MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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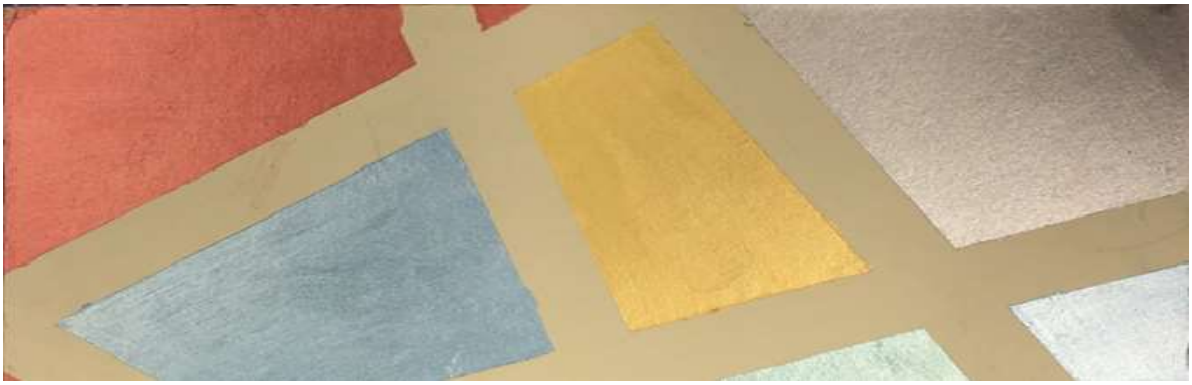

Welcome to the October 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the 14th birthday of the MCA, an important case about the scope and limits of ADRTs, and the impact of coercive control on capacity;

(2) In the Property and Affairs Report: a deputy stand-off and new blogs from the OPG;

(3) In the Practice and Procedure Report: anticipatory declarations and medical treatment – two different scenarios;

(4) In the Wider Context Report: children, competence and capacity in different contexts, the JCHR launches an inquiry into human rights in care settings, and a Jersey perspective on deprivation of liberty;

(5) In the Scotland Report: the Supreme Court, devolution and implications for CRPD incorporation, and resisting guardianship.

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

Happy 14th birthday MCA!

The MCA turned 14 on 1 October 2007. To celebrate, Alex has recorded his personal top ten health and welfare cases, available here.

Advance decisions, Jehovah's Witnesses and what does "doing something clearly inconsistent" with your ADRT mean?

Re PW (Jehovah's Witness: Validity of Advance Decision) [2021] EWCOP 52 (Poole J)

Medical treatment – advance decisions

Summary[1]

The (surprisingly) small body of case-law relating to advance decisions to refuse treatments has been added to by a judgment delivered by Poole J in difficult and urgent circumstances, which grappled head on with the complexities to which they can give rise. In this case, Poole J was sitting as the Out of Hours Business Judge in the Court of Protection, determining an application made in the evening of 17 September 2021, and conducted by telephone between 11:45 pm that evening and 3:25 am the next morning.

The application concerned Mrs W, an 80 year old in a "perilous" condition in hospital. She had severe anaemia following internal bleeding due to an ulcerated gastric tumour, the medical evidence being that in her current state and whilst the tumour remained, she was at risk at any time of sudden bleeding which if untreated would almost certainly end her life. With a blood transfusion that immediate risk would be significantly reduced so that she would be able to undergo investigations and then surgical or possibly other treatment for her tumour and, given her general condition, she would be likely to survive the treatment and might live for another five to ten years. Mrs W had Alzheimer's dementia. Assessment by a Consultant Geriatrician at the hospital had concluded that she lacked capacity to make decisions about her treatment. She was also a Jehovah's Witness, and it emerged on 17 September 2021 that she had made an advance decision in 2001. This clearly included a decision to refuse blood or blood products even if her life is in danger. All parties accepted that the advance decision was

[1] Note, Nicola having been involved in the case, she has not contributed to this note.

properly made and was applicable to the decision whether to refuse or consent to blood transfusion.

As Poole J identified (at paragraph 3):

> *The question for the court, if Mrs W lacks capacity to make a decision whether to consent to or refuse blood transfusion, is whether the advance decision is valid within the meaning of the MCA 2005. If it is, then her decision must be respected even though she may well die as a consequence. If it is not valid, and she lacks capacity to make the decision, then the court is required to assess what decision should be made on her behalf, in her best interests.*

The advance decision included the statement that it "*will remain in force unless and until specifically revoked in writing by me*." It was witnessed by two witnesses. It was three pages long and includes the following (capitalisation as in the original document):

> *I am one of Jehovah's Witnesses. On the basis of my firmly held religious convictions … and on the basis of my desire to avoid the numerous hazards and complications of blood transfusions, I absolutely REFUSE allogeneic blood (another person's blood): the primary blood components red cells, white cells, platelets and/or plasma; and stored (predonated) autologous blood (my own stored blood) under any and all circumstances, no matter what the consequences.*
>
> *MY DECISION to refuse blood and choose non-blood management MUST BE RESPECTED EVEN IF MY LIFE OR HEALTH IS THREATENED by my refusal.*
>
> *Any attempt to administer blood contrary to my instructions will be a violation of my rights of bodily self-determination and personal autonomy, and accordingly will constitute an actional trespass to my person.*

As Poole J noted:

> *24. There are different elements to the advance decision but the refusal of allogeneic blood is very clearly stated to apply "under any and all circumstances". That advance decision is applicable to the administration of allogeneic blood or blood products as life-sustaining treatment but it is not restricted to life-sustaining treatment.*

Importantly, Poole J identified that:

> *25. Although it was made before the MCA 2005 came into force, the advance decision complies with the requirements for making an advance decision to refuse life-sustaining treatment (see s.25 of the MCA 2005). It is in writing, signed in the presence of witnesses, it includes a clear, specific written statement that it is to apply to the specific treatment - the administration of blood - even if life is at risk. There is no evidence that Mrs W took advice from a healthcare professional at the time that she made the advance decision but that was not and is not a requirement for the advance decision to be effective.*

Mrs W had not withdrawn the advance decision but neither had she renewed or updated it since 2001. A further, important, factual matter is that, in August 2020 she made a health and welfare power of attorney in favour of her four children, which was registered with the OPG on

27 November 2020. She did not include any preferences or instructions. Her children's evidence was she told them that she would like to be resuscitated if the need arose but did not tell them of any other preferences or instructions. She did not tell them that she had made an advance decision. The LPA also included a section headed "Life-sustaining treatment;" Mrs W opted not to give her attorneys authority to give or refuse consent to life-sustaining treatment on her behalf.

Two of her daughters gave evidence to the court on their behalf and those of their siblings, recorded as follows (paragraph 30):

> *Mrs W is widowed and there are no other significant family members so far as I am aware. There is no question that the children love their mother dearly but no disguising the hostility they feel towards the Jehovah's Witnesses denomination. They feel that their mother was pressurised into making her advance decision and was indoctrinated. Their father, Mrs W's late husband, was a committed Jehovah's Witness, and Mrs W went along with him because she is a "person who likes to please" and wanted to be a "good wife". They felt that Mrs W was now being treated as "disposable" and that the idea that she should not be given a blood transfusion was akin to euthanasia. They were convinced that she wants to live and would choose to have a blood transfusion if she were able to give a considered and clear view.*

Poole J also noted their evidence to the effect that when earlier in 2021 she had been very ill in hospital, "[a] *'DNR' order had been mistakenly included in her medical notes and she insisted on it being removed. The children told me, through Ms W, that Mrs W had never mentioned the advance decision to them and they had been completely unaware of its existence*."

Poole J identified that it would have been possible for him to avoid making determinations about the key issues in the application, to allow further evidence to be gathered. Despite the shortness of the notice, no party sought an adjournment, and he continued:

> *44.* […] *in any event I was presented with compelling evidence that Mrs W required a blood transition urgently and was at risk of dying due to complications which could occur "at any time" if she were not given a blood transfusion. I was told that clinicians were "standing by" ready to give blood if so authorised. It would, in my judgement, have been an abrogation of responsibility not to make a decision on the evidence before me. With the considerable assistance of counsel, the court did its best to extract and scrutinise the evidence available in order to make the best informed decision that could be made in the circumstances.*

On the evidence, Poole J was satisfied that it was clear that Mrs W lacked capacity to decide whether to accept or refuse a transfusion. The focus was therefore upon what to do in face of the advance decision and, in particular, whether "*in accordance with s.25(2)(c) of the MCA 2005, the advance decision is no longer valid because Mrs W has 'done anything else clearly inconsistent with the advance decision remaining her fixed decision*" (paragraph 47). Poole J's observations about the law in this area merit reproduction in full, given their clarity and lucidity in relation to a point that has not been the subject of detailed

consideration since the MCA 2005 came into force:

> *50. Under s.26 of the MCA 2005, an advance decision only has effect when the person who made it has subsequently lost capacity to make the material decision. The advance decision can be withdrawn (s.25(2)(a)) or displaced by an LPA (s.25(2)(b)) but withdrawal can be effected and an LPA can be granted only when the person concerned has capacity to do so. No such restriction applies to s.25(2)(c). I interpret s.25(2)(c) as allowing for the advance decision to be rendered not valid should the person who made the advance decision do "anything else" (other than withdrawal or granting an LPA which displaces the advance decision) which is "clearly inconsistent" with the advance decision remaining their fixed decision, before or after they have lost capacity to make the relevant treatment in question. The question will only arise after they have lost capacity but the court may consider things done before or after that time. Munby J refers to a person being locked into their advance decision once they have lost both capacity to decide whether or not to accept medical treatment and any ability to express their wishes and feelings. Similarly, s.25(2)(c) allows for a person who has lost capacity nevertheless to do something or to have done something which renders the advance decision not valid.*
>
> *51. I also note that s.25(2)(c) will only fall to be considered in the case of a person who has not withdrawn (revoked) their advance decision, and who has not subsequently granted an LPA conferring authority to give or refuse consent to treatment to which the advance decision relates. Something other that express withdrawal of the advance decision may suffice to render it not valid. It follows that, as Munby J emphasised in HE v A Hospital NHS Trust (above), the term within Mrs W's advance decision that "It will remain in force unless and until specifically revoked in writing by me" is unenforceable.*
>
> *52. Three words within s. 25(2)(c) require particular comment:*
>
> > *a. "done": I read this to include words as well as actions. I am strongly reinforced in this view by what Munby said at paragraph [43] of his judgment in* [the pre-MCA case of] *HE v A Hospital NHS Trust (above):*
> >
> > > *"No doubt there is a practical - what lawyers would call an evidential - burden on those who assert that an undisputed advance directive is for some reason no longer operative, a burden requiring them to point to something indicating that this is or may be so. It may be words said to have been written or spoken by the patient. It may be the patient's actions - for sometimes actions speak louder than words. It may be some change in circumstances. Thus it may be alleged that the patient no longer professes the faith which underlay the advance directive."*

The statutory provision does not refer to words and actions, only what P has "done", but it would be an odd restriction on the interpretation of "done" to exclude written or spoken words when the provision is addressed to previous written or spoken words in the form of an advance decision (an advance decision about treatment which is not life-sustaining treatment may be made verbally).

b. "clearly": the court should not strain to find something done which is inconsistent with the advance decision remaining the individual's fixed decision. Something done or said which could arguably be "inconsistent", or which the court could only find might be inconsistent will not suffice.

c. "fixed": s.25(2)(c) does not merely require something done which is inconsistent with the advance decision, but rather something done which is inconsistent with it remaining the person's fixed decision. Fluctuating adherence to the advance decision may well be inconsistent with it remaining their fixed decision. As with the other elements of the test, whether it is inconsistent will depend on the facts of each case.

The Trust asserted that the advance decision was not now valid because s.25(2)(c) was made out. In this regard, Poole J considered that "*the burden of proof* [was] *on the Trust which must establish that on the balance of probabilities Mrs W has done something inconsistent with the advance decision remaining her fixed decision*" (paragraph 54).

Poole J identified that:

57. The determination of whether Mrs W has done something clearly inconsistent with the advance decision remaining her fixed decision has profound consequences and requires the most anxious consideration. I recognise that the evidence before me does not all go one way. However, weighing all the matters discussed, I am satisfied, on the balance of probabilities, that Mrs W has done things clearly inconsistent with the advance decision remaining her fixed decision. She granted to her children, whom she surely knew were hostile the Jehovah's Witnesses denomination, authority to make decisions about all medical treatment, other than life-sustaining treatment, on her behalf should she lose capacity to make such decisions for herself, without mentioning to them or including in the written LPA any preference or requirement not to receive blood transfusion or blood products. The advance decision was widely drawn and did not restrict the refusal of consent to blood transfusion or blood products by way of life-sustaining treatment. Her actions at the time of granting the LPA were in my judgment clearly inconsistent with the advance decision remaining her fixed decision. For the reasons stated earlier, I must presume that she had capacity at that time.

58. Likewise, Ms W's actions earlier this year on requesting the removal of the

DNR notice, without qualification and without telling her children or, to their knowledge, her clinicians, about the advance decision or that she would refuse a blood transfusion or blood products is, in my judgment inconsistent with the advance decision remaining her fixed decision.

59. Mrs W's stated wish at 1500 hours on 17 September 2021 to have transfusion of blood "free from diseases" if she might die without it, was an expression of wishes and feelings which were inconsistent with the advance decision remaining her fixed decision. Whilst she later expressed wishes and feelings which were consistent with her advance decision, the test under s.25(2)(c) requires the court to consider whether Mrs W has done anything clearly inconsistent with the advanced decision remaining her "fixed" decision. I find that when she expressed wishes and feelings inconsistent with the advance decision she was expressing genuine wishes and feelings with more clarity of thought than when she spoke with Dr J half an hour later. It would be open to the court to dismiss both, contradictory expressions of her wishes and feelings as having no weight because of her cognitive impairment. But I am satisfied that some weight should be given to what she said to Dr J, in particular in the first conversation when, in his considered view, she was not resorting to formulaic expressions. Even if equal weight were given to both, contradictory assertions of her wishes and feelings, it could hardly be said that Mrs W was acting consistently with the advanced decision being her "fixed" decision.

Poole J noted that:

61. No submission was made to me that s.25(2)(b) applied because the lasting power of attorney from 2020 conferred authority on the donees to give or refuse consent to the treatment to which the advance decision relates. Although the LPA expressly did not apply to decisions about life-sustaining treatment, and the treatment under consideration is life-sustaining treatment, the LPA surely conferred authority on the donees to give or refuse consent to the administration of allogeneic blood and blood products by way of non life-sustaining treatment. On the one hand, the advance decision relates to such treatment whether life-sustaining or otherwise but, on the other, the treatment which is now being considered is life-sustaining treatment for which authority was not granted. It might have been argued, but was not, that s.25(2)(b) is satisfied. Since this was not argued at the hearing and did not form the basis of the decision that I communicated at the hearing, I have not asked for further submissions on this issue and I make no determination as to whether s.25(2)(b) applies in this case.

It therefore fell to Poole J to determine what was in Mrs W's best interests. Having reviewed the evidence and circumstances, he held thus at paragraph 63:

In all the circumstances I am satisfied that it is in Mrs W's best interests to have blood transfusion to restore and maintain her haemoglobin at 10 g/dl. I so conclude doing my best to put myself in her shoes and determine her interests taking into account her welfare from the widest perspective. I am satisfied that the decision is in Mrs W's best interests is lawful and in accordance with her human

rights under articles 2, 3, 8 and 9 of the ECHR.

Comment

Views about this decision may vary depending upon one's adherence to the concept of precedent autonomy. Some may feel it useful in working out what they feel about this to consider this article which looks at the situation where (as here) it might be said that a person's past and present wishes collide. Some may also want to mine the judgment for evidence of a discriminatory failure to recognise the beliefs of a Jehovah's Witness. For our part, and given the evidence of the daughters recorded by Poole J, we would suggest that this would be unfair. Rather, it seems to us that Poole J (under clearly sub-optimal circumstances) was striving to identify whether the Trust had upheld their challenge to the ADRT, not to find a way to unpick it on grounds of disagreeing with its religiously-motivated contents. However, this decision serves as a useful opportunity to flag this guidance for anaesthetists (but equally relevant to other medical professionals) about caring for Jehovah's Witnesses who refuse blood.

Poole J's analysis of s.25(2)(c) is crisp and clear, and is entirely consistent with (but much more fully reasoned than) the only previous post-MCA 2005 judicial consideration of what this provision might mean – *Re QQ*, where Keehan J, likewise, considered that the concept of "doing" something inconsistent with the ADRT remaining the person's fixed decision could encompass the "doing" of something on the other side of incapacity. It seems to Alex at least that this must be right, both legally and ethically. But an important corollary of this is that, as set out in more detail here, advance decisions may well be more 'brittle' than some may understand to be the case – and that it is extremely important that any advance decision includes a values statement so as to be able to guide decision-making in the event that (as here) the decision is ultimately one made by reference to best interests, rather than simply loyally seeking to abide by the ADRT.

Coercive control, capacity and the resolution of an ethical dilemma

Re BU [2021] EWCOP 54 (Roberts J)

Mental capacity – best interests – contact

Summary

How does coercive control impact upon decision-making? And what can – and should – the courts do when the victim of coercive control cannot countenance an existence where the perpetrator is not an integral part of their life? These were the issues at the heart of this decision.

The case concerned BU, a 70 year-old woman with a diagnosis of vascular dementia. She had formed a relationship with a man nearly 20 years her junior, NC, which as described by Roberts J in the introduction to her judgment had "*become, for BU, a central and crucially important part of her life and, as she sees it, pivotal to her emotional wellbeing and happiness*." Her daughter, as a representative of her wider family members, brought proceedings "*because of their increasing concerns about the extent to which she is vulnerable to harm as a consequence of that relationship. Those concerns flow from their observations, confirmed by the expert evidence in this case, that the relationship which BU has with*

NC is characterised as one of coercive control exerted by him in several aspects of her day-to-day life and in particular in relation to the management of her financial affairs." NC – who acted as a litigant in person – denied that he had acted in any way to harm BU or expose her to detriment, financial or otherwise: as Roberts J summarised his position "[h]*e believes that this court has no role to play in relation to her decision-making since he maintains that she is capacitous in her own right and able to make choices and decisions for herself*."

As Roberts J reminded herself at the outset of her judgment (in paragraph 2), "[i]*n circumstances where personal autonomy and life choices are a central aspect of the human rights which this court is bound to uphold and respect, it is only in limited circumstances where it can or should intervene*."

By the time the matter came before Roberts J, final declarations had been made that BU lacked capacity to make decisions in relation to her property and financial affairs, and a deputy was appointed to manage her affairs. BU's daughter sought from the Court of Protection a declaration that her mother lacked capacity to make decisions about her contact with others, including NC; an order preventing NC from having further contact with BU (and the continuation of an injunction to this end which had already provided for this for over a year); and an order under the court's inherent jurisdiction which prevented a marriage or civil partnership between NC and BU or, alternatively, an order pursuant to s. 63A of the Family Law Act 1996 (a forced marriage protection order).

The detailed background to the case is set out in the judgment, but for present purposes of particular importance are: (1) BU's significant financial resources; (2) NC's (extensive) history of criminal convictions (including twelve fraud and related offences and fourteen theft and related offences), leading to a 9-year custodial sentence for an offence of dishonesty and blackmail; (3) (in no small part thanks to the determined efforts of BU's daughter) a police investigation leading to an arrest in relation to his actions in relation to BU, and release on bail that he was to have no contact with BU – a condition that he had breached repeatedly.

Capacity

The position of the parties (bar NC) and the expert evidence was that BU lacked capacity to make decisions regarding contact with NC. Having rehearsed the evidence, Roberts J was clear in her agreement:

> *89. In my judgment the expert and other evidence in this case supports overwhelmingly the conclusion that BU currently lacks capacity to decide whether to maintain contact with NC. There is no evidence at all to suggest that she presently wishes to reduce or eliminate her contact with him (indeed, the evidence points to the contrary). I consider nevertheless that she lacks capacity generally in relation to her contact with NC. The expert evidence, which I accept, is clear. Because of the corrosive and coercive nature of the control which I find NC to have exercised over her, BU has been deprived of autonomous decision-making in this context. Put simply, she no longer has the ability to exercise her individual free will in the context of any ongoing relationship with NC. The degenerative vascular changes in her brain have resulted in a global cognitive impairment which has impacted upon her ability to weigh and use information to the extent that a*

person with full capacity could. I am not persuaded that she truly understands the nature of their relationship or what a future with NC would hold in terms of an ongoing relationship. I am entirely persuaded that she craves his companionship which she perceives as relieving the intense loneliness and isolation which she has obviously felt outside the loving relationships she previously had with her extended family. She now perceives those family bonds to have been broken as a result of the family's collective hostility towards NC. I am quite sure that the love which BU has for each of her two daughters remains but it has been subsumed for the time being by the intense need which she perceives to preserve what is in essence her complete dependency on NC. I am satisfied that that dependency shapes more or less all aspects of her life at the present time despite the fact that they have been prevented from having contact with one another for a significant period of time. I suspect that these proceedings have themselves been an important means for BU of preserving that nexus with NC. They will inevitably have reinforced what Professor Dubrow-Marshall has described as the "trauma bond" which binds them together even in absentia.

90. I have no doubt that there have been aspects of her previous contact with NC which have given BU pleasure and a sense of happiness and wellbeing. That said, it is clear that she has closed her mind to the possibility of his motives in that relationship being anything other than benign. Even when presented with clear and overwhelming evidence of NC's antecedent history and his willingness to coerce, intimidate and blackmail others for his own personal benefit and financial gain, she has been quite unable to weigh and balance those factors in her decision-making. She is blind to future risk as she has been to past risk. She has found herself caught up in the excitement of sharing in NC's own future plans for property investment (for such I find them to be) without any understanding of the financial risks to which she might be exposed as a result of her financial involvement. She was plainly willing to liquidate a very significant part of her investment portfolio (and thus risk her future financial security) without being afforded an opportunity to evaluate any future risk. I am left in no doubt whatsoever that her decisions in this context were guided and led by NC. He chose to instruct a solicitor to process those financial property transactions who was not previously known to BU. Whilst there is no evidence to suggest that the solicitor fell short of the professional obligations which were owed to BU as a client, it was, in my judgment, a significant example of NC's ongoing attempts to marginalise her from the ongoing influence of her family.

Roberts J was equally clear that NC had "*engaged on a deliberate and calculated attempt to subvert any independent decision-making on BU's part*" (paragraph 91). She outlined those attempts in detail and found that the test for relying upon similar fact evidence in civil cases was met:

96. […] *no one, including NC, has sought to exclude evidence which may be characterised as evidence which is designed to demonstrate a propensity on NC's part to behave in a certain way. Furthermore, as I have already said, his previous convictions for offences involving dishonesty, fraud and obtaining property by deception are matters of*

> *public record and facts upon which this court is entitled to rely. In relation to his relationship with BU, I have the clearest possible evidence from the expert psychologist instructed in this case that NC exercised both coercion and control over BU throughout the entire course of their relationship which spanned a number of years. To the extent that others have provided the court and/or the police with evidence and information that they have been victims of a similar course of conduct, I take the view that this is both relevant and admissible in the context of assisting me to reach my conclusions in the present case. There is a coalescence of factors in this case which persuades me that BU has indeed been manipulated by NC with deliberate intent to secure for himself a financial benefit.*

Best interests

Given Roberts J's conclusions about BU's capacity, it fell to her to make determinations about her best interests. In the circumstances, there was a binary choice for the court: either to sanction ongoing contact between BU and NC or not:

> *98.* […] *Taking into account all the relevant circumstances in section 4(2) and BU's expressed wishes and feelings as I am obliged to do pursuant to section 4(6) of the 2005 Act, I am in no doubt at all that it is not in her best interests to be exposed to further risk of financial abuse and/or the risk of future manipulation by NC through the control he has exerted through his behaviour to date. I regard it as essential that steps are taken at the earliest opportunity to address and reverse the current estrangement between BU and her family and this is unlikely to happen whilst NC's corrosive influence over her persists. The immediate need is for BU to receive therapeutic assistance in coming to terms with the loss of this relationship and the reasons why that step through court intervention has been necessary. If a view is subsequently taken that this position needs to be reviewed at a later stage once BU has had an opportunity to engage in therapy, the court can look again at the matter. It will remain to be seen whether NC remains interested in contact with her at that stage and/or whether he will be prepared at that stage to undertake whatever therapy or other work is required of him in order to address his own behaviour.*

Roberts J noted (with some apparent regret) that she could not make provision in her order for the provision of such therapy since she had no evidence as to what is needed or who might provide it. However, she proposed nevertheless to include in her order a recital by way of declaration that it was in BU's best interests for such therapy to be offered to her with a view to helping her to make informed and capacitous decisions about any future contact with NC.

The orders that she proposed to make were therefore as follows:

> *100.* […] *a final order providing that there will be no contact between NC and BU. The existing injunction will be replaced with a fresh order which will be expressed to continue until further order but subject to any review which may become necessary at a later stage. I propose to attach a penal notice to that order. NC must be quite clear that any breach or attempted breach of that order may expose him to severe consequences if he*

> *is found to be in contempt of court and that may include a period of imprisonment. I am concerned about what appears to be his complete contempt for orders made by the court in these proceedings and I propose to reserve to myself any future proceedings involving an allegation that my orders have been breached. BU should be reassured that, whilst expressed as a final order, this is not a 'forever' order. If the position changes in the future, this order can and, if necessary, will be reviewed. What is required at this stage is a period of respite during which she will have the opportunity to engage with those who can help her to understand how NC's influence has impacted on her life and the risks which his behaviour has created. I do not delude myself that my decision will do anything other than cause significant distress to BU. That has never been my intention and I continue to hope that in time, with appropriate help, she will come to understand the reasons why this step was necessary to secure her safety and wellbeing.*

Forced marriage protection order

On the facts of the case, and especially given NC's attitude to court orders, Roberts J considered it was necessary to consider, specifically and separately, a forced marriage protection order (which can also encompass a civil partnership). In doing so, it appears that Roberts J proceeded on the basis that BU both had capacity to marry and to enter into a civil partnership (she declined to resolve an issue about the precise breath of the test to enter into a civil partnership). In relation to civil partnership, she made a separate and specific injunction which prevents NC from entering, or attempting to enter, a civil partnership with BU without first obtaining specific permission from this court. In relation to marriage, she followed the "routemap" set out in *Re K (Secretary of State for Justice and another intervening)* [2020] EWCA Civ 190 as follows:

> *In terms of marriage and the 'routemap to judgment' recommended by the President in Re K, I have already set out my findings in relation to the underlying facts which I have found to be proved on the basis of the civil standard of proof, i.e. the balance of probabilities. With that first stage completed, I turn to stage 2 which is to decide whether or not the purpose identified in section 63A(1) of the FLA 1996 is established. In this case I am entirely persuaded from the foot of those facts that BU requires the protection of the court from any attempt to be forced or coerced into a marriage with NC. As to the balancing exercise required by stage 3, I am acutely conscious that there is a high hurdle to be passed before I should take any steps to override BU's clearly expressed wishes in this context. Here, I am dealing with the wishes and the future of a woman who has completely lost her personal autonomy as a result of the total subordination of her free will. In these circumstances there are no sufficiently protective factors which could be put in place to reduce or eliminate the potential risks of a forced marriage. BU would have no comprehension that she was not freely consenting to such a marriage and thus the court must take steps to prevent the possibility of that happening. I propose to reflect in that balance a limit on the duration of the order which I propose to make under the 1996 Act and in relation to the prohibition of a civil partnership. Those orders will represent an interim holding position for a period of*

> *twelve months whilst further work is undertaken to assist BU in whatever therapy can be arranged. I regard this as an appropriate accommodation between the need to protect BU from the inhuman and degrading treatment which is captured by Article 3 of the Convention and the respect which this court must maintain for any autonomous decision-making of which she becomes capable in the future. In this way I propose to intrude on her right to a private family life to the minimum extent which I regard as necessary to meet the duty under Article 3, but no more. Depending on where we are at that point in time, I would regard it as a sensible precaution to list the matter for review before the expiry of that order.*

Transparency

In an important "footnote," Roberts J made clear that the court cannot and should not make reporting restriction orders which are retrospective in their effect. She also noted that reporting restrictions orders:

> *110* […] *should not be drafted so as to include any prohibition of information which is already properly and lawfully in the public domain. The reasons are so obvious that they probably do not need stating. Accredited journalists and bloggers who attend these hearings as of right cannot be put in a position where they risk being held in contempt of court for publishing information which they hear when that information falls outside any restrictions imposed by the court. In this day and age of mass media communication, information acquires a currency as soon as it is available to a wider audience outside the court room. That is part and parcel of the valuable function which the press and others perform as monitors of the court process. They act as the conduit for public dissemination of the court's working process and procedures and, as such, they fulfil a vital function in any democratic society. There is always a careful balancing act to be performed when the exercise of that function, engaged specifically by Article 10, is examined against the need to preserve the Article 8 and other Convention rights of the subject of court proceedings. In this case the balance has now been struck but, for the avoidance of any doubt, I make it plain that no reporting restriction order should operate so as to have retrospective effect.*

Comment

It is unsurprising that Roberts J described this as a difficult case, nor that she considered that, if (as she did) she acceded to the application, BU would be unlikely to understand why she had been denied the happiness which she sought and which she believed she deserved. It is also unsurprising, in consequence, that she considered that there was "*a heavy responsibility on the court to ensure insofar as it can that the outcome of this application, and the reasons for the decision, are laid out in clear and simple terms*" (paragraph 88).

Questions of coercive control in the context of those with impaired decision-making capacity have been highlighted previously by Hayden J as being particularly insidious: see *Re LW*. This case only reinforces how pernicious they can be, and it is (frankly) terrifying to imagine where BU would have been had her daughter not been willing to risk almost all in respect of her relationship with her mother by taking the steps

that she did – including bringing proceedings herself.

What is of wider interest and relevance, perhaps, is the way in which Roberts J was prepared to proceed on the basis that BU lacked capacity to make decisions as to contact with NC. A very narrow view of the MCA would (on one view) prevent relational aspects being taken into account – i.e. in effect to pretend that the person is to be removed from the circumstances and their abilities examined in isolation. In the (common law) context of testamentary capacity, capacity is sometimes viewed in this rather abstract fashion: in *Simons v Byford*, for instance, the Court of Appeal held that "*capacity depends on the potential to understand. It is not to be equated with a test of memory*" (paragraph 40). Translated to the 'real time' analysis required by the MCA, however, such an approach is deeply problematic in any situation where it is not, sensibly, possible to remove the 'disabling' influence from the person's life. BU's case shows just how wrong that would be in circumstances where the disabling influence of NC remained strong despite the fact that she had not had contact with him for a year. The Singaporean case of *Re BKR* (not cited in this case, but decided under legislation almost identical to the MCA 2005 in this regard) provides an important – reasoned – discussion of how to proceed in the context of the interaction of an impairment and the disabling influence of another; for an analysis of the ethical considerations in play, entirely consistent with the approach taken by Roberts J, some may find this book of interest. It is very much to be hoped that the approach adopted in this case – i.e. taking a broad approach to capacity but on the basis of a clear understanding that the corollary is that best interests decision-making should be designed, insofar as possible, to secure the true autonomy of P – is one that other judges feel able to adopt in future cases when these difficult cases come before them. It is certainly a framework which appears to meet the difficult ethical dilemmas in play more satisfactorily than the inherent jurisdiction to which judges other have to have recourse in such cases, bereft as it is of any moral compass to guide them as to the approach to take equivalent to the principles under the MCA 2005.

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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.

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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