available for improving participation; expanding the use of measures to support P's participation (such as familiarisation visits to court and other special measures); and changes to statute and/or the CoP rules to codify P's right to participate. These issues will not be easily resolved, particularly given that two reoccurring themes were the perceived cost implications of improving participation and the inaccessibility of justice in this area. However, the workshop allowed for important conversations to develop with the aim of improving P's participation in CoP proceedings.

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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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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. 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, and is chair of the London Group of the Court of Protection Practitioners Association. 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. While still practising he acted in or instructed many leading cases in the field. 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; 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

Conferences at which editors/contributors are speaking

Centre for Mental Health and Capacity Law CRPD events

Jill Stavert's Centre at Edinburgh Napier is holding three events around the CRPD in October and November: a workshop on CRPD, mental health and capacity: overcoming obstacles to implementation; a seminar by Dr Shih-Ning Then: *An Antipodean Perspective: Supported Decision-making in Law and Practice* and a lecture by Professor Penelope Weller on *Advance decision-making and the Convention on the Rights of Persons with Disabilities: a cross- jurisdictional discussion*. For details and to book, see here.

Taking Stock

Neil and Alex are speaking at the annual Approved Mental Health Professionals Association/University of Manchester taking stock conference on 16 November. For more details, and to book, see here.

Other events of interest

The London branch of the Court of Protection Practitioners Association is holding a seminar on care home fees on 8 November. For 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 will be out in November. 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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