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MENTAL CAPACITY REPORT: COMPENDIUM

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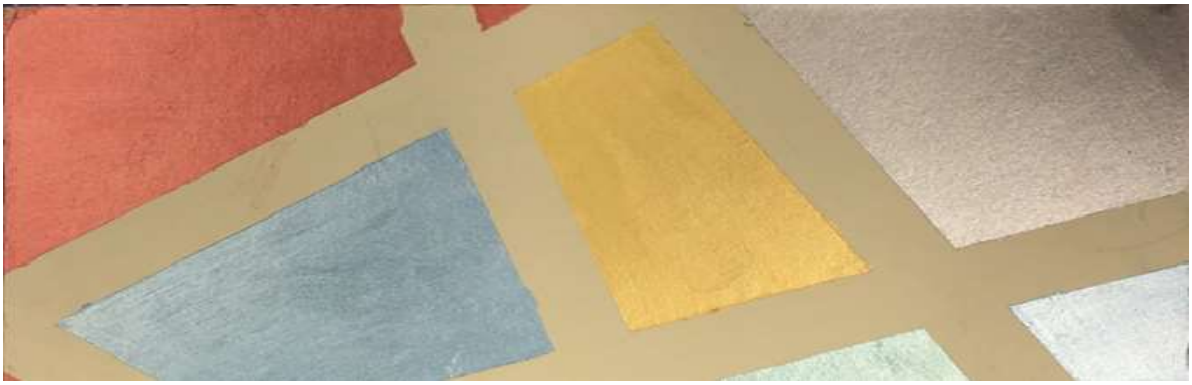

Welcome to the October 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, the CRPD in the Court of Protection and spotting the signs of abuse;

(2) In the Property and Affairs Report: two important cases about deputies and fixed costs and how to get financial deputyship applications right;

(3) In the Practice and Procedure Report: s.21A applications and interim declarations; the limits of the court's jurisdiction; contempt proceedings and when not to recognise a foreign order;

(4) In the Wider Context Report: new GMC consent guidance, Sir James Munby returns to the inherent jurisdiction, new CQC publications and relevant ECHR developments;

(5) In the Scotland Report: a new Chief Executive for the Mental Welfare Commission, MWC publications, and what COVID-19 has revealed about ageism and disability discrimination.

We thank Katherine Barnes for all her contributions to date, and wish her well as she steps down to focus her activities on other areas; we welcome Rachel Sullivan and Stephanie David as new contributors.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

# Contents

## HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

### Updated DHSC MCA/DoLS Emergency Guidance

The DHSC's MCA/DoLS guidance has been further updated on 15 October, not least to make clear the circumstances under which face-to-face visits for DoLS assessment (and support purposes, by RPRs and IMCAs) should be taking place under the new tiered alert system. Alex has done a walkthrough of the guidance, available here.

In this context, we note also the letter from Hayden J published on 15 October relating to visiting restrictions under the new tiered arrangements in force from 17 October. The letter, directed in the first instances to other judges of the Court of Protection, but published on an open basis, identifies that:

> *Of particular concern to us, in the Court of Protection, is the impact the present arrangements may have on elderly people living in Care Homes. The extent to which this group has suffered during the course of the pandemic public health crisis is well known and documented. One of the limited number of positives, is that it was possible to establish pragmatic and imaginative arrangements for contact with relatives during the course of what we have come to know as 'Lockdown.' This became known as 'window contact', though that phrase did not always do justice to the safe and creative measures devised. As restrictions were relaxed over the summer, contact arrangements also became much more flexible within the Care Homes.*

The letter then goes on to note that, even in Tier 3 – "very high" – level of restrictions:[1]

> *This provision* ***permits*** *contact with relatives* ***'staying'*** *in Care Homes, under the same arrangements presently assessed as Covid-19 compliant. It will undoubtedly be the case that the actual arrangements will have to be tailored to the particular individual and the circumstances within the home, during the course of what we have now recognised to be the second wave of the pandemic. What is important to emphasise is that these arrangements have been identified within the Regulations made by the Secretary of State and are therefore lawful.* (emphasis added)

## The CPRD in the Court of Protection

*Cornwall Council v NP and BKP* [2020] EWCOP 44 (DJ Ian Taylor)

*Article 5 – DoLS authorisations – Article 8 – residence*

### Summary

These reconstituted s.21A MCA proceedings concerned a 69-year-old man who, married for 35 years, collapsed in the marital home and was hospitalised with diagnoses of neurological sequelae of herpesviral encephalitis and personality change. With incapacity not in dispute, the issue was whether it was in his best interests to be discharged a neuro-rehabilitation unit to a care home or the family home with a care package. He wanted to go home and, if he had capacity, it was likely that he would decide to do so.

At the hearing, the local authority no longer opposed a trial return home but had significant reservations about its sustainability and risks involved. NP's behavioural volatility could lead to unpredictable physical aggression and there were concerns for his wife as primary carer. But she was able and willing to meet his needs. Due to the pandemic, she had not been able to see him for six months. She said: "*Give* [NP] *and I time together, some of which would be private, which I believe would be overall good for both our mental health*" and *"enable us to have privacy of our relationship, a hug, a kiss goodnight and experience most of the lucid moments he has together*."

In reaching its best interests decision, the court took account of Article 19 CRPD, which provides the right to live in the community with choices equal to others. Consideration was also given to General Comment No.5 of the United Nation's CRPD Committee on institutions. Unsurprisingly, the court ordered that it was in NP's best interests to return home for a trial period of 3 weeks, with the care home bed kept open as a contingency.

### Comment

This decision is of interest in two particular respects. First, although arguments are often made on

[1] These are discussed in this post by Alex.

Article 19 CRPD, rarely do they then feature in a judgment. Secondly, on the nature of s.21A MCA proceedings, the judge rightly states:

> *17. Once an application is made under section 21A, the court's powers are not confined simply to determining the question of whether P meets one or more of the qualifying requirements and the court has the power to make declarations under section 15 as to whether P lacks capacity to make any decision, and once such a declaration is made, the court has wide powers under section 16 to make decisions on P's behalf concerning his personal welfare or property and affairs (CC v KK [2012] EWHC 2136 (COP), Baker J at para 16, PH v A Local Authority [2011] EWHC 1704 (Fam), Baker J at para 15).*

This can be contrasted with para 38 of the *DP v Hillingdon* [2020] EWCOP 45 decision (discussed in the Practice and Procedure section) which refers to the "*discrete scope and ambit of a Section 21A application*." Section 21A MCA provides that the court "may" determine any question relating to the four matters there referred to. As described by Baker J (as he then was), we suggest the s.21A power to consider those questions are additional to, not discrete from, the court's general jurisdiction under MCA ss.15-16. In other words, the court is not precluded in a s.21A application from considering issues arising beyond the scope of the four matters identified in s.21A. To do otherwise would result in P losing non-means tested legal aid and require separate applications to be made for non-s.21A matters which would offend the overriding objective and result in litigious compartmentalisation.

## Short note: spotting abuse

In *Re LW* [2020] EWCOP 50, Hayden J was concerned with a 60-year-old woman, LW. She had been admitted to a specialist unit, initially detained under the MHA 1983, in a "truly parlous condition." She had then stayed in the unit for nearly 3 years, although the professional consensus had been for many months that it was not the right place for her. The professionals involved were seeking to identify the right way forward, in circumstances where the central challenge was that she had

> *5.* […] *formed a relationship with a man, known as MG, whom she described to me as her "long term partner." It is important to say that even the most cursory analysis of the extensive evidence available points clearly to this relationship as being abusive, exploitative, coercive and wholly inimical to LW's welfare. As I have read the papers and heard the evidence, I have wondered how this has been permitted to continue for as long as it has. On a rational and objective analysis, LW derives nothing from this relationship at all. She expresses a strong wish for it to continue, though her behaviour often indicates that the relationship is stressful and disturbing to her. For reasons that I will identify below this relationship is corrosive of her welfare and significantly impedes her capacity to enjoy life which has been identified, historically, as intrinsic to her personality. I consider that some of MG's behaviour has a sadistic component to it.*

It was clear from the facts before the court that only a cessation of contact with MG would assist in terms of progressing LW's departure from the unit and her – slow – move towards independent living. As Hayden J noted:

> *13.* […] *It is the influence that MG asserts over LW's fragile personality that compromises her capacity to weigh and evaluate the questions relating to her care and where she should live. This is compounded by her inability to understand her own mental health needs. All this had led Dr N ultimately to come to the conclusion that LW lacks capacity to take key decisions. That is a conclusion with which everyone agrees. It is perhaps important to mention that in her earlier report Dr N had expressed herself more cautiously in relation to LW's capacity. This is because on so many levels LW is able to communicate her views eloquently and articulately. She is a charming lady who inspires affection. This was obvious even in the glimpse that I had of her with those caring for her. To some degree this masks the more pervasive factors Dr N has identified. In any event, I am entirely satisfied that she lacks capacity to take the interrelated decisions relating to contact with MG, where she should live and the nature and extent of the care she requires.*

Hayden J therefore set out the planning process thereafter, including as to how bring about MG's eviction from LW's property. He emphasised that this was a:

> *14.* […] *sensitive situation. The pace of progress will very much depend on LW's reaction to this judgment. The timescales that Dr N indicated must not be regarded as "set in stone," progress must be at LW's own pace. It is LW's needs that should drive the timetable not the exigencies of the litigation.*
>
> *15. What is envisaged is an order permitting the parties to return to court to submit a finalised care plan. I have no doubt the plan is contrary to LW's expressed "wishes." Whether it is contrary to her "feelings" though, remains to be seen.*
>
> *16. Mr Hallin, acting for the NHS Social Care Partnership Trust, observes that neither the Official Solicitor nor the Court lightly goes against the clear and consistently expressed wishes and feelings of an incapacitated person, but here, were I to permit her to return to her flat with MG, I would be exposing her to a regime of insidious controlling and abusive behaviour which is both corrosive of her personal autonomy and entirely irreconcilable with her best interests.*

Hayden J also took the opportunity to highlight both the insidious nature of controlling and coercive behaviour and the extreme vulnerability of those lacking mental capacity in facets of their decision making. He drew attention to the definition of domestic violence abuse first published in 2012, as well as the Statutory Guidance pursuant to s.77(1) Serious Crime Act 2015, emphasising those features seen with some frequency by those concerned with the welfare of vulnerable adults:

- Isolating a person from their friends and family
- Depriving them of their basic needs
- Monitoring their time
- Monitoring a person via online communication tools or using spyware
- Taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep
- Depriving them access to support services, such as specialist support or medical services
- Repeatedly putting them down such as telling them they are worthless

- Enforcing rules and activity which humiliate, degrade or dehumanise the victim
- Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities
- Financial abuse including control of finances, such as only allowing a person a punitive allowance
- Control ability to go to school or place of study
- Taking wages, benefits or allowances
- Threats to hurt or kill
- Threats to harm a child
- Threats to reveal or publish private information (e.g. threatening to 'out' someone)
- Threats to hurt or physically harming a family pet
- Assault
- Criminal damage (such as destruction of household goods)
- Preventing a person from having access to transport or from working
- Preventing a person from being able to attend school, college or University
- Family 'dishonour'
- Reputational damage
- Disclosure of sexual orientation
- Disclosure of HIV status or other medical condition without consent
- Limiting access to family, friends and finances

At paragraph 22, Hayden J emphasised that the list was not exhaustive:

> *It does not, for example, include controlling intake of food and nutrition, which was such a striking facet of the evidence here. Abusive behaviour of this kind will often be tailored to the individual circumstances of those involved. The above is no more than a check list which should prompt questioning and enquiry, the responses to which should be carefully recorded so that the wider picture emerges. That which might, in isolation, appear innocuous or insignificant may in the context of a wider evidential picture be more accurately understood.*

## DNACPR notices – the danger signs

Solicitors working with clients in the Court of Protection working with clients in the Court of Protection would be well-advised to read the guest post on Alex's website written by Richard Charlton and Bharati Gidoomal, two very experienced Court of Protection solicitors, who set out the issues that their firm have been encountering as regards DNACPR notices, and also practical steps that solicitors should be taking in welfare cases in which they are instructed to make sure that they have identified potential danger signs.

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# PROPERTY AND AFFAIRS

## Deputies, fixed costs, detailed assessment and net assets

*Penntrust Ltd v West Berkshire District Council & Anor* [2020] EWCOP 48 (Senior Judge Hilder)

*Deputies – property and affairs – CoP jurisdiction and powers – costs*

### Summary

Senior Judge Hilder has returned to the vexed question of Practice Direction 19B and fixed costs in the Court of Protection. In its current iteration, PD19B provides that "*where the net assets of P are below £16,000*," the option for detailed assessment of costs of the estate "*will only arise if the court makes a specific order*."

The Applicant trust corporation was formerly appointed as property and affairs deputy for a woman called AH. At all times during the deputyship P's liquid assets were less than £16,000 but her total assets, including a property in which she lives, were substantially higher. The deputyship order includes authorisation to seek SCCO assessment but made no explicit reference to the size or nature of AH's estate. The Applicant contended that it was entitled to rely on the authorisation in its deputyship order to seek SCCO assessment of its costs. In the event that the court did not agree, the Applicant sought retrospective authority to obtain SCCO assessment. The Respondent local authority, which was now the property and affairs deputy, wanted to understand what debt AH had incurred; the Public Guardian sought no specific outcome, but to seek to assist the court.

Section 19(7) MCA provides that deputies are entitled (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and (b) if the court so directs when appointing him, to remuneration out of P's property for discharging them. As Charles J identified in *Re AR* [2018] EWCOP 8, a decision as to remuneration is a "best interests" decision, to be determined by reference to the individual facts of a particular case.

The range of options for remuneration is set out in Rule 19.13, and amplified by a Practice Direction, PD19B. There have been two versions (for present purposes): the old version which was effective between 1 February 2011 and 30 March 2017; and the version which has in effect since 1 April 2017. The old version had a footnote explaining that "*Net assets includes any land or property owned by P except where that land or property is occupied by P or one of P's dependents*;" the new version has no explanation. There has been no guidance or explanation for the removal of the footnote. Neither the versions before 2011 nor the pre-Mental Capacity Act equivalent had the footnote in. Contrary to the arguments of the Public Guardian that the footnote definition should be carried over into the new version, Senior Judge Hilder held that the 2011-2017 version was an outlier, such that (paragraph 72):

> *the definition from the 2011-17 version of Practice Direction 19B does not somehow "carry over" into the current version from which it is omitted. The term "net assets" in the version of PD19B effective*

> *from 1st April 2017 falls to be interpreted according to the ordinary meaning of the phrase, as "total assets minus total liabilities."*

On the facts of the case, and in light of this interpretation, Senior Judge Hilder held that the Applicant was always authorised by the deputyship order to obtain SCCO assessment of its costs.

Going forwards, Senior Judge Hilder (at paragraph 86) held that:

> *to avoid the necessity for proceedings such as these, where a deputy is appointed in respect of a net estate worth – at the time of appointment – less than £16 000 (within the meaning current at the time of appointment) but with authority to seek SCCO assessment, the decision-maker (either judge or Authorised Court Officer) should make explicit reference to the nature of the estate and paragraph 12 of PD19B in the wording of the order (as has been the practice at the central registry for some time.) Additionally, the deputy should check the terms of the costs authorisation carefully on first receipt of the order. If it includes the option of SCCO assessment but does not expressly confirm that such authorisation applies even where the net estate is worth less than £16 000 for the purposes of paragraph 12 of Practice Direction 19B, the deputy should make a speedy COP9 application pursuant to Rule 13.4 of the Court of Protection Rules 2017 for reconsideration. Such an approach would be of minimal cost to P and would avoid future argument.*

### Comment

The judgment provides helpful clarification of an otherwise ambiguous position. However, more broadly, with a liquid estate of less than £16,000 and P's only other asset being the house in which she lives (the value of which the report does not divulge), the former deputy's claim for remuneration over 3 years amounting to some £70,000 might indicate that more control of the costs of deputyship in the case of small estates is needed not less and begs the question why the PD was changed. That is without considering the costs of the litigation which presumably also will fall on P's now much diminished estate.

## Professional deputies, hourly rates, and the realities of 2020

*PLK & Ors (Court of Protection: Costs)* [2020] EWHC B28 (Senior Court Costs Office (Master Whalan))

*Deputies – property and affairs – CoP jurisdiction and powers – costs*

### Summary

In an important decision, the Senior Court Costs Office has looked at the method of assessment of the hourly rates claimed by Deputies and, in particular, at whether those rates need to reflect commercial realities in 2020. The SCCO consolidated the assessments in four cases that were chosen to represent the costs claimed by Deputies in different parts of England in the management of the affairs of protected parties who had sustained significant brain or birth injuries. The central submission of the deputies was that the court's current approach, which, broadly speaking, relied on the application of

the Guidelines Hourly Rates ('GHR') approved by the Costs Committee of the Civil Justice Council was, by 2020, incorrect and unjust. Instead, they submitted, the assessment of COP work should be predicated on a more flexible exercise of the discretion conferred by CPR 44.3(3), whereby the GHR were utilised as merely a 'starting point' and not a 'starting and end point'.

Master Whalan did not accept the primary argument of the applicants that COP firms had experienced:

> *29.* [*…*] *'a significant increase in hard and soft overheads' (SA, 45). The evidence, both in respect of time and expenditure, is inconsistent and, in my view, incomplete. Nor am I persuaded by the submission made in the oral hearing that 'it is clear that no other area of practice requires such a level of unrecoverable time'. So far as the datum is consistent and stable – and, as noted, the most reliable figures are probably those produced by Clarion – it suggests a comparatively modest incidence of time and expenditure. However reliable the figures produced may be, they do not, in my view, demonstrate that the burden is one that is exclusive to COP work or that it is atypically high in comparison with that experienced by practitioners in comparable areas of practice. Fee earners in personal injury, medical and professional negligence, for example, incur invariably time and expense that is irrecoverable, in marketing, accessing cases that are not proceeded with or, indeed, pursued and lost. These are burdens which do not apply to Deputy's sources of work (on a case by case basis) which is often consistent and predictable over many years.*

However, he continued at paragraph 31:

> *Three preliminary observations then inform my initial approach to the applicants' secondary argument. First, it should be emphasised from the outset that this court has no power to review or amend the GHR, either formally or informally, as this role is the exclusive preserve of the Civil Justice Council. This reality is recognised properly by Mr Wilcock in his written and oral submissions. Secondly, while the court has received submissions concerning the application of an inflationary uplift when applying the GHR, this is not just a 'blunt tool', but an approach which endorses the application of a practise which has been rejected explicitly since 2014, from which time the emphasis has been on a 'comprehensive, evidence based review'. Thirdly, however, it must be acknowledged that the GHR cannot be applied fairly as an index of reasonable remuneration unless these rates are subject to some form of periodic, upwards review. O'Farrell J. in Ohpen (ibid) observed that it 'is unsatisfactory that the guidelines are based on rates fixed in 2010' as these 'are not helpful in determining reasonable rates in 2019'. These observations were made in the context of an assessment of London City solicitor rates in an assessment where the court was not bound by the GHR. It seems clear to me that the failure to review the GHR since 2010 constitutes an omission which is not simply regrettable but seriously problematic where the GHR form the 'going rates' applied on assessment. I do not merely express some empathy for Deputies engaged in COP work, I recognise also the force in the submission that the failure to review the GHR since 2010 threatens the viability of work that is fundamental to the operation of the COP and the court system generally.*

Against this backdrop, Master Whalan concluded that

> *35. I am satisfied that in 2020 the GHR cannot be applied reasonably or equitably without some form of monetary uplift that recognises the erosive effect of inflation and, no doubt, other commercial*

*pressures since the last formal review in 2010. I am conscious equally of the fact that I have no power to review or amend the GHR. Accordingly my finding and, in turn, my direction to Costs Officers conducting COP assessments is that they should exercise some broad, pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed. If the hourly rates claimed fall within approximately 120% of the 2010 GHR, then they should be regarded as being prima facie reasonable. Rates claimed above this level will be correspondingly unreasonable. To assist with the practical conduct of COP assessments, I produce a table below which demonstrates the effect of a 20% uplift of the 2010 GHR. I stress again that I do not purport to revise the GHR, as this court has no power to do so; instead this is a practical attempt to assist Costs Officers and avoid unnecessary delay (caused by individual re-calculation) in a busy department conducting over 8000 COP assessments per annum.*

| | Guideline Hourly Rates | | | |
|---|---|---|---|---|
| Bands | A | B | C | D |
| London 1 | £490 | £355 | £271 | £165 |
| London 2 | £380 | £290 | £235 | £151 |
| London 3 | £275-320 | £206-275 | £198 | £145 |
| National 1 | £260 | £230 | £193 | £142 |
| National 2 | £241 | £212 | £175 | £133 |

Master Whalan indicated that

*This approach can be adopted immediately and is applicable to all outstanding bills, regardless of whether the period is to 2018, 2019, 2020 or subsequently. It goes without saying that this approach is subject ultimately to the recommendations of Mr Justice Stewart and his Hourly Rates Working Group and the Civil Justice Council. Ultimately the recommendations of the Working Group must be adopted in preference to my findings.*

Subsequent to the decision, the Senior Costs Judge issued a Practice Note explaining some of the practical consequences.

## Comment

The long gap between the last review of the SCCO Guideline Hourly Rates and the current one has caused problems and dissatisfaction both in the COP and generally. In that context, this decision and the Senior Cost Judge's subsequent practice direction are welcome interim measures. It is to be hoped

that reviews will henceforth happen more than once a decade.

## Getting deputyship applications right

A helpful blog has been published on the Law Society's website, written by Caroline Bielanska, and setting out how to avoid common mistakes in making financial deputyship applications to the Court of Protection.

# PRACTICE AND PROCEDURE

## Section 21A, interim declarations, and an ALR in action

*DP v LB Hillingdon* [2020] EWCOP 45 (Hayden J)

*Article 5 – DoLS authorisations*

### Summary[2]

In this case, Hayden J has clarified what the court is to do on an s.21A application where it has doubt as to whether it can, on the evidence before, it be satisfied that P satisfies the DOLS capacity requirement. He also – and entirely separately – took the opportunity to clarify what had apparently become a tension in the authorities as to the circumstances under which it is appropriate for the court to proceed on the basis of the interim jurisdiction granted it under s.48.

*Section 21A*

The facts of the case are not relevant to the legal point that Hayden J was asked to consider, save that it is worth noting that amongst the deficiencies in the capacity evidence upon which the LB Hillingdon (as supervisory body) sought to rely were the fact that the doctor had not explained the purposes of his visit to P. The evidence before the first instance judge did not satisfy her that P lacked capacity on the balance of probabilities, although she considered that it did cross the threshold under s.48.

As Hayden J noted, citing *Re UF* [2013] EWCOP 4289:

> *The Court's approach to a Section 21A application is different to and distinct from its role in a standard welfare application. The Section 21A application is either to vary or to discharge a Deprivation of Liberty authorisation. In such applications, the task of the court is to evaluate the relevant qualifying requirements and to come to a view, on the available evidence, as to whether those requirements continue to be met.*

He endorsed the position of both parties that an application made under s.21A did not permit the making of an interim declaration under s.48, notwithstanding such are frequently made to 'hold the ring' whilst the court is progressed. Importantly, Hayden J identified that there was, in fact, no need for such a declaration because, for so long as the DOLS authorisation is in place, it provides the authority for the deprivation of P's liberty, and, whilst the court discharges its functions of determining questions relating to the authorisation, "*the extant authorisation remains in force, without the need for any positive decision by the court. The court does not become responsible for authorising P's deprivation of liberty upon the issuing of a s. 21A application. The court's only function is to provide the review of the authorisation which is in force*" (paragraph 45).

[2] Note, Tor having been involved in the case, she has not contributed to this summary and comment.

What the court has to do, Hayden J made clear, is to investigate the position (for instance in relation to uncertainty as to capacity) speedily (paragraph 41), so as to comply with Article 5(4) ECHR, and deploying its case management powers in Rule 1.3 of the Court of Protection Rules 2017 appropriately. At paragraph 41, Hayden J also observed that (on the facts of this case):

> *It was open to the Deputy District Judge, for example, to permit questions to be put to* [the doctor who had conducted the capacity assessment] *and/or, if necessary, to arrange for him to give evidence or revisit his assessment. I doubt that it was necessary to instruct a further expert on what is, when properly identified, an essentially uncomplicated issue i.e. does DP have capacity to decide to change care homes to be nearer to his friend Bill and, if not, whether it is in his best interests to do so.*

*Section 48*

Although, on the analysis above, it was not necessary for him to do so, Hayden J took the opportunity to resolve the perceived difference of judicial opinion as to the threshold to apply for purposes of s.48 MCA 2005, given its importance to practitioners on a day to day basis. Having done so, he made clear that the words in s.48 MCA 2005 require no gloss, such that the question remains throughout: is there reason to believe that P lacks capacity? That question, he observed at paragraph 62, stimulates "*an evidential enquiry in which the entire canvas of the available evidence requires to be scrutinised*," and in which the presumption of capacity applies with equal force. Helpfully, he distinguished between the test in s.48 and the test in s.15 (paragraph 62(vi)):

> *The exercise required by Section 48 is different from that set out in Section 15. The former requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter requires an evaluation as to whether P, in fact, lacks capacity.*

## Comment

The analysis of s.21A in this case is crisp and clear, both clearing away a drafting confusion that has crept into many orders, and also – helpfully – reinforcing the importance of: (1) s.21A applications being determined speedily; and (2) the court requiring proper evidence of capacity before declaring itself satisfied that the capacity requirement under DOLS is met. The observation that it would be possible to resolve the doubts about capacity that had arisen by asking further questions of the individual who had conducted the capacity assessment (rather than by seeking a further view) may well be of wider application, and the thought that the capacity assessor might routinely be expected to stand behind their assessment in court may help concentrate minds in the underlying authorisation process.

The (obiter) analysis of the threshold under s.48 is also very helpful for clearing away another problem which had been encountered on the ground.

The judgment raises, though, an interesting wrinkle as regards 'ordinary' cases in which the Court of

Protection is deploying its conventional powers. There are very many cases where the court does not have the evidence before it to reach the conclusion whether P, in fact, lacks capacity in the material domains. The conventional route, to date, has been for interim declarations to be made under ss.15 and 48 as to capacity, and interim decisions to be made under ss.16 and 48. The approach outlined by Hayden J could be read as suggesting that, in fact:

- Section 15 should only ever be used at the point where the court is satisfied that it can determine whether or not P has capacity;
- Section 16 should only be used at the point where the court is in a position to have reached a conclusion – recorded in a s.15 declaration – that they do not; and
- In any case where the court is holding the ring whilst the evidence as to capacity is being finalised, only s.48 should be used, and that any orders (for instance as to residence, care or contact) should be made on the basis of s.48 alone.[3]

If the approach set out immediately above is the case then this would give rise to an interesting – further – issue in relation to deprivation of liberty. Section 4A envisages that deprivation of liberty is lawful where there is a decision of the court under s.16(2)(a) MCA 2005. But a court could not make such a decision on an interim basis on the analysis above. It may therefore be in cases outside s.21A (i.e. where no DOLS authorisation is in place) that the authority to deprive P of their liberty must continue to arise under s.4B(1), i.e. that they are waiting for a decision of the Court of Protection – which means, in turn, that the person may only rely upon this authority where (in essence) the deprivation of liberty is for purposes of giving life-sustaining treatment or preventing a serious deterioration in P's condition. But what if the deprivation of liberty is in the person's best interests, and necessary and proportionate to the risks, but not to prevent a serious deterioration in the person's condition?

It is perhaps fair to say that no-one, to date, has appreciated that there may be this additional (and perhaps not unimportant) condition in cases where the case is not only before the court in the sense of having been issued, but indeed is the subject of active consideration by the court.

It may well be the case, therefore, that there will be a need before too much longer for a judge to consider the interaction between ss.15-16 and s.48 and to give a definitive interpretation of this particular construction conundrum.

Finally, it is also of note that this is the first reported case where an ALR has appeared – although they have now been around for some time, the court's take up of the opportunity to deploy them has to date

[3] Section 48 is not drafted in the clearest of terms, but it does contain a reference to the court being able to make an order (not just give directions); this has conventionally been understood as enabling the court to make an order under s.16, but on the basis of this judgment should be understood as enabling the court to make the order – i.e. a decision – as to where, e.g. P should live.

been relatively slow. That the ALR in this case, involving an appeal, appeared to consider – and no-one appeared to doubt – that they were in a position to run the case, may perhaps serve as an encouragement to other judges to consider appointing them.

## Discharging obligations to P and the court – a salutary tale

*Re ND (Court of Protection: Costs and Declarations)* [2020] EWCOP 42 (Keehan J)

*CoP jurisdiction and powers – costs – declarations – interface with public law jurisdiction*

### Summary

In this case, the Court of Protection has alighted upon procedural failings by a local authority to ground the making of declarations as to failures of that authority to discharge its statutory obligations to the subject of proceedings.

The case concerned a young man, Nikolai D'Araille, with a diagnosis of Autism Spectrum Disorder (the man, himself, wished to be named in the judgment). In May 2018, an application had been made by Shropshire Council for care orders in respect of ND and his five sisters. Just prior to the issue of these applications, the mother left the jurisdiction to live with the girls in Poland. She and the girls had since remained living in Poland. At hearings in April 2019, the proceedings concerning ND were transferred to the Court of Protection; subsequently, Keehan J determined (exercising the inherent jurisdiction of the High Court) that ND was a vulnerable young person and made a declaration that protective relief under the High Court's inherent jurisdiction was necessary in the interim pending expert evidence being obtained on the issue of ND's capacity to make decisions in the relevant areas. That expert evidence concluded that he had capacity in all relevant domains, and Keehan J made a declaration to that effect in December 2019.

At that hearing, the Official Solicitor invited the court to exercise its powers under section 15(1)(c) of the 2005 Act and declare that the local authority had acted unlawfully by:

> *i) failing to provide ND with a choate pathway plan in accordance with its duties to ND as a relevant and now former relevant child under section 23 of the Children Act 1989;*
>
> *ii) failing to provide ND with a choate care and support plan in accordance with its duties under section 25 of the Care Act 2014 (to include identification of suitable accommodation) and court order; and*
>
> *iii) failing to support ND having regard to its statutory duties under the Children Act 1989 and Care Act 2014 which has exacerbated ND's presentation, reinforced his poor view of the local authority, and resulted in ND being reluctant to engage with all professionals or seeking support should the need arise.*

The Official Solicitor also invited the court to depart from the general rule on costs and make a costs

order against the local authority, pursuant to Part 19.5 of the Court of Protection Rules 2017. Several months later, and following written submissions and a further oral hearing, Keehan J ruled on both the application for declarations and the application for costs.

*Declarations*

Having conducted a review of the (distinctly unhappy) history of the local authority's engagement with ND and also of its failures to comply with orders of the court requiring it to produce care plans, Keehan J granted the declarations sought for the following reasons set out at paragraph 66 of his judgment:

> *i) between June and December 2019, it was necessary for me to grant five extensions to the deadline for the local authority's final evidence, due to a series of non-compliance;*
>
> *ii) during that period, the local authority had submitted plans on a number of occasions, however it became a recurring theme that the evidence submitted was not fit for purpose. On one occasion, the local authority sought my 'advice and guidance' on the steps to be taken. I agree with the submission made on behalf of the Official Solicitor, that the court is not an 'advice centre'.*
>
> *iii) I accepted the submission of the Official Solicitor that the hearing on 17th December 2019 could have been avoided had the local authority complied with court orders;*
>
> *iv) I have in mind the words of then President, Sir James Munby,[4] as well as my own words, in the case law cited by the Official Solicitor highlighting the importance of compliance with directions;*
>
> *v) I am also persuaded by the case of R (J) v Caerphilly County Borough Council [2005] EWHC 586 (Admin)[5] that the difficulties in ND's behaviour and his failure consistently to engage positively with the social workers do not justify or excuse the failures of the local authority referred to above; and*
>
> *vi) whilst there may be occasions when a local authority is faced with difficulties and does all that it can to make progress, but to no avail, the difficulties faced by the local authority in this case are not sufficiently cogent reasons for their failure to have progressed the matter in a more satisfactory and timely manner.*

Keehan J noted the observations of Lady Hale in *N v ACCG* [2017] UKSC 22 that:

> *40. The Court of Protection has extensive case management powers. The Court of Protection Rules*

[4] In *Re W (A Child) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1177, the then President, Sir James Munby, referred to, at paragraph 51: "the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders…"

[5] In which Munby J had observed at paragraph 56 that "[t]*he fact that a child is uncooperative and unwilling to engage, or even refuses to engage, is no reason for the local authority not to carry out its obligations under the Act and the Regulations. After all, a disturbed child's unwillingness to engage with those who are trying to help is often merely a part of the overall problems which justified the local authority's statutory intervention in the first place. The local authority must do its best*."

> *do not include an express power to strike out a statement of case or to give summary judgment, but such powers are provided for in the Civil Procedure Rules, which apply in any case not provided for so far as necessary to further the overriding objective. The overriding objective is to deal with a case justly having regard to the principles contained in the 2005 Act (Court of Protection Rules 2007, rule 3(1)). Dealing with a case justly includes dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues and allocating to it an appropriate share of the court's resources (rule 3(3)(c) and (f)). The Court will further the overriding objective by actively managing cases (rule 5(1)). This includes encouraging the parties to co-operate with one another in the conduct of the proceedings, identifying the issues at an early stage, deciding promptly which issues need a full investigation and hearing and which do not, and encouraging the parties to use an alternative dispute resolution procedure if appropriate (rule 5(2)(a), (b)(i), (c)(i), and (e)). The court's general powers of case management include a power to exclude any issue from consideration and to take any step or give any direction for the purpose of managing the case and furthering the overriding objective (rule 25(j) and (m)). It was held in KD and LD v Havering London Borough Council [2010] 1 FLR 1393 that the court may determine a case summarily of its own motion, but their power "must be exercised appropriately and with a modicum of restraint".*

However, at paragraph 67, he observed that he did not consider that *"a full fact-hearing hearing is or was required in order to obtain the necessary context in which to consider the declarations sought by the Official Solicitor. Given the clear pattern of non-compliance by the local authority, which I do not consider to be justified, I am content to make the declarations sought based upon what is already known. In particular, I am able to rely upon the recitals made in my previous orders, which document the local authority's repeated failure to comply with the court's directions."*

At paragraph 68, Keehan J also:

> *acknowledge*[d] *the local authority's submission that these proceedings should now be ended, given that there are no further welfare issues to be determined and that ND can, if he so wishes, pursue a claim against the local authority under section 7 of the Human Rights Act 1998.*

However, as he identified, "*that submission does not recognise the reality that the very purpose of section 15(1)(c) is to give this court the power to make such declarations as those sought by the Official Solicitor, and that power is not fettered by the option of a party seeking such findings via an alternative route.*"

*Costs*

As to costs, it was perhaps not surprising that Keehan J found that there were cogent reasons which justified him in departing from the usual rule on costs, namely an order for no costs should be made. He had regard, in particular, to the conduct of this local authority and its failures to comply with court orders. He therefore ordered costs against the local authority in favour of the Official Solicitor and the third respondent, ND's father.

## Comment

This decision is a very helpful reminder that the fact that the court cannot require public authorities to

put options on the table does not mean that it cannot require them to follow court orders.

What is, however, perhaps a little striking is that Keehan J made declarations which reflected (in essence) public law failures by the local authority to discharge their obligations towards ND, but justified making those declarations by (in essence) their failures to comply with court orders. It would – one anticipates – have been a rather different picture had the local authority conscientiously sought to comply with court orders but produced plans with which ND (or anyone else) objected as regards the actual provision of services proposed. At that point, matters would very clearly have been back in the *N v ACCG* territory of requiring those matters to be raised in the judicial review arena. However, because the local authority both substantively failed to discharge its obligations towards ND and procedurally failed to discharge its obligations towards the court, the door was open for the Official Solicitor to ask for, and Keehan J then to grant, hard-hitting declarations of unlawfulness and then, in turn, to award costs against the local authority.

## Short note: demanding the impossible – the costs consequences

It is interesting to contrast the decision in *Re ND* with another decision of Keehan J in *Re JB (Costs)* [2020] EWCOP 49 where the Court of Protection had also been asked to take aggressive steps in terms of service provision. In *Re JB*, the local authority applicant in question had gone one stage too far, seeking an injunction that: (1) a young man should remain at a specialist residential facility which had given notice that he had had to leave; and (2) no steps were to be taken to remove him to alternative accommodation without the permission of the court. However, the court having listed the matter for a full hearing of the question of whether it had the jurisdiction to grant the injunction, the local authority withdrew the application. A costs application then ensued against the local authority. The Official Solicitor argued that a departure from the ordinary 'no costs' rule was warranted because:

> *The application was doomed because the court's power was limited to making decisions on behalf of JB, which he could make if he had capacity. This proposition of law is clear from the decision of Baroness Hale in Re: M (An Adult) (Court of Protection: Jurisdiction) [2017] AC 459. It should not be controversial.*
>
> *Beyond the 24 July 2020, which was the date SG Limited/AH had agreed that JB could remain residing at AH, AH was not an available option for the court to consider in determining JB's best interests. SG Limited/AH had given valid notice under the contractual arrangements between it and the local authority to terminate the placement with effect from that date. The court had no power to make any orders under section 16(2) of the MCA 2005. The court had no power to make an injunction order against SG Limited/AH compelling AH either to keep JB at AH beyond the 24 July 2020 or preventing JB from being removed from there. In its skeleton argument AH/SG Limited/AH asserted, correctly, 15.7 rather, "It is the conduct of the local authority which is improper and impermissible in making and/or maintaining its application for injunctive orders in the Court of Protection which seeks to circumscribe a contractual relationship between itself and AH SG to which P, JB, has no involvement,*
>
> *Reliance by the local authority on the decision of Keehan J. in Re: SF (Injunctive Relief) [2020] EWCOP*

> *19 was misconceived. This case concerned the proper use of the Court of Protection's powers pursuant to section 16(2) and (5) of the MCA 2005. It did not involve the creation by the court of an option where none existed.*

Keehan J "entirely agreed" with this submission, holding that the application was totally without merit, and that the local authority's conduct in making and pursuing the application amounted to unreasonable conduct which justified a departure from the usual rule of no order for costs. The local authority was therefore ordered to pay the costs of SB (the man's mother) and the Official Solicitor occasioned by the injunction application.

The case serves as an important reminder that the powers of the Court of Protection are extensive but – ultimately – limited, and that where "*rigorous probing, searching questions and persuasion" (as per Sir James Munby P in Re MN* (Adult) [2015] EWCA Civ 411) do not succeed, it cannot, itself, magic up options that do not exist.

## Contempt, court orders and P's confidentiality

*P v Griffith* [2020] EWCOP 46 (MacDonald J)

*Practice and Procedure – Court of Protection – Other*

### Summary

In a very unusual case, the Court of Protection has sentenced a woman, a Ms Griffith, to 12 months imprisonment for forging a court order so as to obtain medical records in relation to P, her relation. P was a 50 year old woman who resided at a specialist hospital on a long term care ward. She had been admitted to that hospital on 17 September 2018 having previously been at a different hospital from 28 May 2018. On 28 January 2018, P she had suffered a bilateral stroke which caused significant brain damage, with a diagnosis of a permanent disorder of consciousness of the type known as Minimally Conscious State Minus.

Ms Griffith had been the applicant in proceedings before the Court of Protection, concerning a dispute between Ms Griffith and the other parties as to P's condition and prognosis and as to her best interests in relation to her medical treatment, her residence and care and in relation to whether she should be subject to a DNACPR notice. Those proceedings concluded in April 2020, Ms Griffith's application being dismissed (it does not appear that there is a reported judgment); she sought permission to appeal to the Court of Appeal, but her application for permission to appeal was dismissed in July 2020.

In October 2019, Ms Griffith sent an email to Barts Health NHS Trust attaching what purported to be a court order made on 10 July 2019. In the body of the email, Ms Griffith informed Barts Health NHS Trust that she was "*submitting the above stated form and associated proofs required*" and that "*she had been alerted to the fact that I needed to approach this organisation for the information myself*". The purported court order attached to Ms Griffith's email provided for the disclosure of P's medical records

directly to Ms Griffith from Barts Health NHS Trust. Barts should, perhaps, have been alerted by the fact that "*purported order bears no court seal and contains none of the recitals that characterise the third party disclosure orders made by HHJ Hilder*." The records were sent by Barts to the solicitors instructed by Ms Griffith – the solicitor with conduct of the case did not, in fact, read the records or show them to Ms Griffith.[6]

No such order had, in fact, been made, something which only came to light when the solicitors instructed by the Official Solicitor on behalf of P sought disclosure pursuant to orders actually made by the court, at which point Barts said that they had already received the request.

Unsurprisingly, when this came to light, matters were put in train to investigate and then by the Official Solicitor to seek permission to make an application for committal for contempt. Ms Griffiths did not attend the hearing, but was represented; whilst she exercised her right to silence, her representative submitted that the circumstances did not prove beyond reasonable doubt that Ms Griffith falsified a court order and presented this in support of her request in order to obtain disclosure of confidential medical records of P.

MacDonald J had little difficulty in finding that he was:

> *39.* […] *satisfied beyond reasonable doubt that Dahlia Griffith forged the purported court order and sent the forged purported order to Barts Health NHS Trust with the intention of obtaining the medical confidential records of P despite the court refusing to direct this. This action constituted a very serious interference with the due administration of justice. I am further satisfied beyond reasonable doubt that Dahlia Griffith took this action with the intention of interfering with the due administration of justice, her applications for the disclosure provided for by the purported order having previously been refused by the court on a principled basis.*

He adjourned sentencing for two days to give Ms Griffith an opportunity to attend court; she did not do so. She sent an email to the clerk to MacDonald J saying that she was unwell, although not attending a medical note. Her representative was unable to contact her, and MacDonald J declined his application to adjourn sentencing.

The Official Solicitor made clear that (although she had no formal role as regards penalty) she had no wish to see Ms Griffith sentenced to a term of imprisonment but felt compelled to bring the conduct of Ms Griffith before the court by way of an application for committal on behalf of P given the gravity of that conduct.

MacDonald J was deeply concerned by the disclosure, noting at paragraph 47 that:

> *Ms Griffith's action in forging a court order, whilst not resulting in her receiving P's medical records,*

[6] Note, after posting an earlier version of this summary on his website, Alex was contacted by the solicitor who made clear that the reason that she did had not either read the records or shown them to Ms Griffith was because she could see that something was awry and was investigating the position.

> *resulted in confidential medical records to which she was not entitled being disclosed to her solicitors. It was only a matter of chance that Ms Griffith actions were discovered when a legitimate order was made by the court. Within this context, P was, to a certain extent, prejudiced by Ms Griffith's contempt, particularly in circumstances where medical records are confidential to the individual and it is crucial to respect the privacy of a patient (see Z v Finland (1997) 25 EHRR 371). These actions by Ms Griffith were undertaken in the face of repeated, principled decisions of the court that Ms Griffith should not have such disclosure. In the circumstances, a high degree of culpability must attach to Ms Griffith's actions which, as I have noted, were deliberate in nature. Ms Griffith has shown no remorse for these actions, and indeed has failed to co-operate with the court by attending court in response to the application to commit her. There is no indication that she appreciates the gravity of her conduct.*

Further, he noted:

> *48. Further, the act of forging a court order strikes at the very heart of the due administration of justice. The need for litigants and third parties to be able to have confidence in the integrity of orders made by the court is fundamental not only to the integrity of individual proceedings but to the maintenance of the rule of law. Any course that acts to undermine confidence in the integrity of court orders is accordingly highly corrosive of both the administration of justice by the courts and to the rule of law more widely (see Commissioners for Her Majesty's Revenue and Customs v. Munir [2015] EWHC 1366 (Ch) at [9(i)]). Within this context, the counterfeiting of court documents is considered by the courts to amount to a very serious contempt of court (see for example Dryer v HSBC Bank Plc [2014] EWHC 3949 (Ch) and Patel v Patel and others).*

The sentencing exercise he was carrying out, MacDonald J observed, was also in part designed to deter others from "*forging orders of the court by making abundantly clear that by doing so they would place themselves at grave risk of an immediate and lengthy sentence of imprisonment*" (paragraph 49).

MacDonald J therefore found that the appropriate sentence was one of 12 months imprisonment (which would have been 18 months but for the fact that Ms Griffith has not to date experienced prison, and the current impact on the nature of custody of the COVID-19 pandemic). He did not consider appropriate to suspend the sentence of imprisonment in circumstances where the objective of the sentence is to mark the disapproval of the court of Ms Griffith's deliberate and calculated actions and to deter others from acting in a similar fashion, rather than to ensure future compliance with orders of the court in circumstances the substantive proceedings having now concluded.

## Comment

Whether MacDonald J was correct to characterise it solely as a matter of chance that Ms Griffith's actions were detected, the case should undoubtedly serve as a cautionary tale for medical bodies in receipt of orders purporting to be from the Court of Protection – if in doubt, it is always sensible to check with the court itself. MacDonald J was also clearly – and rightly – concerned by the fact that this was not an offence which was without consequence for P, even if P herself is not a position to recognise those consequences. It is perhaps therefore not surprising that the penalty was so harsh.

## When not to recognise a foreign order

*Re AB* [2020] EWCOP 47 (Senior Judge Hilder)

*International jurisdiction of Court of Protection – Recognition and enforcement*

In this case, Senior Judge Hilder had to grapple with two difficult questions in the context of the Court of Protection's international jurisdiction. The first was whether she should declare to be recognised and enforceable as 'protective measures' in England and Wales Letters of Guardianship granted by a court in New York State, and the second was their impact upon the question of whether the 'no refusals' requirement was met for purposes of the DOLS regime.

As so often in international cases, the facts were complex, but at their heart was a young woman with very significant disabilities, AB, resident at that point in a care home in London. She had been born in the US, and had lived there with her mother until November 2019 when she and her mother flew to the UK on one-way tickets at a point when the statutory authorities in New York State were investigating her ability to care for AB, and were taking steps to have the Letters of Guardianship (akin – it appears – to deputyship under the MCA 2005) revoked; an order had been made in the course of these proceedings that AB was not to be removed from the county where she was resident in New York State.

Not long after AB and her mother arrived, she was then taken to King's College Hospital by ambulance; the hospital subsequently raised safeguarding concerns about her mother's feeding practices. AB was considered medically fit for discharge but remained an inpatient for almost three months because there was no accessible home to which she could be discharged. She then went to a care home, initially accompanied by her mother, who apparently had nowhere else to live; the COVID-19 emergency led the care home to enforce restrictions on visitors. Police were involved in removing the mother. A DOLS authorisation was granted in respect of AB.

AB's mother and the mother's sister sought the immediate return of AB to the care of M. AB brought to the hearing on its second day the original Letters of Guardianship, bearing the raised seal of the US court. Although originally the Applicants relied on these orders as the basis for seeking AB's return to her mother's care, by the end of the hearing their position seemed to be that those orders could be disregarded. Intending that M and AB were now resident in the UK as a long-term arrangement, M – who acted in person – sought – an English welfare deputyship under the MCA 2005 effectively to replace the American Letters of Guardianship. The Respondents – AB (represented by the Official Solicitor) and the London Borough of Southwark – agreed that AB was still habitually resident in the USA, and any issues in respect of her long-term welfare fell to be considered first by the US courts. They contended that the jurisdiction of the Court of Protection was presently limited. They were further agreed that the question of recognition of the American Letters of Guardianship had to be determined first, before any determination of the s21A application could be made. The Official Solicitor invited the Court to refuse to recognise the American Guardianship orders on grounds of public policy but to

provide for the matter to be referred to the US court as soon as possible, making in relation to AB herself only such orders as were immediately necessary for her protection pending further order of the US court.

Senior Judge Hilder undertook a detailed analysis of both the statutory provisions of Schedule 3 to the MCA (governing the international jurisdiction of the Court of Protection) and the case-law before reaching conclusions on the three key issues: (1) AB's current habitual residence; (2) whether the court could refuse recognition of the Letters of Guardianship; and (3) what – if any – ability M's status under the Letters of Guardianship had on the operation of the DoLS regime.

*Habitual residence*

On the facts of the case, Senior Judge Hilder was satisfied that M had moved AB out of the jurisdiction of the court in New York State "*consciously in a bid to avoid its exercise*" (paragraph 83), such that:

> *84. M's decision to move AB to the UK was therefore not a proper exercise of legitimate powers, and not effective to change AB's habitual residence.*
>
> *85. Moreover, AB's circumstances since her arrival in the UK cannot be said to have settled such that her habitual residence has changed by passage of time notwithstanding the bad faith in the arrangements for her arrival. Any support that AB has received from wider family has been extremely transient. She lives in a care home precisely because she had no other appropriate accommodation. She is not integrated into the community beyond the care home placement.*

This meant that AB remained habitually resident in the United States of America (indeed, strictly, although Senior Judge Hilder did not have to make this determination, presumably in New York State – a determination which could be of some relevance in the domestic American proceedings).

*Recognition and enforcement*

Senior Judge Hilder noted that she was:

> *89.* […] acutely conscious of the mandatory nature of paragraph 19(1) of Schedule 3 and the requirement to "work with the grain of the order" of a country whose legal systems, laws and procedures are closely aligned to our own. It has not been suggested by any party that either the Erie County Surrogate Court or the Monroe County Surrogate Court is anything other than "an experienced court with a sophisticated family and capacity system."[7]

The Official Solicitor having sought that the mandatory recognition requirement be disapplied on the grounds of public policy, Senior Judge Hilder had sought clarification of the "public policy" in issue. The Official Solicitor identified the policy of "judicial comity": the argument being that:

[7] The phrases in quotation marks being from *Health & Safety Executive of Ireland v PA & Ors* [2015] EWCOP 38 and *Re MN* [2010] EWHC 1926 (Fam) respectively.

> *91.* […]*, if M knew that her care of AB was being investigated with the possibility of steps to discharge her guardianship and she left the USA deliberately to avoid that possibility, recognising her guardianship now would amount to failure of judicial comity with the Monroe Surrogate Court. In effect, the determination of issues put before Monroe Surrogate Court has been thwarted by actions of M taken in bad faith. Recognition of the guardianship authority in the face of frustrated proceedings to discharge it would endorse the bad faith of M. It is not the measure (ie the Letters of Guardianship) which is manifestly contrary to public policy but rather the* ***recognition*** *of it in circumstances where the US court was actively engaged in the process of considering whether the measure should be discharged immediately before AB's was removal from its jurisdiction.* (emphasis added)

Senior Judge Hilder had also asked whether:

1. The recognition application could or should be adjourned, or determined on an interim basis. The Official Solicitor's position was that such would be contrary to the mandatory nature of paragraph 19(1) of Schedule 3. Rather, the Official Solicitor argued, "[i*]f the purpose behind either adjournment or interim decision was to revisit the question of recognition in the light of the US court's determination of the discharge petition, a better approach would be to require a new application for recognition if the discharge petition failed. Such application would then be free of any question of 'bad faith'*" (paragraph 92).

2. Whether the court could or should recognise the US Letters of Guardianship but then also suspend them. Mr. McKendrick (Leading Counsel for the Official Solicitor) professed himself "not at all confident" that this court has such power, although he also properly acknowledged that paragraph 128 of the Lagarde Report[8] seemed to suggest that this might indeed be permissible.

Senior Judge Hilder held that it was important to consider the effect of recognising the Letters of Guardianship granted to M, which would be to recognise that M has authority to decide where AB lived and how she was cared for. In reality, Senior Judge Hilder noted, "*M would decide that AB should immediately leave the care home to live with her, whatever the insecurities of M's own position and the limitations of her resources to provide care at the moment*" (paragraph 95). Against this backdrop, and in circumstances where the American court has already been asked to determine an application to revoke M's authority to make such a decision, and had only been prevented from doing so by M removing herself and AB from its jurisdiction, Senior Judge Hilder held that it was clear that:

> *96.* […] *it would be contrary to the requirements of judicial comity to recognise now that very authority*

[8] I.e. the Explanatory Report to the 2000 Hague Convention on the International Protection of Adults, the Convention to which Schedule 3 to the MCA 2005 gives effect (notwithstanding that it is has not been ratified in respect of England and Wales). Paragraph 128 provides that "*This Article [22]…. sets out the principle that the measures taken in a Contracting State and declared enforceable in another 'shall be enforced in the latter State as if they had been taken by the authorities of that State.' This is a sort of naturalisation of the measure in the Contracting State where it is to be enforced. The authorities of the requested State will thus be able to stay execution of a placement measure taken abroad in cases where they would have been authorised to do so for a measure taken in their own State….*"

> *which the American court has been asked to review. I have come to the firm conclusion that it is clearly right and just, at this point, to disapply the requirement of mandatory recognition on the grounds of the policy of judicial comity. Such conclusion is not a reflection on the merits of the Letters of Guardianship themselves, or the powers of the US court to grant such Letters. Rather, it is a reflection of the circumstances in which the application for recognition comes to be determined by this court.* (emphasis in original)

Senior Judge Hilder therefore dismissed the application for recognition. She emphasised that she was not determining whether the Court of Protection could recognise the foreign protective power and then immediately suspend it – as she said at paragraph 96: "[t]*hat decision will likely fall to be made in the circumstances of another case, on another occasion*." She also made clear that there was nothing in the dismissal of the current application for recognition which prevented a further application for recognition of the same Letters of Guardianship in the light of any future decision by the US court.

*The DoLS authorisation*

As Senior Judge Hilder noted,

> *101. On a narrow interpretation of paragraph 20 of Schedule A1, M does not come within the class of persons whose valid decision could mean that AB failed to meet the 'no refusals' requirement because M is not and never has been "a donee of a lasting power of attorney" granted by AB or "a deputy" within the meaning of the Act.*

However, this was not the end of the story:

> *102.* […]*, the authority encompassed by Letters of Guardianship granted by a US Court is clearly comparable to English deputyship (it would appear, even wider.) Following the principle of recognition by operation of law, as explained at paragraph 116 of the Lagarde Report, M was in an equivalent position to an English deputy with authority to determine residence, at least until she took a step towards enforcement. A narrow interpretation of paragraph 20 may therefore be vulnerable to criticism of inconsistency with the mandatory nature of the recognition provisions, and a wider interpretation – which considers whether M falls within the definition of persons who may make a valid decision for the purposes of the 'no refusals' requirement- ought to be considered.*

M had taken steps towards enforcement of her Letters of Guardianship, and, in the course of that application, not only had enforcement refused but also recognition. In the circumstances, and whether a narrow or wider interpretation of the 'no refusals' requirement was adopted, Senior Judge Hilder found that any decision made by M may have taken that AB should live with her and not at B Care Home was not such as to count as a 'valid decision' for the purposes of the 'no refusals' requirement.

Senior Judge Hilder also had little hesitation in dismissing summarily the challenge that AB's current living arrangements were not in her best interests.

The balance of the judgment was then taken up with a detailed series of steps required to ensure that

the courts of New York State were put in a position properly to consider AB's welfare, and to secure AB's welfare in the interim.

### Comment

Previous judges considering Schedule 3 have had cause to discuss the possibility that recognition and enforcement of a foreign protective measure might fall to be refused on the basis that it would be manifestly contrary to public policy (in particular Baker J in *Health & Safety Executive of Ireland v PA & Ors* [2015] EWCOP 38. However, no previous judge has reached a conclusion that such a step should be taken, perhaps because it would have involved impugning the expertise and/or good faith of a foreign court. What is unusual about this case, and perhaps explained its outcome, was that Senior Judge Hilder, by declining to recognise and enforce the Letters of Guardianship was, in effect, seeking to give effect to the steps being taken before the courts of the State of New York to revoke those Letters.

One other point of no little interest is in relation to 'no refusals,' the logic of Senior Judge Hilder's approach in paragraph 102 suggesting strongly that a guardian appointed by a Scottish court would be able to prevent an authorisation being granted by seeking to decide that the individual should reside elsewhere. This is logically impeccable, and undoubtedly important as regards intra-UK relationships, but it does mean that more focus might in due course be required as to whether a guardian under the Adults with Incapacity Act has the authority to deprive an individual of their liberty.[9] It is not at all clear that the orders routinely made in the Sheriff's Courts in Scotland meet the requirements of Article 5 ECHR as regards (for instance) the question of whether the individual has a mental disorder of a nature and degree warranting detention. It is therefore suggested that in any situation where a guardian purports to exercise their power so as to refuse a DoLS authorisation that the supervisory body in question is careful then to identify whether it is being asserted that the guardian has the power to authorise the deprivation of liberty to which the person is subject, either at the care home or elsewhere.

## Short note: YouTube posting and the Court of Protection

In *The Public Guardian v XR & Ors* [2019] EWCOP 65,[10] District Judge Geddes had to consider the ability of the Court of Protection to grant injunctive relief in relation to the publication of video material relating to P on YouTube. DJ Geddes made clear that posting on a YouTube channel, even one with no subscribers, undoubtedly constituted "publication." She continued:

> *25. It is not unusual for families to post innocent material including incapacitous family members online, either as a means of storing their own memories, or even as a means of sharing with each other, their friends, or the wider public news about their family. I doubt whether anyone puts their mind to whether they need the consent of the individuals to do that. When other organisations such as schools and day centres wish to publish material, they almost invariably seek consent from the*

[9] This is also the same in relation to any other foreign 'deputy equivalent,' but there is quite a regular 'trade' in individuals being placed in England by Scottish guardians, so this issue is on our minds.
[10] Note, Neil having been involved in this case, he has not contributed to this summary and comment.

> *people involved usually as part of a general contract. I do not have any evidence and have not heard submissions to allow me to come to any conclusions about whether consent is, in fact, required for the posting of such innocent material and, if so, whether it would be in VQ's best interest for such material to be posted.*

Interestingly, DJ Geddes noted that she was unconvinced that this wide question would properly be for the Court of Protection at all:

> *26.* […] *There might be issues of copyright in relation to the ownership of video or still imagery and there may or may not be grounds to restrain the publication of images or videos of VQ per se to protect her right to a private life but I believe those issues would be a matter for a court sitting in the civil jurisdiction with the Court of Protection's role merely being to decide whether it would be in her interests to bring such proceedings.*

In the instant case, the material in question was specifically related to the proceedings before the Court of Protection, and DJ Geddes had little hesitation in finding that, whether or not it showed P or contains an audio record of her speaking, was controlled by s.12(1)(b) Administration of Justice Act 1960 and may not be published unless publication falls within the exceptions contained in Practice Direction 4A, paragraphs 33 to 37.

DJ Geddes therefore made an order directing the individual in question to remove "*any video, audio, still photography of* [P] *or any other person and any other written material of whatever sort, which includes content relating to these proceedings posted on social media, YouTube, or any other platform accessible to third parties forthwith.*"

In the main body of the proceedings, concerned with whether or not the individual in question should be removed as attorney, and usefully, as, to date, there has been no reported decision on this point,[11] DJ Geddes made clear at paragraph 48 that the donor of an LPA must understand, retain and be able to use and weigh:

> *what is a lasting power of attorney, why she wants to make the power, who she is appointing as an attorney, why she has chosen to appoint that person as an attorney, and what powers are being given to the attorneys. There are a number of other matters which would need to be understood in terms of the nature of the power that has been granted and the authority which the attorney is given including in relation to property which would be anything that the donor could do but also in relation to welfare, authority to give or refuse consent to the carrying out or continuation of life-sustaining treatment. It is submitted that for the purpose of s.3(4) of the Mental Capacity Act, the donor has to understand the reasonably foreseeable consequences of making or not making a power, or making it in different terms, or appointing different people.*

[11] References having to be made to *Re Boar (Unreported)* and *Re Collis, an order of Senior Judge Lush made on 27 October 2010.*

## Short note: re-opening fact-finding hearings

In *Re CTD (A Child: Rehearing)* [2020] EWCA Civ 1316, the Court of Appeal revisited the three-stage approach to reopening findings of fact in family cases. In particular, it emphasised that when conducting a rehearing the court had to look at all the evidence afresh and reach its own conclusions, requiring the party seeking the relevant findings to prove them to the civil standard in the normal way. A rehearing was not, in principle, a different process to an ordinary fact-finding hearing. In particular, Peter Jackson LJ emphasised that the concepts of 'a starting point', 'strong' evidence, 'making the running' and 'an evidential burden' which have ebbed and flowed in the judgments that developed the ground rules in this area:

> *12.* […] *can now be laid aside as adding nothing and as being a possible source of misunderstanding. Of course the product of the rehearing will be that the earlier finding should or should not to be changed, but it is only in that very limited sense that the original finding is the starting point. Likewise, the original evidence was clearly strong enough to justify the original findings, but to describe evidence as strong before it is reconsidered is to beg the question that has to be decided. Lastly, concepts of 'making the running' and of an 'evidential burden' apply at the first stage (when securing a rehearing) and may do at the second stage (when persuading the court that a particular issue needs to be revisited). By the time of the rehearing itself the applicant will already have made the running by successfully adducing evidence to persuade the court to carry out an appropriate kind of rehearing and there is no need for further safeguards against unwarranted challenges to settled findings.*

Whilst this decision was made in the context of cases concerning children, its logic applies equally to cases before the Court of Protection.

## Not assessing capacity for the sake of it

*SB (capacity assessment)* [2020] EWCOP 43 (HHJ Anderson)

*Mental capacity – assessing capacity*

### Summary[12]

This case is the sequel to the decision [2020] EWCOP 32 that we reported previously, concerning a 30-year-old woman with moderate intellectual disability. In May 2020, HHJ Richardson made a direction for an independent expert psychiatrist to assess SB's capacity to make decisions about contact with other people. The Official Solicitor then made an application for this to be discharged and the proceedings brought to an end. The basis of the application was the belief of the Official Solicitor that SB does not wish to take part in a further assessment and would find it distressing and intrusive. The local authority supported the application.

[12] Note, Tor having been involved in the case, she has not contributed to this summary and comment.

HHJ Anderson, before whom the application came, met SB by telephone, in the presence of her solicitor Ms H. She had asked to see the judge. In simple terms she stated that she wanted the proceedings to continue, there was a need for assessment, she was not prepared to be assessed by a Dr O'D but would be prepared to be assessed by a different doctor.

HHJ Anderson acceded to the application, primarily because no party wished the court to make any decisions about best interests in relation to SB's contact with others. Nor was there any evidence before her that the woman was currently at risk from third parties or was engaged in activity which will draw them to her.

SB's mother submitted that she:

> *16.* […] *spends a lot of time communicating with people on social media and that she is very evasive when asked by her mother who she has been communicating with. I note that I have not seen any evidence from AB to this effect. I have not seen any evidence that there is a perceived risk from any specific individual or group of individuals as a result of this pastime. Furthermore, I have been reminded that SB has capacity to access the Internet and social media and is entitled to do so. I accept the submission of the Official Solicitor that it would not be unusual for a 30-year-old woman with capacity to engage in social media to be reluctant to inform her mother about the detail of those communications.*

In terms of the impact upon SB, HHJ Anderson considered that there was a:

> *"17.* […] *real risk to SB's emotional well-being if I allow such an assessment to proceed. SB now says to me that she is content to see another doctor. Therefore, I can assume that if I allow such an assessment she would cooperate. However, I note the evidence of both the social worker and SB's solicitor that SB has engaged less with them since the further work was ordered. She has told her solicitor that she finds questions from professionals distressing. I also take into account the evidence of the social worker that the involvement of a new professional is likely to cause SB distress, as all contact with professionals appears to do. The introduction of a new professional and therefore going over very difficult matters in SB's past, which she has perhaps covered with others, will be likely to cause SB anxiety and distress and increase the risk of emotional harm to SB. It cannot be said that the process will have a therapeutic element. It is purely discussion for assessment purposes and will not necessarily have any intrinsic benefit to SB. I take into account that when SB spoke to me she indicated a willingness to take part in a further assessment. However, SB also mentioned her wish to have the care of her son. She said, "if I have capacity I don't get and understand why I shouldn't have my son living with me now". I have a very real concern that SB was confusing the proposed assessment with an assessment relating to contact with her child.*
>
> […]
>
> *19. Bearing in mind that the court is not being asked to make any decisions about SB's contact with others it would not be in her interests for me to direct that there be such an assessment. I consider that the level of anxiety and distress which would be caused by repeated conversations about very difficult matters is now likely to outweigh any perceived benefits.*

HHJ Anderson observed that, given the time specific nature of capacity, it would be appropriate for any capacity assessment to be undertaken if and when a specific concern about SB's contact with others arose.

### Comment

This case is a helpful reminder both that capacity assessment is not an entirely 'neutral' process, nor do questions of capacity arise in the abstract; capacity assessments should therefore only be ordered if something is actually going to turn on them.

## Court of Protection statistics April – June 2020

The most recent set of statistics have now been published, covering the first months of the pandemic, and showing the impact that it has had on court business.

*Decrease in applications with an increase in orders made in relation to deprivation of liberty*

There were 1,020 applications relating to deprivation of liberty made in the most recent quarter, down by 26% on the number made in the same quarter in 2019. The applications were broken down as follows: 84 for orders within s.16 proceedings, 375 s.21A applications and 561 applications under the *Re X* process. However, there was an increase by 33% in the orders made for deprivation of liberty over the same period from 651 to 867.

*A decrease in applications and orders under the MCA 2005*

There were 5,754 applications made in April to June 2020, down by 29%. During the same period there were 11,024 orders made, down by 7%.

In April to June 2020, there were 5,754 applications made under the MCA 2005, down by 29% on the equivalent quarter in 2019 (8,110 applications). Of those, 39% related to applications for appointment of a property and affairs deputy.

In comparison, there were 11,024 orders made under the MCA 2005, down by 7% on the same quarter in 2019. Of those, 37% related to orders by an existing deputy or registered attorney.

*LPAs*

In April to June 2020, there were 125,076 LPAs received, down 44% compared to the equivalent quarter in 2019. There were 1,421 EPAs in April to June 2020, down 35% on the equivalent quarter in 2019.

# THE WIDER CONTEXT

## ENGLAND AND WALES

### As if Expendable

In a very hard-hitting and detailed report (complementing the equally hard-hitting report by the Joint Committee on Human Rights looking at wider issues), Amnesty International has set out a series of stark failures in the Government's protection of older people in care homes during the COVID-19 pandemic. It should perhaps be noted that, whilst referring to the UK Government, the report is in fact focused upon England & Wales: there is, sadly, much to suggest that the picture may not have been radically different in other parts of the UK.

### GMC Consent Guidance updated

At the end of September, the GMC published new guidance on decision making and consent. It comes into effect on 9 November 2020.

It sets out seven "principles" of decision making and consent:

1. All patients have the right to be involved in decisions about their treatment and care and be supported to make informed decisions if they are able.
2. Decision making is an ongoing process focused on meaningful dialogue: the exchange of relevant information specific to the individual patient.
3. All patients have the right to be listened to, and to be given the information they need to make a decision and the time and support they need to understand it.
4. Doctors must try to find out what matters to patients so they can share relevant information about the benefits and harms of proposed options and reasonable alternatives, including the option to take no action.
5. Doctors must start from the presumption that all adult patients have capacity to make decisions about their treatment and care. A patient can only be judged to lack capacity to make a specific decision at a specific time, and only after assessment in line with legal requirements.
6. The choice of treatment or care for patients who lack capacity must be of overall benefit to them, and decisions should be made in consultation with those who are close to them or advocating for them.
7. Patients whose right to consent is affected by law should be supported to be involved in the decision-making process, and to exercise choice if possible.

There has been much discussion online about the fact that the new Guidance requires disclosure of a

risk of serious harm "however unlikely it is to occur" (23(d)). On close reading, however, paragraph 23 is slightly more nuanced, stating that practitioners should "usually" include information on serious harm, however unlikely it is to occur.

As the GMC has been quick to point out, paragraph 5 of the Guidance sets out the importance of "*taking a proportionate approach*" and provides that "*not every paragraph of this guidance will be relevant to every decision*" and that a "*judgement*" will be required in any decision as to how the guidance is applied, consideration including factors such as the nature and severity of a patient's condition and the speed with which a decision must be made. To this end, paragraph 22 states in terms: "*it wouldn't be reasonable to share every possible risk of harm, potential complication or side effect. Instead, you should tailor the discussion to each individual patient, guided by what matters to them, and share information in a way they can understand*."

Separately, the Guidance suggests (para 6) that "*obtaining a patient's consent needn't always be a formal, time-consuming process. While some interventions require a patient's signature on a form, for most healthcare decisions you can rely on a patient's verbal consent*". The paragraph that follows gives the example of minimally or non-invasive interventions, particularly examinations. Clearly, this is an area which, like others, will require the "*judgement*" of the practitioner who may wish to be cautious about choosing not to record a formal consent process in many circumstances.

Of particular interest to readers of this Report will be the sections on supporting decision making (para 27), which adopts some of the MCA language of understanding and retaining; the section on future decision making including end of life care (32-39), which sets out circumstances in which practitioners and patients may be able to anticipate future impairment of decision making powers, and the specific section on mental capacity (76-96). They all make clear the importance of recording such discussions that may take place regarding present and future treatment and patients' wishes and feelings.

As the Guidance makes clear (paras 40-47) the support of colleagues and a "team-based approach" to the taking of consent can be helpful. However, the Guidance emphasises that while some elements of the decision-making process may be delegated – for example to colleagues with particular communication skills – the ultimate responsibility for ensuring the patient has been given sufficient information, time and support to give their consent rests with the treating clinician (para 45). As the section on capacity emphasises, "*assessing capacity is a core clinical skill and doesn't necessarily require specialist input (eg by a psychiatrist)*" (para 82). Importantly, the Guidance makes clear that doctors cannot 'hide' behind the presumption of capacity, stating in terms at para 84 that "[i]*f you believe that a patient may lack capacity to make a decision, you must assess their capacity using the test set out in the relevant legislation, taking account of the advice in the relevant guidance*."

The guidance naturally reflects the judgment in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 in which the Supreme Court emphasised the importance of patients being informed to make decisions for themselves: the thread of the importance of dialogue is visible throughout the Guidance. *Montgomery* was a key subject of debate in the recent "trans" judicial review, *Bell v Tavistock*: it will be

interesting to see whether there are any further developments in this area ahead.

## CQC publications

Three recent CQC publications are of particular relevance to readers of this Report.

1. Its Annual State of Care Report, divided into the world before and the world after COVID-19 (16 October 2020). Amongst many other things, the report highlighted the impact of COVID-19 on the operation of DoLS: "[f]*rom March to May, we saw a sharp fall in the number of notifications compared with the same period in 2019. Notifications from adult social care services dropped by almost a third (31%), and in hospitals by almost two-thirds (65%), compared with the same period in 2019. By July, the numbers received from adult social care services had risen again, although they fell back in August*." It also highlighted the impact of the uncertainty around the date for LPS implementation (now fixed for April 2022): "*poor understanding of DoLS has remained a fundamental issue throughout its years in legislation. This, together with the delays and uncertainty over the progress of LPS, may mean there is an increasing risk of people being deprived of their liberty without the proper authorisation. Given that DoLS authorisations can last up to a year, it may not be until March 2023 that DoLS is fully behind us. This underlines the importance of continuing to improve the way providers, local authorities and others work together to support the proper use of the DoLS – and to give careful consideration of how the two systems will work alongside each other in the first year of implementing the LPS. The time ahead also provides an opportunity to consider what can be done now within the current DoLS system to ease the transition.*"

2. The themed report on Assessment of mental health services in acute trusts (16 October 2020), looking at findings from over 100 acute hospital inspections. Of particular note is the CQC's findings that governance around the legal framework was poor, and that there was often confusion between the MHA 1983 and the MCA 2005. This reinforced the urgent need to update the codes of practice for the MHA, the MCA and DoLS to provide clear guidance for professionals on these complex interface issues.

3. The updated guidance on the regulation of services for autistic people and/or people with a learning disability (8 October 2020). Now called "Right support, right care, right culture," the guidance outlines three key factors that CQC expects providers to consider if they are, or want to care for autistic people and/or people with a learning disability: (a) Right support: The model of care and setting should maximise people's choice, control and independence; (b) Right care: Care should be person-centred and promote people's dignity, privacy and human rights; and (c) Right culture: The ethos, values, attitudes and behaviours of leaders and care staff should ensure people using services lead confident, inclusive and empowered lives. This guidance has always been set alongside other standards in health and social care - this includes NICE guidance (CG142) on the definition of 'small'' services for autistic people with mental health conditions

and/or behaviour that challenges. This states that residential care "should usually be provided in small, local community-based units (of no more than six people and with well-supported single person accommodation)". While CQC use NICE guidance in describing what 'small' means for how they apply their approach, this is not the same as having an absolute upper limit for the size of services. CQC have never applied a six-bed limit in their registration or inspection assessments and will continue to register based on care that is person-centred, and promotes choice, inclusion, control and independence. We note that CQC's review into restraint, prolonged seclusion and segregation for people with a mental health problem, learning disability or autistic people supports this and, for people currently in the hospital system, this is likely to require commissioners and providers to develop bespoke services.

## Short note: Sir James Munby explores the inherent jurisdiction

As Sir James Munby noted at the outset of his judgment in *FS v RS and JS* [2020] EWFC 63: "[t]*his is a most unusual case. Indeed, so far as I am aware, and the very experienced counsel who appear before me do not dispute this, the case is unprecedented. Certainly, the researches of counsel have identified no decision directly in point. The applicant's own description is that his applications are 'novel.' I suspect that the initial reaction of most experienced family lawyers would be a robust disbelief that there is even arguable substance to any of it.*" In short terms, the applicant, who was the 41-year old son of the respondents, sought financial relief against them: (i) pursuant to Section 27 of the Matrimonial Causes Act 1973; (ii) pursuant to Schedule 1 to the Children Act 1989; and (iii) pursuant to that branch of the recently rediscovered inherent jurisdiction which applies in relation to adults who, though not lacking capacity, are "vulnerable." Barbara Rich has written an interesting and thoughtful blog on the judgment as a whole; for present purposes, we draw attention to it because of the opportunity that it gave Sir James to make further comment upon an aspect of the inherent jurisdiction which he more or less singlehandedly discovered (or, perhaps more accurately, invented). At paragraphs 100-138 of his judgment, Sir James undertook a tour d'horizon of the jurisdiction as it now stands. Whilst those missing his characteristically erudite exegeses of difficult areas of the law will no doubt want to read these passages in full, we suggest that the following observations are of particular wider significance:

- Whilst the inherent jurisdiction may be the great safety net which lies behind all statute law, and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole, "*the inherent jurisdiction is a safety net, not a springboard*" (paragraph 100). Whatever its theoretical reach, it is in settled practice, recognised as being subject to limitations on what the court can and should do. Whilst it may be called upon to address new problems, *"novelty alone does not demand a remedy. Any development of the inherent jurisdiction must be principled and determined by more than the length of the Chancellor's foot (John Selden, Table Talk, 1689; Selden Society, 1927)*" (paragraph 103);

- "[P]*recisely because they do not lack capacity, those subject to this branch of the inherent jurisdiction [i.e. that relating to vulnerable adults] are fully autonomous adults; and (2) that, fundamentally, the*

*jurisdiction exists to protect and to facilitate their exercise of that autonomy*" (paragraph 114);

- Sir James Munby's observations as to whether the jurisdiction might be extended as far as had been identified by Hayden J in *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), as then explained by Lieven J in *London Borough of Croydon v KR & Anor* [2019] EWHC 2498 (Fam).[13] As he noted, "[t]*here is no need for me to consider whether this is correct, though I have to confess to some doubt. But even if correct, it must, not least for the reasons articulated by Lieven J, mark the extremity of what can be done in exercise of the jurisdiction*" (paragraph 122);

- The "*fundamental principle that the inherent jurisdiction cannot be used to compel an unwilling third party to provide money or services*" (paragraph 123). In other words, and just as is the position for a Court of Protection judge, a judge exercising the High Court's inherent jurisdiction cannot seek to generate options for the vulnerable adult that are not, in fact, on the table;

- The equally fundamental principle that the inherent jurisdiction cannot be used to cut across or usurp any relevant statutory scheme enacted by Parliament. Sir James expressly endorsed the "very pithy" formulation of the point by Lieven J in *JK v A Local Health Board* [2019] EWHC 67 (Fam), namely that "[t]*he inherent jurisdiction cannot be used to simply reverse the outcome under a statutory scheme, which deals with the very situation in issue, on the basis that the court disagrees with the statutory outcome*." As Sir James noted, on *"one view this all depends on the degree of generality or specificity with which one chooses to define or describe the ground or scope or ambit of the relevant statutory scheme*" (paragraph 136). The Supreme Court will, we should note, be grappling with precisely this question in the appeal it is shortly to hear in the *Re T* case concerning the question of when the inherent jurisdiction can be used lawfully to deprive a child of their liberty where no secure accommodation is available.

## Best interests, children and religious belief

*Birmingham Women's and Children's NHS Foundation Trust v JB* [2020] EWHC 2595 (Fam) (Hayden J)

*Best interests – medical treatment*

### Summary[14]

In *Birmingham Women's and Children's NHS Foundation Trust v JB* [2020] EWHC 2595 (Fam), Hayden J

[13] In which she had said (at paragraph 63) that she did "*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.*"

[14] Note, Tor having been involved in this case, she has not contributed to the summary or comment.

provided an important clarification regarding MacDonald J's judgment in *Barts Health NHS Trust v Raqeeb* [2019] EWHC 2530 (Fam) in relation to the evaluation of a child's best interests in the context of medical treatment.

The application was brought by the NHS Trust in relation to a 12-year old young person, J, who acquired a severe brain injury for a declaration sanctioning the withdrawal of intensive care and effectively confirming the absence of any alternative procedures that might otherwise be in his best interests.

Hayden J recognised that the case was *"of almost unbearable sadness."* He had been found with a ligature around his neck on the back of his bedroom door on 28 April 2020, having only been in his room for 20 minutes. His mother administered basic life support before the paramedics arrived and he was taken to hospital.

Whilst J did not fulfil the criteria for brain stem death, he had a profoundly severe neurological injury, which manifested by unconsciousness. He required augmentation by ventilator; and whilst a tracheostomy was trialed, the conclusion was that it was not possible. When the ventilator was disconnected, his muscle spasms would impede regular breathing.

Hayden J emphasised the circumstances of a global pandemic, which intensified the human suffering and included J contracting COVID-19. The consequence of which was that only his mother could visit him for two weeks, which was heartbreaking for his father and other family members.

Hayden J was satisfied that medical treatment was providing no benefit for him, the limited and hypothetical alternatives to ventilation having been explored. The burdens of treatment included irritation, his airway was vulnerable due to loss of cough and gag reflex and he risked acquiring chest infections. He determined that the prospects for J's life were futile: as captured in the evidence of the paediatric intensive care specialist, the professional ethical dilemma was: "*I am no longer saving J's life, I am prolonging his death."*

In the course of his judgment, Hayden J helpfully confirmed that MacDonald J in *Barts Health NHS Trust v Raqeeb* [2019] EWHC 2530 (Fam) *"did not for a moment intend that a Trust should ever approach an evaluation of a child's best interests, in the context of medical treatment, as secondary to the wishes or religious beliefs of the parents",* as had been suggested by commentary in the Medical Law Review. He expanded:

> *That would subvert the framework of the established law which preserves the interests of the child as paramount. Nor do I believe Macdonald J intended to sever medical 'best interests' from an overall evaluation of the child's interests. Such an approach would be artificial. A true and meaningful assessment of a child's best interests requires a conscientious survey of the wide canvas of his life, in which process the views of his parents concerning matters of faith, culture and more widely will be important but never a determinative factor.*

Hayden J considered the views of J's family who were firm followers of the Pentecostal church,

however he declined to investigate what J might have wanted for himself in the circumstances in which he was in. He considered that in many cases, the views and wishes of a child aged 12 extrapolated from the facts surrounding the way he lived his life would be appropriate, but the circumstances leading up to his hospital admission left too many unanswered questions.

He was satisfied that he should grant the declaration, because prolonging his present situation risked compromising his dignity and for no identifiable benefit.

### Comment

In addressing the commentary on the *Raqeeb* judgment, Hayden repeated the authorities of *Wyatt v Portsmouth NHS Trust* [2006] 1 FLR 554 and *Re J (a minor) (Wardship: Medical Treatment)* [1991] Fam 33 in relation to the court's approach in evaluating the best interests of a child. The *"intellectual milestones"* in carrying out that evaluation as laid out in *Wyatt* are worth restating:

> *In making that decision, the welfare of the child is paramount, and the judge must look at the question from the assumed point of view of the patient (Re J). There is a strong presumption in favour of a course of action which will prolong life, but that presumption is not irrebuttable (Re J). The term 'best interests' encompasses medical, emotional, and all other welfare issues (Re J). The court must conduct a balancing exercise in which all the relevant factors are weighed (Re J) and a helpful way of undertaking this exercise is to draw up a balance sheet (Re A).*

Further, the global pandemic coloured the judgment in a number of different ways, which will be equally relevant to cases involving adults:

- The opportunity afforded by "remote hearings" which has meant that judges have been able to "visit" patients to a degree not considered possible in the past.
- The pain and suffering of J's family had only been heightened by the pandemic and intensified the distress due to the visiting restrictions, particularly when J contracted the virus.
- The pandemic presented a stark check on the limits to the growing therapeutic possibilities of medical science in eliminating disease and prolonging people's life span.

## Short note: An infertile lie

We briefly mention the criminal case of *R v Lawrance* [2020] EWCA Crim 971 where the defendant allegedly lied about having a vasectomy before having unprotected sex, after which he was prosecuted for rape. The issue was whether a lie about fertility negated ostensible consent for the purposes of s.74 of the Sexual Offences Act 2003 which provides that, "*For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice*."

The Court of Appeal distinguished between (a) lies closely connected to the performance of the sexual act, and (b) lies relating to the broader circumstances of that act. The former can vitiate the consent;

the latter did not. Examples of the latter included lies concerning marital status or being in a committed relationship; lies about political or religious views; and lies about status, employment or wealth. The lie in this case fell into the broader category:

> *37… She agreed both to penetration of her vagina and to ejaculation without the protection of a condom. In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it.*

Accordingly, she was not deprived by the lie of the freedom to choose whether to have intercourse and the rape convictions were quashed.

This decision is of interest for those considering the relevance of deception on the issue of consent. One must tread carefully before drawing jurisdictional analogies between the criminal and civil law. After all, consent is defined in s.74 only for the purposes of the SOA 2003 and not for MCA 2005 purposes. Indeed, the relationship between the two was considered in *A Local Authority v JB* [2020] EWCA Civ 735 where the Court of Appeal identified the information relevant to the decision whether to engage in sexual relations. This requires an understanding that you should only have sex with someone who is able to consent and gives and maintains consent throughout. It was held that "*a full and complete understanding of consent in terms recognised by the criminal law*" was not an essential component of the capacity test. Rather, if a person lies in connection with the performance of the sexual act, the consent of P will be negated and an offence committed in the same way as for those without mental impairment which, we suggest, is the proper non-discriminatory approach to take.

## Coronavirus Public Health Officer powers in action

A case history in *Progress in Neurology & Psychiatry* exemplifies the difficult interface between Covid-19 legislation and mental health.

The patient was a woman with diagnoses of schizophrenia and mild learning disability. Her condition had been stable for some years but concerns had been raised in preceding months about a deterioration in her mood. She lived in a care home with mental health support.

In April 2020 she developed a cough: given that other residents of the care home had tested positive for Covid-19 the suspicion was that she was infected. She continued to leave, despite staff advice. A request was made for a capacity assessment, which concluded that she had fluctuating capacity to understand the pandemic.

Her GP escalated concerns to Public Health England. Following discussions with PHE, an order was made (purportedly pursuant to Schedule 21 of the Coronavirus Act 2020) for her detention at a local mental health unit.

Schedule 21 of the 2020 Act provides for powers in relation to potentially infectious persons. These include powers to direct or remove someone to a place for assessment and treatment if there is reason to believe they are potentially infectious, for up to 48 hours (paras 6-9). Once assessed, there is a power to impose 'such requirements and restrictions' as are necessary and proportionate in the interests of the person, for the protection of others or for the maintenance of public health for a maximum of 14 days (paras 14-15). Failure to comply with such requirements is a potential offence. The only route of appeal is by application to a magistrate.

In this case, the order appears to have provided for the patient to be detained at the mental health unit for an initial period of seven days. It is also reported as having provided for staff to use reasonable endeavours to prevent the patient leaving, applying reasonable restraint to prevent injury or the commission of a criminal offence and offering mental and physical healthcare as appropriate.

Within 24 hours of admission, her condition deteriorated and she was transferred to hospital. Testing there by way of swab revealed that was not infected with Covid-19, and she recovered to be discharged home 72 hours later.

### Comment

This case is alarming as an illustration of the use of covid legislation to effect the detention of a patient with mental health problems. The pandemic has undoubtedly created difficult issues around keeping vulnerable people safe but the measures adopted here are concerning.

One issue is the appropriateness of using the 2020 Act in these circumstances at all. It is reported that a capacity assessment was carried out, and that the patient was assessed as having fluctuating capacity 'to understand the impact of Covid-19'. It is unclear what precisely was assessed, or whether given the conclusion of fluctuating any further consideration was given to whether DOLS or an application to court were appropriate. It is also unclear whether any consideration was given to whether the MHA 1983 was engaged. Under either the MCA or MHA regimes, appropriate safeguards would have been in place and the patient (who is noted as having had 'limited awareness of the risk to herself or others, nor why she was in hospital') would not have been exposed to potential criminal sanctions.

A further concern is the appropriateness (or indeed lawfulness) of the manner in which powers under the Act were used. If the order provided for an initial period of seven days' effective detention before assessment, that appears to be outside the powers afforded by the Act. Requiring someone to remain on a mental health unit – albeit on a ward set up for treatment of covid patients – raises at least a question as to how this was identified as a suitable location. Finally, the appropriateness of authorising the use of restraint through such an order is questionable.

We also note in this context that the powers under Schedule 21 have barely been used: a FOI request by Lucy Series has produced the information that the power to require a person to remain in isolation

at a specified place had been used twice between April 2020 and September 2020, and the power to require a person to remain somewhere to be screened once in the same period.

## Nick Lewis

We – belatedly – note the death of Nick Lewis, an extraordinarily dedicated mental health solicitor and President of the Mental Health Lawyers Association, whom Alex had the privilege of serving alongside on the Law Society Mental Health and Disability Committee. A lovely tribute can be found to him on the Law Society Gazette's website.

### BOOK REVIEW

Adolescent Mental Health Care and the Law (Camilla Parker, Legal Action Group, 2020, £50)

Camilla Parker set herself a hugely difficult task in identifying and seeking to make sense of the overlapping, tangled, and frequently incoherent and mutually inconsistent legal frameworks relating to the mental health care of those under 18. It is a task which many have recognised as necessary before, but which has not been done to date, much to the detriment of the interests of the children and young people concerned. All those who work with such clients – importantly, including professionals seeking to discharge their functions in relation to those clients – owe Camilla a debt for taking it on, and doing so well. The result of her work is a tour de force. Not only does it cover everything that you might be going to a book on this subject to find, and does so with sure-footed accuracy and helpful summary route-maps at key points, but as with all the best books, it also includes matters that you would not realise that you should be aware of.

I only have two regrets in relation to the book. The first is that, understandably, given the amount of terrain covered, Camilla has chosen to limit herself to England only – there is the equivalent book to be written, and I would hope soon, in relation to Wales, where the law is evolving in some fascinatingly different ways to that in England. The second is perhaps not a regret about the book per se, but rather that the book expertly shows how badly both the legislators and the courts have approached the specific issues that arise in relation to those under 18 and their mental health needs. I would hope that this book, by allowing a stock-take and highlighting the current problems, not only allows people to navigate the current minefields, but also to encourage them to plot a course towards better ways of thinking about the law in this area.

*Alex Ruck Keene*

[Full disclosure, I had sight of this book, and made comments upon it, in draft form, and was also provided with a copy by the publishers. I am always happy to review books in the field of mental capacity and mental health law (broadly defined).]

## JERSEY

The small body of case-law relating to Jersey's Capacity and Self-Determination Law 2016 has been added to in two very interesting decisions that have recently appeared on the Jerseylaw website:

- *Re C* [2020] JRC 150A, concerning orders that a woman with significant learning difficulties, C, reside at a specific address, that she be subject to a care plan that involves substantial supervision and restrictions on her freedom; that she lacked capacity to give consent for arrangements for her placement and where she should reside, her care plan, and her social contact which would need to be supervised; contact with her husband D and her capacity to consent to sexual intercourse. The Royal Court drew heavily, as it has done on other occasions, on the case-law of the Court of Protection – in particular in relation to the approach to take to capacity and sexual intercourse. The Royal Court in its judgment made clear that its determination in relation to sexual relations was not a "once for all" one, and expressed the expectation that work would be done with her to assist her develop her abilities in this context; it will be interesting to see when the case does come back whether the Royal Court will then follow the evolution in the English case-law from the focus on capacity to consent to sexual relations to capacity to engage in sexual relations.

- *In the Matter of B (Medical)* [2020] JRC 153, concerning the meaning of "significant restriction upon liberty" (a statutory term within the 2016 Law) and also the circumstances under which a delegate should be appointed. Of particular interest to those outside Jersey may be the Royal Court's observation at paragraph 92 that it would be reluctant to treat someone "*who is physically incapacitated such that he is unable to leave a relevant place such as the special needs home are subject to a significant restriction on his liberty as a result of any activity by the State. The objective position is that the First Respondent is unable to leave the special needs home because of his physical impairment, but that does not amount to a significant restriction on his liberty imposed by the State. As a matter of law, in the hypothetical situation where he woke up with physical and mental capacity, there would be nothing to prevent him from doing so, and in practice we do not think any impediment would be put in his way by staff members*."

## EUROPEAN COURT OF HUMAN RIGHTS

### Short note: Article 3, restraint and the psychiatric setting

In *Aggerholm v Denmark* [2020] ECHR 628, the ECtHR considered the situation where a man with paranoid schizophrenia was strapped to a restraint bed for almost twenty-three hours in a psychiatric hospital. He contended that this was in breach of Article 3 ECHR. The court reiterated (at paragraph 83) the familiar mantra that:

> *"it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves, and for whom they are therefore*

> *responsible. The established principles of medicine are admittedly, in principle, decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (M.S. v. Croatia (no. 2), cited above, § 98).*

Turning to physical restraint, the court noted (at paragraph 84) that:

> *the developments in contemporary legal standards on seclusion and other forms of coercive and non-consensual measures against patients with psychological or intellectual disabilities in hospitals and all other places of deprivation of liberty require that such measures be employed as a matter of last resort, when their application is the only means available to prevent immediate or imminent harm to the patient or others* […] *Furthermore, the use of such measures must be commensurate with adequate safeguards against any abuse, provide sufficient procedural protection, and be capable of demonstrating sufficient justification that the requirements of ultimate necessity and proportionality have been complied with and that all other reasonable options have failed to satisfactorily contain the risk of harm to the patient or others. It must also be shown that the coercive measure at issue was not prolonged beyond the period which was strictly necessary for that purpose* […].

The court found that the situation could be distinguished from those it had previously considered, and (at paragraph 105) that, it could:

> *not be concluded that the duration of almost twenty-three hours for the applicant to be strapped to the restraint bed is, per se, sufficient to find a violation of Article 3. It will depend on whether the continuation and duration of the measure of physical restraint in respect of the applicant was the only means available to prevent immediate or imminent harm to himself or others* […].

On the facts of the case, the court found that this justification was not made out, such that the circumstances did breach Article 3 ECHR.

## Equinet Equality Law Working Group's analysis of Article 14 jurisprudence

The European Network of Equality Bodies ('Equinent') Equality Law Working Group has published the fruits of a year's worth of labour focused on analysing Article 14 of the European Convention on Human Rights ("ECHR"). The first output was a publication entitled, "Compendium: Article 14 cases from the European Court of Human Rights," which offers a detailed analysis of the court's recent Article 14 case law. The group searched for all cases where Article 14 had been argued, and then focused on those where the court made a substantive finding in relation to the article. As part of their analysis, the group considered (inter alia) the scope of "other status", the range of sectors that Article 14 can reach, the legal definition of discrimination, positive obligations and the influence of international instruments (including the UN Convention for the Rights of Persons with Disabilities) and the approach of the Court to the margin of appreciation and justification.

The second output was a third party intervention in the case of *Toplak and Mrak v Slovenia* (a case concerning accessibility of polling station to individuals with disabilities). The case raised critical

questions as to the nature and extent of Contracting States' obligations to secure the rights of persons with disabilities to vote without discrimination. The intervention provides a useful overview of the international human rights standards on this issue and national legislation and practice across Contracting States." The case has been held admissible, and a judgment will be rendered in due course.

## RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle. This month, we highlight the new Mental Disability Law Network website and blog established by Peter Bartlett at the University of Nottingham. We also highlight the two most recent publications from the Mental Health and Justice Project appearing in Frontiers of Psychiatry: Insight Under Scrutiny in the Court of Protection: A Case Law Survey and Advance Decision Making in Bipolar: A Systematic Review.

# SCOTLAND

## Mental Welfare Commission Chief Executive

Julie Paterson took up the position of Chief Executive of the Mental Welfare Commission for Scotland on 3rd August 2020, after a significant period since Colin McKay stepped down from that role in March, as we reported in the February 2020 Report. Although Julie had a two-year secondment to the Mental Welfare Commission more than a decade ago, she had no coordinated period of overlap with Colin. However, following a period of updating and familiarisation with the Commission, and engagement with key stakeholders, we anticipate that she will be in a position to make her own introductory contribution to next month's Report.

Colin was the first lawyer to be Chief Executive of the Commission. Julie is now the first qualified social worker. She is in addition a mental health officer, and well aware of the needs to substantially improve the recruitment, training and retention of mental health officers; the pressures upon the existing service and the challenges from her own experience of managing it; and the factors that are adverse to recruitment and retention.

Prior to her appointment to the Commission she was Divisional General Manager (Fifewide Division) at Fife Health and Social Care Partnership. She can be expected to bring a particular focus upon the work of Health and Social Care Partnerships. She is also well aware of the need in Scotland for greater alertness to identify situations of actual or potential deprivation of liberty, and to ensure that they are properly addressed.

I would suggest that her appointment is particularly timely against the background that figures presented by Professor David Bell at the Online Scottish Policy Conferences Keynote Seminar on "Next steps for adult social care in Scotland – quality, support and developing effective models of care" on 7th October 2020 showed that from the period 2012/2013 to the period 2019/2020 healthcare spending in Scotland increased in real terms by 7.1%, and local authority funding reduced in real terms by 13.9%.

It is expected, however, that next month's Report will enable Julie to speak for herself.

*Adrian D Ward*

## Mental Welfare Commission publications

The Mental Welfare Commission has recently published its Adults with Incapacity Act monitoring report for 2019/2020. It states that there has been a 7% increase in guardianship orders (3,199) since the previous monitoring period, the majority being for people with either learning disability (49%) or dementia/Alzheimer's Disease (36%). Whilst there has been a decline in indefinite orders which is comforting in human rights terms (notably Articles 5 and 8 ECHR and 12 and 14 CRPD) the reasons for the rise in orders should be investigated. This is important in terms of the operation of the Adults

with Incapacity (Scotland) Act 2000 and respect for the range of civil and socio-economic rights applicable to those subject to guardianship orders. This is brought into even sharper relief by the fact that the report contains some case studies from the Commission's visits which illustrate the views of both those subject to guardianship orders and their guardians. It notes that in most cases the experience of people subject to guardianship orders and guardians were largely positive but there were concerns indicated by some individuals subject to the orders relating to restrictions and by guardians relating to the quality and level of care provided.

The Commission has also published an advice note for practitioners who are using the Mental Health Act and Adults with Incapacity (Scotland) Act 2000 when caring for patients during the coronavirus pandemic and updated advice relating to coronavirus for people using mental health, learning disability and dementia services and their family or carers. It has also published a position statement on the use of section 13ZA Social Work (Scotland) Act 1968 in relation to the coronavirus. Although provisions in the Coronavirus (Scotland) Act 2020 introduced a so-called 'easement' relating to section 13ZA allowing local authorities to move persons who lack capacity to residential care without the usual statutory requirement to take into account their present and past wishes and feelings[15] did not come into force and have now been suspended, there has been concern about the apparent transfer from hospital to residential care of relatively large numbers of older persons who may lack capacity without legal basis. The Commission position statement essentially makes it clear that it would never have been proportionate to use the 'easement' to s13ZA and warns that local authorities should be very careful when using s13ZA at present. It states its intention to work with Health and Social Care Partnerships to independently review the practice in recent months with specific reference to moves from hospital to care homes.

*Jill Stavert*

## "… then take the other knee" – *Covid reveals endemic issues*

On 1st October 2020 Scottish Human Rights Commission published "Covid-19, Social Care and Human Rights: Impact Monitoring Report". The report was presented a week later, in an online discussion on Thursday 8th October 2020. The report, available here, is a major and important document, extending to 87 pages. It is worthy of careful consideration, preferably in full, though the nine conclusions and 24 recommendations in the final chapter are essential reading for all working in the field. Points of major concern are the significant gaps in the realisation of rights of people who rely on social care support, including unpaid carers, and the widespread experience of people who use social care support at home of reductions or complete withdrawals of support for adults who may lack relevant capacity. These occurred even where a welfare guardian or attorney had relevant powers but had not been informed, and often happened rapidly in the early months of the pandemic without either adequate communication or adequate assessment of the proportionality of such decisions. The result is that

[15] Section 1(4) Adults with Incapacity (Scotland) Act 2000.

the impact of policy and practice has had a direct and detrimental effect on people's rights, including those under the European Convention on Human Rights as well as the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of Persons with Disabilities. The Commission believes that these violations include potential unlawful interferences with people's rights to physical and psychological integrity, and negative impact on rights to private and family life, without recourse to the normal assessment and review procedures.

Looking forward from now, the Commission states that it is deeply concerned about the future care support available to people whose packages were reduced or withdrawn over the period, and the potential impact that this could have on how their rights are realised, in the future as well as in the present. Indeed, if one steps back from the immediate situation, perhaps the greatest concerns demonstrated (and for many of us verified) by the report are that the pandemic "has exposed and exacerbated the inadequacies of the ways in which social care is accessed, funded, procured and commissioned in Scotland". In its concluding remarks, the Commission asserts that: "The current social care system is unable to provide people with the support that fits their life best and most appropriately, and to ensure their rights are respected, protected and realised". In consequence, both short and longer-term change is needed. That is necessary "to ensure the level of decline in the realisation of people's rights that has taken place never happens again". The Commission expresses the hope that its research will be acted upon by the Scottish Government, COSLA, and other relevant public authorities. Most readers of the report are likely to conclude that this should be an imperative, rather than a hope.

It appears that at one point the report does not state the law accurately. In a section entitled "Processes around the reduction in care and support at home", it is suggested (pages 53-54) that decisions to reduce care packages are subject to the provision of section 1(2) of the Adults with Incapacity (Scotland) Act 2000 that: "There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention". The report asserts that: "It is not clear how the removal of essential support could be viewed as of benefit to an adult who lacks capacity to make some decisions, particularly if they also need physical support and personal care".

However, one must question the basis for asserting that the principles in section 1 of the 2000 Act apply to such decisions. Section 1(1) provides that: "The principles …. shall be given effect to in relation to any intervention …. under or in pursuance of this Act". Alterations in care packages are not an intervention in pursuance of the 2000 Act. In the case of adults who have guardians with relevant powers, an order to comply with the decisions of the guardian under section 70 could be theoretically relevant. One has to say "theoretically" because at best that cumbersome procedure might be available if things had gone wrong once, the guardian had given explicit instructions to the chief social work officer requiring consultation before any further adjustment to the care package, and could persuade a sheriff that in the circumstances such an order was necessary to prevent things going wrong

again: all rather cumbersome, and uncertain. Perhaps, if a particular local authority had a demonstrably bad record in this regard, it might be possible to persuade a sheriff to grant such an order on a precautionary basis ahead of anything going wrong: and it might be possible to justify an application under section 70, which provides remedies in the event of non-compliance with the decisions of a welfare guardian, on the basis of a request for an undertaking in the matter which had not been granted within a reasonable period. Section 70 procedure is not available to attorneys, and in any event better alternatives might be either a referral to the Ombudsman, or human rights-based proceedings.

Apart from that particular point, what is most likely to strike any reader of the report, or anyone listening to the presentations at the conference, is the apparent lack of reference to Article 5 of ECHR, or to the widespread concerns about apparent unlawful violations of Article 5, which are unwarranted in the circumstances that the United Kingdom is not one of the states which have notified temporary derogation from Article 5 by reason of the pandemic: see my report "Equalities and Human Rights Committee and related matters" in the September Report. The answer provided in response to a question about this at the conference was in fact entirely reassuring. That answer was confirmed by email from the Commission to me that same afternoon. The Commission had in fact drafted so much text on potential deprivations of liberty, which would have added so much to an already lengthy report, that it concluded that: "This was actually an issue which requires its own focus". That is a decision to be welcomed, provided that the evidence on this assembled by the Commission, together with the Commission's resulting conclusions and recommendations, are given adequate prominence at the earliest reasonably practicable date.

Taking a wider and more fundamental view, the pandemic has exposed not only the inadequacies highlighted at the end of the Commission's report, but – I would suggest – serious institutional ageism and disability discrimination, comparable in gravity to the racism currently addressed by the "Black Lives Matter" movement, particularly in Scotland, across areas including access to and administration of justice, and through large areas of national and local government. This is the place only for some brief references and the quotation of particular experiences that have actually occurred. The delays by local authorities in producing mental health officer reports, which are essential to allow applications for guardianship and intervention orders to be presented in court, are unlawful, and no less so because they are endemic and frequently are outrageously protracted. The Parliament specifically set a 21-day limit for production of such reports, recognising that delivery of justice to people with relevant disabilities depended upon production of them taking no longer. It is rare for such reports to appear within the statutory time limit, and not uncommon for them to take months, or even in excess of a year, to be produced. That point features in some of the experience quoted below.

In contrast with the Court of Protection in England, where comparable procedures were recently reported to be up to date, there are still long delays in processing many adult incapacity actions. The fundamental rights of elderly and disabled clients are routinely violated in this way by these delays. No such application is brought unless those bringing it assert, and offer if necessary to prove, the

necessity for them. Where they are shown to be necessary, they are required to avoid violation of fundamental rights; and unwarranted difficulty or delay amounts to such violation. The same comment applies to discrimination in social care, and the imposition of unlawful deprivations of liberty without regard to (or even recognition of) the applicability of Article 5 of ECHR: see again my article in the September Report referred to above.

In the article "Covid-19: the case histories" in the May Report, I narrated six case histories reported by legal and medical professionals to the Mental Health and Disability Committee of the Law Society of Scotland. They were subsequently included, with commentary, in the response dated 26th May 2020 by the Law Society of Scotland to the Inquiry on the Impact of Covid-19 by the Equalities and Human Rights Committee of the Scottish Parliament, available here.

Since then, several further worrying situations have been reported to me personally. I conclude by listing them in the words reported to me:

a. "At least 50% of my clients describe an older relative going into hospital for physical reasons, with no real cognitive impairment, and no existing diagnosis, and almost immediately being assessed as incapable. In all of those cases, family had been unable to visit their relatives, and had no means of assessing their relative's mental state, for themselves."

b. "I have had a client being pressured by Social Workers to move a dying relative from a ward designed specifically to provide end-of-life care."

c. "I have had half a dozen clients who have been urged to seek Welfare Guardianship, only for their relative to be moved within days to a care home, using Section13ZA. At which point, it is no longer considered urgent to allocate an MHO, and their applications have been placed on a waiting list – in all of those cases, the Adult still does not have the protection of Guardianship, and nor has there been judicial scrutiny of their situation."

d. "I had a Charge Nurse allow me access to visit an Adult in hospital, as Safeguarder, on the basis that 'it might help to get him moved on quicker'."

e. "A number of MHOs have complained to me about the extent of pressure placed upon them by senior NHS staff; the more experienced have stood up to that pressure, and taken on the fight. In one case, where the local authority and the Adult's wife were joint interim Welfare Guardians, the MHO refused to seek a Direction from the Sheriff that the Adult be moved to a care home against the wishes of his wife, on the basis that the wife's point of view was entirely reasonable. This was at the height of deaths in care homes, and the NHS had tried to move the Adult to at least six different facilities, all of which had Covid deaths. The NHS threatened to take the case to court themselves (but never did)."

f. "I have heard of, and from, Social Workers who have been told that the coronavirus legislation has amended Section 13ZA, and who have then told my clients that their relative will be moved, even

if neither they, nor the Adult, agrees."

g. "Some local authorities bounced back very quickly, and I now have MHOs from one authority doing 'routine' AWI(2)s, for younger Adults and older Adults alike. Other authorities have used the restrictions to avoid doing 'private' AWI work, at all."

h. "There has been a massive disregard for human rights, which cannot possibly be justified by the Covid-19 'emergency'. When [a hospital] was, at one stage, running at 50% capacity, and the empty corridors of [another hospital] echoed as you walked through them, it is very hard to see why the discharge agenda was pursued so ruthlessly, and fatally, against such very vulnerable people. We may only be seeing the very tip of the iceberg at this stage."

*Adrian D Ward*

## Add 176 days: latest on emergency provisions

Updated guidance from Scottish Government on 28th September 2020, available here, helpfully summarises the current position on emergency provisions affecting adults with incapacity. The relevant provisions are those set out in paragraphs 11(1), (2) and (3) of Schedule 3, Part 2, of the Coronavirus (Scotland) Act 2020. Paragraph 11(1) related to section 13ZA of the Social Work (Scotland) Act 1968. Section 13ZA as it stands permits what are probably violations of human rights even without the violations which would have been sanctioned by the temporary provisions under paragraph 11(1). The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 expires paragraph 11(1). The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 and The Coronavirus (Scotland) Act 2020 (Suspension: Adults with Incapacity) Regulations 2020 together have the effect of providing that "stop the clock" provisions in relation to expiry dates of guardianship orders and of certificates under section 47 of the 2000 Act came into effect on 7th April 2020 and ceased from 30th September 2020, when the "stopped clock" started running again. Accordingly, 176 days require to be added to original dates of expiry affected by the "stop the clock" provisions. Further complications will arise if paragraphs 11(2) and (3) are activated again, and the clock is stopped for a further period.

*Adrian D Ward*

## GMC Guidance on consent updated

We note here by way of cross-reference the commentary on the GMC's new consent guidance in the Wider Context section of the report. The GMC guidance provides at the outset that: "[w]*hile the law relating to decision making varies across the UK, this guidance is consistent with the law in all four countries and supports doctors to act within it.* […]. *Doctors are expected to keep up to date with the law and follow our guidance and other regulations that are relevant to their work*." There are, however, a number of points within the Guidance which do not sit easily with the law in Scotland, reminding readers yet again of the difficulty of producing guidance which seeks to straddle different legal systems.

*Alex Ruck Keene*

## Is there a general right of privacy in Scots law?

What is the relevance to the Mental Capacity Report of a decision about whether messages exchanged in a WhatsApp group by 10 police officers could be produced in misconduct proceedings, or whether they were protected by the right to privacy under Article 8 of the European Convention on Human Rights? At first sight, the case of *C v Chief Constable of the Police Service of Scotland*, [2020] CSIH 61; 2020 S.L.T. 1021, a decision on appeal by the Second Division of the Inner House of the Court of Session, merely confirmed – in a modern context – the long-standing advice not to write anything in a letter that one would not wish to hear being read out in court. However, the leading Opinion of the Lord Justice Clerk (Lady Dorrian) is of general interest for its comments on the question of whether there is "a general right of privacy" in Scots law equivalent to that under Article 8 of ECHR. In both the proceedings and decision at first instance, and the submissions in this appeal, it appears to have been assumed that there was no room for relevant dispute about the existence and scope of a common law right of privacy. Lady Dorrian regarded that as "somewhat unfortunate". As she had not been addressed at all on the point, she was unwilling to decide the case without having the benefit of detailed submissions, but on the other hand she did not feel that "the Lord Ordinary's conclusions on the matter can pass without comment". She proceeded to comment, trenchantly and (in this writer's respectful opinion) persuasively in the passage on pages 1036 et seq. of the SLT report.

At first instance the Lord Ordinary had stated that he considered there to be "a nascent recognition of a common law right of privacy in the case law". For reasons which Lady Dorrian developed, and as she carefully put it, it seemed to her "that the reasoning which led the Lord Ordinary to conclude that there is a fully developed right of privacy in Scots law concomitant in range and scope with art. 8 may be questioned". She proceeded to question it, by way of careful consideration of the terms of decisions founded upon by the Lord Ordinary. Lady Dorrian conceded that there is no doubt that the law in this area continues to evolve, and that the scope of protection given to private information has expanded considerably. However, she doubted whether that development had reached the absolute stage suggested by the Lord Ordinary.

The purpose of this report is to draw attention to this part of Lady Dorrian's Opinion, without narrating the details of her consideration and reasoning.

*Adrian D Ward*

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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 Visiting Professor 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 and created the website www.lpslaw.co.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. To view full CV click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

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

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Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

## Simon Edwards: simon.edwards@39essex.com

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.

## Adrian Ward: adw@tcyoung.co.uk

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

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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

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

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

Jill Stavert's Centre for Mental Health and Capacity Law (Edinburgh Napier University)'s Autumn 2020/January 2021 webinar series will include contributions by Adrian Ward on 11 November at a webinar about Advance Care Planning: advance care and treatment planning, end of life, COVID-19, and by Alex on 2 December 2020 at a webinar about Psychiatric Advance Statements. Attendance is free but registration via Eventbrite is required. 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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