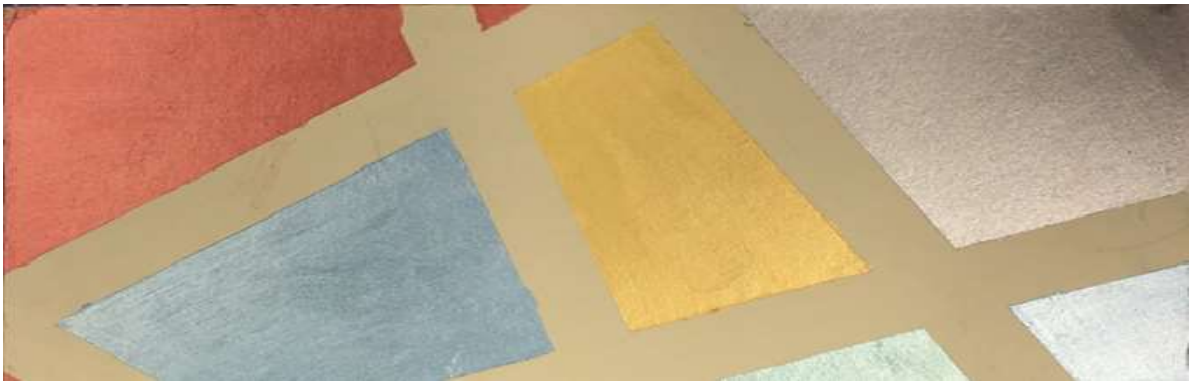
MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE
October 2021 | Issue 116



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.

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Short note: anticipatory declarations and medical treatment (1)

In *Re Z (Medical Treatment: Invasive Ventilation)* [2021] EWHC 2613 (Fam), Peel J made observations about the appropriateness of making an anticipatory declaration in a medical treatment case.[1] The case related to a child, as opposed to an adult with impaired decision-making capacity, but we suggest that the observations that he made are equally relevant to cases before the Court of Protection. In reliance upon *An NHS Trust v Mrs H* [2012] EWHC B18 (Fam), Peter Jackson J (as he then was) considered that the approach of the Court of Appeal in *Wyatt v Portsmouth Hospital NHS Trust* [2005] EWCA Civ 1181 made clear that "*declarations should only extend to matters where the factual basis is known. This makes it unwise to endorse aspects of plans that may change in their details, as the plan in this case may. […]. The approach that I take is to identify the treatment issues that need to be determined and that are not likely to change over time.*" Peel J noted that he did not join issue any of these dicta, but that:

> *16.* […] *None of them suggest that the court is prohibited from making an anticipatory declaration. Although there may, in some cases, be a disadvantage in attempting to pre-empt a fluctuating situation, there are many cases where the facts establish, to the requisite civil standard of proof, not just what the current circumstances are, but what future circumstances are likely to be. Medical prognosis almost always involves an assessment of the future which by definition cannot be guaranteed, but the court will ordinarily have the benefit of expert evidence to assist in making findings to the requisite civil standard. The court is entitled to weigh up such medical prognosis as part of the totality of the evidence and, if the factual foundation is made out, and the evaluative exercise so justifies, I see no reason why an anticipatory declaration should not be made. Further, there are good reasons for thinking that to clarify the permissible level of medical treatment before the patient reaches a critical condition may avoid urgently instituted proceedings, fraught disputes and rushed decision making while the patient is in intensive care. That is the very situation which M in this case has said that she wishes to avoid. To my mind, it is therefore essentially a question of fact and evaluation. In my judgment, I am entitled to make an anticipatory declaration provided that (i) I have a*

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

> *factual basis on which to do so, (ii) those facts enable me not just to assess the situation as it is now, but also to form with a degree of solidity a prospective view, and (iii) the proposed anticipatory declaration, viewed in the context of best interests, is justified.*

These observations place – we suggest – some very useful flesh upon the bones of Lady Hale's (very short) observation in the adult case of *Aintree v James* at paragraph 47 that:

> *if the clinical team are unable to reach agreement with the family or others about whether particular treatments will be in the best interests of the patient, they may of course bring the question to court in advance of those treatments being needed. But they may find that, as here, the court is unable to say that when they are needed, they will not be in the patient's best interests.*

Short note: anticipatory declarations and medical treatment (2)

By way of an example of the courts having to having to grapple with advance planning in a much more fluid context, see *Cambridge University Hospitals NHS Foundation Trust & Anor v GD & Anor* [2021] EWHC 2105 (Fam). This case concerned a 17 year old with chronic depression and MS. She was in a psychiatric hospital at the time of the application and was going to require further admissions every 4-6 weeks for infusions of medication for severe relapsing and remitting MS. She had a history of self-harming, described by the judge as being 'extraordinarily severe in nature' such that hospital admissions and surgical treatment had been required. GW was an informal patient and was not deprived of her liberty, having given consent to being in hospital. The Trust applied for orders under the inherent jurisdiction in respect of treatment for her MS and for the management of wounds caused by self-harm, both requiring physical restraint as a last resort, if GW objected to receiving treatment. There was evidence that GW had refused treatment in the past, for both MS and for her wounds, and could become overwhelmed and unable to think through the risks of such refusals.

GW's mother and the Official Solicitor for GW opposed the use of physical restraint in respect of treatment for MS, but were open to its use in respect of wound management.

Theis J approved the MS treatment plan but without provision for restraint, on the basis that GW had been compliant with treatment for a period of months prior to the hearing, and had written a letter to the court explaining that she understood the need for regular treatment and had reflected on her previous experience after missing a scheduled infusion, when her condition had deteriorated markedly. The risk of GW withdrawing consent was low, and if she did, there would be a 2 week window when the Trust could apply back to the court for further orders.

The wound management plan was approved, including physical restraint, and including aspects of treatment where GW had not previously refused consent. Treatment of self-harm wounds was likely to be needed urgently, and the consequences of not providing treatment were very serious. The court found that GW did not understand the magnitude of the risks posed by her refusal of treatment related to her wounds, and that at times when she self-harmed, her mental state was likely to be such

that she could not weigh up risks and benefits. Theis J observed "[i*]t would not be in GW's best interests to leave the Trusts to rely on statutory defences under ss 5 and 6 MCA 2005, or the common law of necessity, which would provide less clarity and more uncertainty than the proposed wound management treatment plan*."

The court ordered that the Official Solicitor should be notified of any occasion on which physical or chemical restraint was provided to GW.

This case required the parties and the court to deal with a complex and dynamic medical situation, and to make advance plans where the precise circumstances that would prevail in the future were not known. That task was made somewhat easier by the fact that GW was 17 as the court could step in under the inherent jurisdiction regardless of whether GW had capacity, and so the fluctuating capacity problems that arise in the Court of Protection could be side-stepped for the time being.

It is of interest that the Official Solicitor sought notification of future use of restraint under the wound management plan authorised by the court, as the Official Solicitor's stance is often to say that once proceedings have concluded, she has no role and should not be used to monitor the implementation of orders.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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

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

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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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