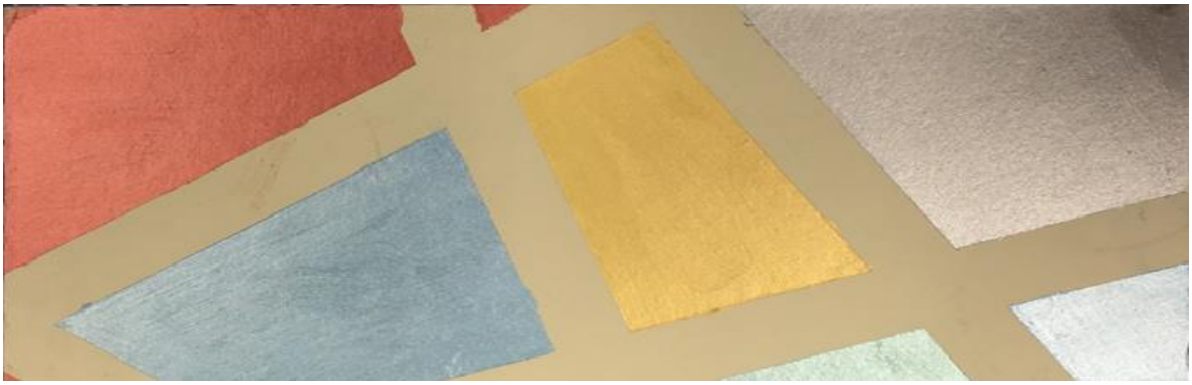
Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

October 2019 | Issue 98



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court pronounces on confinement and 16/17 year olds and two important – and difficult – cases about sex;

(2) In the Property and Affairs Report: attorneys and gifts, and withholding knowledge of an application from P or another person;

(3) In the Practice and Procedure Report: the Court of Protection mediation scheme, and the inherent jurisdiction, necessity and proportionality;

(4) In the Wider Context Report: learning from a complex case about medical treatment for a child, the Irish Bournewood and an important shift from the CRPD Committee in the context of legal capacity;

(5) In the Scotland Report: developments in the context of the MHTS and sentencing in the presence of disability.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find our new guidance note on the inherent jurisdiction.

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

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

Contents

Launch of the Court of Protection Mediation Scheme

We are delighted to announce the launch of the Court of Protection Mediation Scheme.

The scheme has been designed by a group of practitioners, including one of our editors Katie Scott, to provide those who wish to mediate issued court of protection cases with an appropriately qualified mediator, who will mediate at the legal aid rate. The scheme provides participants with information to ensure that they are properly prepared for a mediation so as to give it the best chance of success, a step by step guide as to what is required throughout the process, and provides detailed information about some of the more challenging aspects of mediating a Court of Protection case, including how to best ensure P's participation. One of the most exciting aspects of the scheme is the opportunity to participate in the research into the effectiveness of mediation being undertaken by Dr Lindsay from the University of Essex. If you are interested in becoming a mediator on the scheme, or mediating within the scheme, please visit www.courtofprotectionmediation.uk or contact ks@39essex.com.

Necessity, proportionality and the inherent jurisdiction

Mayor and Burgesses of the London Borough of Croydon v (1) KR and (2) ST [2019] EWHC 2498 (Fam) (High Court (Lieven J))

Inherent jurisdiction

Summary[1]

The local authority, Croydon, brought proceedings under the inherent jurisdiction where they had become concerned about a husband (KR) living in his wife (ST) in what could be characterised as highly dysfunctional circumstances. KR was a 59-year-old man, who was seriously disabled having suffered a life changing brain injury in 2004 after an attack. He had right sided hemiplegia, brain injury and epilepsy. He was unable to self-mobilise, was confined to a wheelchair and only has movement in one arm. He was in need of fairly constant care and is completely dependent on those who care for him. KR had been assessed

[1] With thanks to Alexis Hearnden and Stephanie David for permission to draw upon their summary of the case for a seminar given in Chambers.

as having capacity to make decisions about residence and care; which was never in issue throughout the proceedings. The couple had a history of domestic violence (the husband had once attacked his wife with a knife) and KR had previously been addicted to heroin. KR had been diagnosed with bipolar affective disorder and emotionally unstable personality disorder. It was alleged that KR had a long and ongoing problem with alcohol misuse. They lived together in a one bedroom flat (with KR sleeping on the sofa) and the local authority provided regular care visits. Professionals became increasingly concerned: carers could not always access the property for care visits, ST was sometimes said to leave KR by himself in the property and there were concerns that the couple were being preyed upon by local criminals/drug users. The local authority were concerned that not only could ST not keep KR safe, but that she exposed him to harm (e.g. by allegedly being drunk when pushing his wheelchair to the shops).

After KR was admitted to hospital the local authority made a without notice application to the High Court under the inherent jurisdiction for an order preventing ST from removing him from hospital. A week later, KR agreed to move to CP, a nursing home, for a period of respite. At the same time, Williams J discharged the order made by Cohen J (to prevent removal from hospital) and replaced it with an order that ST was not remove KR from CP, and that her contact with him be limited, including it being supervised at all times.

The application came on for a final hearing before Lieven J. The local authority's primary position was to ask for an order that KR could not live with ST; but that in the alternative he would seek protective orders against ST. On the first day of the hearing the local authority witnesses gave evidence which by the day's end (a) revealed that the evidence could not sustain the picture painted by the local authority that carers could rarely access the property and (b) included evidence from a social worker that KR's will was not "overborne" by external factors. On the second day, the local authority applied for permission to withdraw the case, and Lieven J granted their application. However, she went on to give a detailed judgment to address the question of whether making the order sought would have been justified.

In order to do so, Lieven J identified that she needed to address the following questions:

(a) Did KR fall within the inherent jurisdiction as set out in *SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867?

(b) If yes, were the terms of the order justified under article 8(2)?

(c) In answering (b) were there less intrusive means which would achieve the legitimate aim of protection of KR's health under article 8(2)?

As to (a), Lieven J found that KR was undoubtedly vulnerable in the sense that he was severely disabled and very much within the physical control of his carers. However, he had capacity, and although he had some communication problems he appeared to fully understand what was going on around him, and was able to express his views clearly and forcefully. Lieven J observed (at para 60) that: "[t]*he fact that he is physically vulnerable cannot possibly be sufficient to incur the use of the*

inherent jurisdiction." As Lieven J noted "[t]h*ere is some evidence that KR's views as to where he wants to live fluctuate, and may change when he is with or has just been with ST. However, it is important to be careful to distinguish between the entirely natural and common influence that one close family member will have over another, and the "undue influence" or "coercion" identified in SA and DL. If a dysfunctional family relationship is to fall within these principles then the evidence has to show that the vulnerable individual is incapable of making their own decision."*

Whilst Lieven J found that it was possible that KR fell within the scope of the inherent jurisdiction when the initial application was made, by the time the matter came before her KR had been living away from ST for a period of almost 6 months. His evidence was clear in his two witness statements that he wanted to leave the care home and live with ST. The witness statements suggested that he had carefully weighed up the pros and cons of living with ST, and come up with a well thought out position. As Lieven J noted:

> *63* […]*This might fall within what the Mental Capacity Act calls an unwise decision, but if an adult without capacity is allowed to make an unwise decision so too must someone facing an application under the inherent jurisdiction. I do not reject the possibility that in extremely exceptional cases the inherent jurisdiction might be used for long term or permanent orders forcing the vulnerable adult not to live with the person(s) he wants to, as was the case in Meyers. However, that must be a truly exceptional case. As was contemplated by Macur J in LBL, and apparently supported by McFarlane LJ in DL at [67], the normal use of the inherent jurisdiction is to secure for the individual, who is subject to the alleged coercion or undue influence, a space in which their true decision making can be re-established. If the inherent jurisdiction is used beyond this then the level of interference in the individual's article 8 rights will become increasingly difficult to justify.*
>
> *64. The Local Authority relied on Meyers, where it was equally clear that Mr Meyers had capacity and had strongly expressed his wish to go home and live with his son, yet the final order was still made. In my view there are two key differences from Meyers, which I will consider through the analytical framework of article 8. Firstly, there is the scale of the interference in stopping a couple, who have been married for 40 years and both of whom have capacity, from living together. It is hard to imagine the State interfering more intrusively in a person's private life. Secondly, on the article 8(2) justification, Hayden J was very clear in Meyers that if Mr Meyers returned home then he would be likely to die because of the conditions he was living in and his son's refusal to allow carers to look after him. It is therefore possible to analyse the case as one where the State had a positive obligation under article 2 to intervene to preserve life. In any event, Meyers was a truly exceptional case, where the evidence that the local authority had taken every possible step to protect Mr Meyers, including trying to control the actions of his son, was overwhelming. That is not the case here, as I will explain below.*

Lieven J therefore found that, by the time that the matter came before her, the evidence did not support a conclusion that KR fell within the

scope of the inherent jurisdiction as a vulnerable adult or that KR remained under the undue influence of ST to a degree which would justify the use of the inherent jurisdiction.

Lieven J nonetheless went on to consider the question of whether, even had KR fallen within the scope of the inherent jurisdiction, any order should have been made. She had set out the framework earlier in the judgment, starting at paragraph 45, at which she had noted that:

> *45. The parties in this case appear to have focused primarily on article 5 (the right to liberty), perhaps because that is necessarily the critical article in cases concerning Deprivation of Liberty orders. However, it appears to me that the answer to this case, and the correct analytical framework arises much more clearly under article 8. In order for article 5 to be in play the orders sought would have to be restricting KR's liberty. However, the LA do not seek KR to be required to live at CP, they merely require him not to live with ST. Although in practice KR given his condition would have little or no choice certainly in the short run, but to live at CP if the order was made, the order itself would not be a removal of his liberty. As such I do not think that this is a case where article 5 is in truth the issue. This entirely accords with Cobb J's judgment in PR [2019] EWHC 2305 (Fam).*

Turning to Article 8 ECHR, and relying upon *Hokkannen v Finland* (19823/92), Lieven J noted that "*the protection of the individual's autonomy against interference by the State is absolutely central to the present case*," and that the proposed interference with the Article 8 rights of KR and his wife in a marriage of 40 years was colossal. "*That does not mean that the State can never separate a married couple*," she continued, "*but it must do so with full consideration of the scale of interference in that couples' rights*."

The question was therefore whether that interference was justified. This turned on whether the interference in KR's rights was on the facts of the case necessary and proportionate. As she noted "[i]*n any case involving an interference with an article 8 right it will be necessary for the Court to consider whether the State has properly had regard to the potential for "less intrusive measures". Plainly the greater the interference the more closely less intrusive means will need to be scrutinised*" (para 51).

On the facts of KR's case, she found that the Article 8(2) balance came down against making an order:

> *68. In terms of risk to KR from ST, I accept that this is a couple with a history of domestic violence. Historically KR accepts that he did hit ST, but it is obvious now that given his physical disability he is more at risk from ST. There was some evidence from bruising that ST may have assaulted KR but this is certainly not clear. In any event it would only be in the most exceptional case that the State would seek to forcibly prevent a couple from living together where there was a history of domestic violence, in circumstances where both genuinely said they wanted to live together.*
>
> *69. Further, this is again a point where the LA have plainly failed to properly consider less intrusive means to mitigate the alleged risk. The couple live in a one bedroom flat and due to KR's disability ST has been having to sleep on a sofa in the*

> *living room ever since KR returned home in 2015. ST is obviously under extreme strain living in these circumstances and being KR's primary carer. I asked what steps had been made to find them more suitable accommodation, but Ms Bamfield told me there were no supported flats available, and they were simply on the LA's waiting list for a two bedroom flat. It is obvious to me that before seeking a highly draconian order and making such a colossal interference in this couple's article 8 rights it was incumbent on the LA to ensure that they had suitable accommodation. That simply has not been done.*
>
> *70. In conclusion I therefore find that the risks on the facts of this case do not justify the interference under article 8(2). Further I find that the LA has not properly considered whether there are less intrusive means by which KR could be properly protected. In these circumstances I find that making the order sought would not have been necessary or proportionate.*

Comment

In the absence of any governing statute, it is extremely difficult for both practitioners and the courts to identify what is, and is not, permissible even to ask for under the inherent jurisdiction. This is therefore an important and helpful case in terms of developing a framework through which decisions can be made as to when to bring applications under the inherent jurisdiction and what orders can appropriately be sought.

We have sought to provide further guidance, and to draw together the strands from recent case-law, in our guidance note on the inherent jurisdiction available here.

Separately, and as a practice point, it is important to highlight Lieven J's concerns with the way in which the application was presented to court. Three working days before the trial, 1400 pages of background documents were sent to the lawyers for KR and ST. As Lieven J noted:

> *17. There are a number of points of concern to me about these documents. Firstly, it is not acceptable that they were only disclosed, at least in this form, so shortly before trial. The hearing date had been set down since 21 May 2019, and the late disclosure meant the bundles were both unmanageable, and in reality, unreadable. Secondly, the disclosure appears to have been in the form of simply putting all these documents in the court bundle without any attempt to agree the bundle. Again, this is not acceptable, at the least attempts must be made to agree a bundle, and the bundle should be limited to documents which will be necessary for the judge to consider.*
>
> *18. Thirdly, and most importantly, I am seriously concerned about the discrepancies between what some of these background documents show and what was said in the evidence to the court, particularly in the first witness statement of Ms Jones, which was the basis of the without notice order. This case commenced with an application for an injunction without notice. It continued through a series of interim injunctions where the judges necessarily had very limited time to examine background documents, even if they had been exhibited, which in key instances they were not. It is trite law that when a without notice injunction is applied for there is a duty of full and frank disclosure*

> *and there is in any event a duty on any claimant not to mislead the court. This is just as true in proceedings like this as in the Commercial Court or Queen's Bench. Indeed it is relevant, and I will return to this below, that the injunction sought was not just draconian it was deeply intrusive into the private lives of two adults with capacity. I will refer below to the European and domestic caselaw on the importance of the State not interfering into individuals' marriage. In those circumstances the obligation for full and frank disclosure is as important if not more important, than in any other form of litigation. I appreciate local authorities are hard pressed, and poorly resourced, however the importance of ensuring the Court is possession of all the relevant facts at a without notice injunction application cannot be overstated.*

In this context, it may be of assistance for readers also to note our guide to without notice applications in the Court of Protection (equally applicable to applications under the inherent jurisdiction), available here.

Short note: the inherent jurisdiction and deprivation of liberty

The Court of Appeal ([2019] EWCA Civ 1558) has granted permission (out of time) for Mr Mazhar to appeal an (on its face) somewhat startling order made by Mostyn J in 2016. In the Court of Appeal's summary:

> *5. Mr Mazhar suffers from severe physical disabilities for which he requires 24-hour care, including ventilation. He has mental capacity in all material respects, including in respect of decisions about his care. At the material time his care was provided by carers at his home.*
>
> *6. On 22 April 2016, Birmingham Community Healthcare NHS Foundation Trust ("the NHS Trust") made an urgent out-of-hours application, by telephone, for an order authorising the use of reasonable and proportionate force to remove Mr Mazhar from his home to Queen Elizabeth Hospital in Birmingham (paras. 1-3 of Mostyn J's order), and to detain him in hospital for medical care (para. 4 of that order) on the basis that no carers were available to attend his home at the weekend, and no agreement had been reached between the NHS Trust and his family that would have met his care needs. Para. 5 of Mostyn J's order required that the matter be listed for an urgent hearing as soon as possible on or after 25 April 2016.*

Mr Mazhar contended that the order was based on misrepresentations made to Mostyn J by the NHS Trust. He also contended that, even on the evidence that was before Mostyn J, the order could not and should not have been made because there was no evidence that he was a person "of unsound mind", to use the phrase in Article 5(1)(e) of the ECHR. He did not seek to appeal the order, but initiated proceedings against both the NHS Trust and the Lord Chancellor, seeking a declaration that both had violated his Article 5, 6 and/or 8 rights under the ECHR. He also sought damages. He settled his claim against the NHS trust by accepting a Part 36 offer, and then sought a declaration only against the Lord Chancellor.

After a rather complex procedural journey, and for reasons that need not detain us here, the Court of Appeal found that, in fact, the

appropriate remedy was for Mr Mazhar to seek to appeal Mostyn J's order, and granted him permission (substantially out of time) to do so. In doing so, the Court of Appeal held that the appeal would have a real prospect of success, recording the submission of Counsel for Mr Mazhart that "*as a matter of law, Mostyn J's order should never have been made because there was no evidence before him that Mr Mazhar was a person "of unsound mind" (the phrase used in Article 5(1)(e) of the ECHR).*"

It will be interesting to see whether in defending the appeal, the Lord Chancellor maintains the position that was advanced at first instance, to the effect that:

> *The Lord Chancellor concedes that Mr Mazhar was deprived of his liberty when he was removed from his home and taken to hospital and accepts that he was not a person of unsound mind within the meaning of article 5(1)(e) at the date of the order. He does not however accept that the broader proposition that the inherent jurisdiction is limited in the way suggested on behalf of Mr Mazhar and in particular that it can only be used to facilitate the re-establishment of autonomy. He argues that its use to detain and remove a person who has mental capacity to make decisions about his care (but who is a vulnerable adult) to a safe place such as a hospital is a well recognised jurisdiction which acts as a safety net to protect persons who fall outside the scope of the Mental Capacity Act 2005. He contends that use of the jurisdiction to detain is neither arbitrary nor unlawful because there are procedural safeguards ie it is a procedure prescribed by law, governed by Rules of Court, Practice Directions and Guidance. It is clearly established by case law which is sufficiently accessible and foreseeable with advice and the jurisdiction's flexibility is reasoned and justified so that, for example, where detention is permitted there are rigorous safeguards that include regular review.*

Deputyship fees refund

The Ministry of Justice has launched its scheme to refund overpayments of deputyship fees paid between 1 April 2008 and 31 March 2015.

Where the deputyship is still in place, there is no need for an application and the PGO will be in touch with the deputy to organise the refund.

If, however, the deputyship has ceased, either because P has died or because P has recovered capacity, then an application for a refund has to be made respectively by those representing P's estate or by P himself.

For more details, see here.

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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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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. 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. 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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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; 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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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

AWI, guardianship and elder law conference

Adrian is giving the keynote address for the Law Society of Scotland's conference on this subject in Glasgow on 30 October. For more details, and to book, see here.

Adult incapacity law

Adrian is delivering a lecture at Edinburgh Napier University on 13 November on "Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history." For more details, see the website of the Centre for Mental Health and Capacity Law.

Taking Stock

Neil is giving the keynote speech at the annual national conference on 15 November jointly promoted by the Approved Mental Health Professionals Association (North West England and North Wales) and the University of Manchester. For more information, and to book, see here.

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.

Other conferences of interest

The Court of Protection Bar Association will be holding a seminar, open to members of the Association, on 28 October at 39 Essex Chambers in London addressing recent developments in mental capacity law. For more details, 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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