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MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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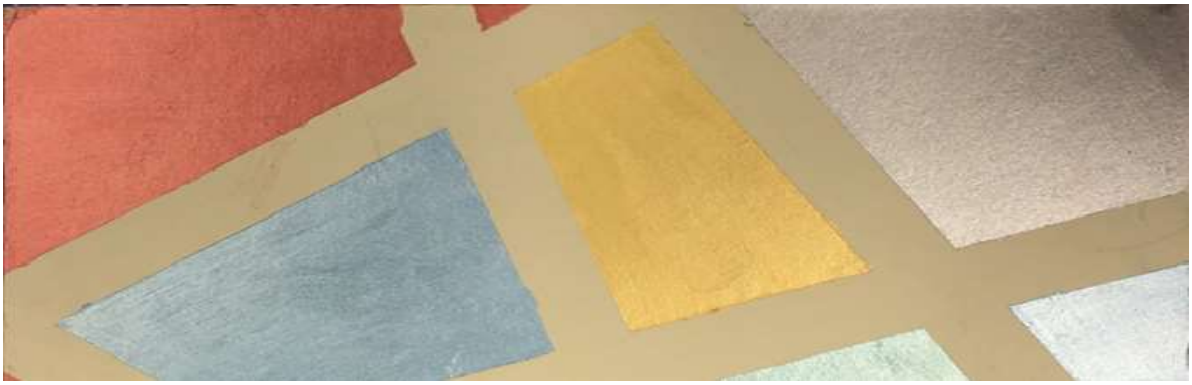

Welcome to the October 2020 Mental Capacity Report. Highlights this month include:

(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.

Editors
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Rachel Sullivan
Stephanie David
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

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

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

Article 5 – DoLS authorisations

Summary[1]

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*

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

> *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).

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.[2]

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?

[2] 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.

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 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,[3] 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)[4] 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*

[3] 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…"

[4] 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*."

> *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 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.[5]

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

[5] 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.

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, 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."[6]

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:

> *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[7] 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*

[6] 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.

[7] 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….*"

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 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.[8] 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,[9] 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

[8] 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.

[9] Note, Neil having been involved in this case, he has not contributed to this summary and comment.

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 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, 10 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*

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

> *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.*

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

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.

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.

Editors and Contributors

Alex Ruck Keene: alex.ruckkeene@39essex.com

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.

Victoria Butler-Cole QC: vb@39essex.com

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.

Neil Allen: neil.allen@39essex.com

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.

Annabel Lee: annabel.lee@39essex.com

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.

Nicola Kohn: nicola.kohn@39essex.com

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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Katie Scott: katie.scott@39essex.com

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.

Rachel Sullivan: rachel.sullivan@39essex.com

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.

Stephanie David: stephanie.david@39essex.com

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.

Jill Stavert: j.stavert@napier.ac.uk

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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085