MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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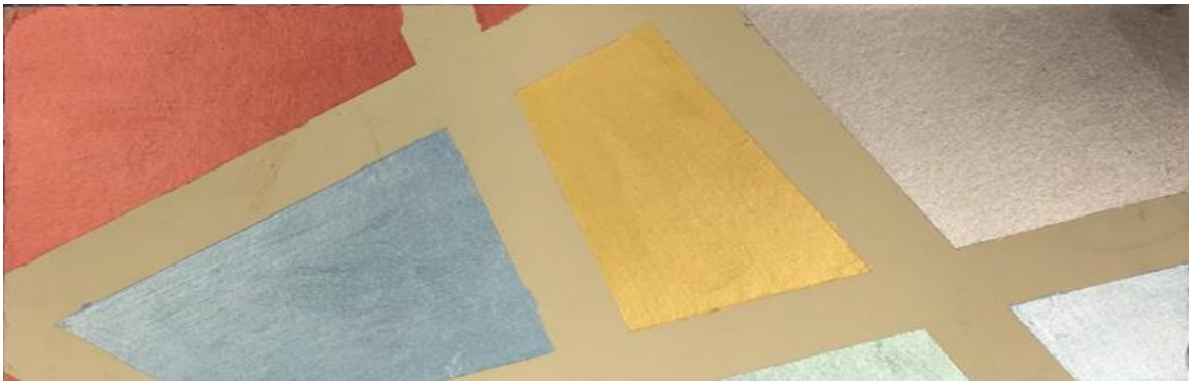

Welcome to the September 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity, and two important decisions on the scope of the inherent jurisdiction at the border of the MCA 2005;

(2) In the Property and Affairs Report: appointing a charitable trust corporation as a deputy and donating/tax-planning in PVS;

(3) In the Practice and Procedure Report: procedure in medical treatment cases; disclosure from proceedings to the police; and an update from relevant associations

(4) In the Wider Context Report: guidance on advance decisions and covert medication; alcohol, capacity and vulnerability; the FCA and vulnerable customers;

(5) In the Scotland Report: the Scott Review terms of reference; guardianship and (the failure of?) legal representation; and the apparent downgrading of the Mental Health Tribunal for Scotland.

You can find all our past issues, our case summaries, and more on our dedicated sub-site 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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A framework for ensuring applications are made

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Summary

The issue in this case (decided in November 2018, but appearing on Bailii in August 2019) was whether it was in SE's best interests to have her right leg amputated.

SE was diagnosed with schizophrenia and had delusional beliefs which led the clinicians to assess her as lacking capacity to decide whether or not to undergo this procedure. By the time the matter came before the court, it was agreed by all parties that SE lacked capacity to make this decision herself.

The only issue for the court to determine therefore, was whether the amputation was in SE's best interests. The medical evidence was clear, that without it she would die in a short time frame. Set against this was the fact that SE did not want an amputation (albeit she had at times been ambivalent about it). A factor that the court considered to be particularly important in the balancing exercise was that while SE did not want the amputation, she was clear that she did not want to die. Unsurprisingly therefore the court made the order authorising the amputation.

Comment

The judgment in this case is notable for the criticisms the judge made of the applicant's failures to follow the correct steps to bring the application before the court in a timely manner and on proper notice to SE's family. So concerned was Theis J about the applicant's conduct that she directed that a letter be sent to Mr Justice Hayden (Vice President of the Court of Protection) setting out what the court was told were the concrete changes that had been made as a result of the case to ensure that those on the front line are not without effective legal advice in relation to applications that should be made in a timely way in the future. Those steps are set out at the conclusion of the judgment and make essential reading for all Trusts as stress-testing to ensure that they have a sufficient framework in place.

The limits of interim declarations and out of hours applications

Guy's and St Thomas' NHS Foundation Trust v X [2019] EWCOP 35 (Theis J)

Best interests – medical treatment – mental capacity – medical treatment – practice and procedure – other

Summary

This case concerned the obstetric care and delivery of X, a young woman who had a number of different mental health diagnosis including bipolar disorder, schizoaffective disorder and personality disorder. She had been in a psychiatric hospital for 6 weeks at an early stage in her pregnancy.

X attended Guys and St Thomas' Hospital where the doctors became concerned that there was a high risk of still birth. They concluded that the safest option was to deliver by c-section. X wanted the baby to be born alive but did not consent to a c-section – she had strong views about wanting a 'natural birth'. She was assessed as lacking capacity to make decisions about her obstetric care and the delivery of her baby.

The matter came before the Court of Protection as an out of hours' telephone application in the early hours of the morning, at which hearing X represented herself. The Court was critical in the judgment of both the fact that the application was not brought earlier in the day so that the hearing could take place in Court hours, and of the fact that the Official Solicitor was unable to represent X at the out of hours hearing as the office does not offer an out of hours service.

The judge adjourned the application to the following morning, by which time the Official Solicitor was available to represent X as her litigation friend.

By the time of that adjourned hearing, X had agreed to have labour induced as soon as possible. In fact, X had her baby the following day without the need for a c-section.

The judge dealt with the issue of capacity in a somewhat striking fashion. The Official Solicitor did not consider that there was sufficient evidence before the court to rebut the presumption that X had capacity to make decisions about her obstetric care and the delivery of her baby. Accordingly, the Official Solicitor submitted that the court should not make any order, but that in the event X lost capacity in the future, the matter could be restored urgently. The high point of the Trust's case on capacity was that there was sufficient evidence to make an interim declaration on capacity pursuant to s.48 MCA 2005 (namely that there was reason to believe X lacked capacity).

The court agreed with the Trust that it was appropriate to make an interim declaration that X lacked capacity to make decisions about her obstetric care and the delivery of her baby and authorised the treatment plan on this basis.

Comment

It is difficult to see the justification for relying on s.48 MCA 2005 in the way that Theis J did in this case. At the point that the court is being asked to authorise serious medical treatment against a person's wishes, the court is being asked to make a final order. If the evidence was not sufficient at this final hearing, to rebut the presumption that X had the capacity to make the decisions herself applying the test on capacity

set down in s.15 MCA 2005, then we suggest that the court should have acceded to the Official Solicitor's submission to make no order.

See by contrast the comments Francis J made in *United Lincolnshire Hospital NHS Trust v CD* [2019] EWCOP 24 when he agreed with the Official Solicitor that to authorise the treatment pursuant to section 4B of the MCA (section 4B authorises the deprivation of liberty "*while a decision as respect any relevant issue is sought from the court")* would not be appropriate as it would involve adjourning the s16 order until after the birth, "*which was entirely artificial since it is in relation to treatment during labour that the issue arises*" (emphasis in original).

Separately, Theis J was – we suggest – entirely correct to flag the problem (which is at root a resourcing problem) that the Official Solicitor is unable to offer an out of hours service. As Theis J noted, "[w]*hy should the timing of an application have an impact on X's ability to be properly represented, which she would have been if the application had been made a few hours earlier?*" We will see whether the Official Solicitor is, indeed, able "*urgently* [to] *review this position and consider putting in place arrangements that will ensure appropriate representation out of normal court hours for those individuals who are the subject of urgent applications that potentially involve serious medical treatment*."

Disclosure from proceedings to the police

Re M (Children) (Disclosure to the Police) [2019] EWCA Civ 1364 (Court of Appeal (Sir Andrew McFarlane P, Simon and Nicola Davies LJJ))

Other proceedings – criminal – practice and procedure – other

Summary

This was an appeal to the Court of Appeal by parents against a decision of Keehan J's in care proceedings, acceding to an application brought by the police for disclosure to the police of the witness statements and position statements filed by the parents.

It is of interest to Court of Protection practitioners as it is concerned with the power of the court to permit access to documents filed within proceedings to a non-party where those documents interfere with a litigant's right in civil proceedings not to be put in the position of making an admission of criminal conduct i.e. the privilege against crimination or self-incrimination (now on a statutory footing – see s.14 Civil Evidence Act 1968).

The parents were British citizens who met in Syria and had two children there. On their return to the UK the parents were arrested under s.41 Terrorism Act 2000 but later released on police bail. The children were taken into foster care and the local authority brought care proceedings arguing that the threshold criteria were met on the basis that Syria '*is currently characterised by violent conflict and the children have either been exposed to this or were at risk of exposure, and as such have suffered emotional harm or been at risk of suffering significant emotional and physical harm*'.

The appeal was concerned with the rule against self-incrimination which does not apply in care proceedings as a result of s.98 Children Act 1989, with the important proviso that evidence or answers given in those proceedings are not admissible in any criminal proceedings other than perjury. The leading case on the approach

to be adopted by a court when considering disclosure to the police is *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76. This case identifies 10 factors which are likely to be relevant to any such application.

Keehan J granted the police's application primarily on the basis that the investigation of alleged offences contrary to the Terrorism Act 2000 established "*particularly substantial weight to the public interest in such offences being investigated*." Of particular relevance to the Judge was the fact that the there was nothing in the parents' witness statements, that might be termed an admission of wrongdoing or guilt of any offence. The Court of Appeal upheld the judgment on this basis, adding that even "*where, in another case, the material that is subject to a disclosure application might contain potentially incriminating evidence, that factor would not establish a complete bar to disclosure. In such circumstances, the court would evaluate the application by giving careful consideration to the Re C factors before determining whether disclosure was necessary and proportionate."*

Comment

There is no equivalent to s.98 Children Act in the Mental Capacity Act. Thus, witnesses in Court of Protection proceedings are able to invoke the privilege against self-incrimination as codified in section 14 of the Civil Evidence Act 1968. If incriminating evidence is given in the proceedings, and an application is made for disclosure of it to a third party, the court will consider it against the following legal background:

(i) If the proceedings are in private, rules 4.2 and 5.9 of the Court of Protection Rules 2017 give the court the power to determine what material related to the proceedings can be communicated or published to non-parties.

(ii) If the hearing is in public, third parties can obtain from the court records a copy of any judgment or order given or made in public. If any other documents are sought, an application must be made to the court. The court can only make an order in respect of documents in the court records (rule 5.9). This is not defined in the rules. However, the Supreme Court recently had cause to consider this phrase in the case of *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum* UK [2019] UKSC 38, in which it held that:

> *The "records of the court" must therefore refer to those documents and records which the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court. It cannot depend upon how much of the material lodged at court happens still to be there when the request is made.*

(iii) In both public and private hearings, the court has an inherent jurisdiction

to uphold the constitutional principle of open justice. As the Supreme Court held: '*It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question*.'Thus, if the disclosure is required in pursuit of this principle, the court can order disclosure beyond that provided for in the rules.

Associations update

The East Midlands Group of the Court of Protection Practitioners' Association has now been established; and is being officially launched with a practitioners' knowledge day conference on 7 November. For more details, see here.

The Court of Protection Bar Association now has a website, here, on which the autumn series of events (including the inaugural annual dinner, with guest speaker Sir Alan Ward) can be found.

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

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

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. To view full CV click here.

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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

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

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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

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Conferences

Conferences at which editors/contributors are speaking

Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. The conference is also be held on 5 December in Manchester. For more information and to book, see here.

Clinically Assisted Nutrition and Hydration Supporting Decision Making: Ensuring Best Practice

Alex is speaking at a conference about this, focusing on the application of the BMA/RCP guidance, in London on 14 October. For more information and to book, see here.

Taking Stock

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

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 October. 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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