Essex CHAMBERS

MENTAL CAPACITY REPORT: THE WIDER CONTEXT

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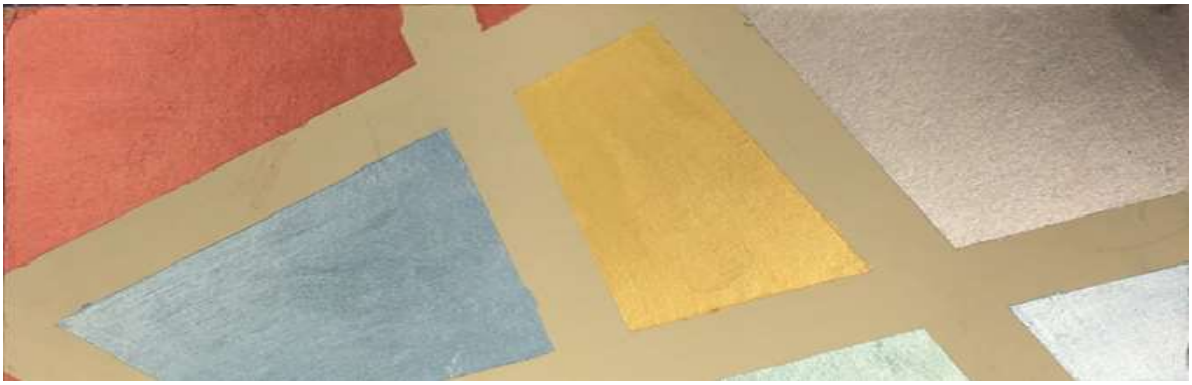

Welcome to the September 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: capacity, silos and pigeon-holes, medical treatment dilemmas, and the limits of support;

(2) In the Property and Affairs Report: LPA modernisation and help with COP1 and COP1A forms;

(3) In the Practice and Procedure Report: the Court of Protection is, in fact, a court, costs updates, and insights in the future of remote hearings;

(4) In the Wider Context Report: a policy round-up, the inherent jurisdiction and children, advocacy in restricted settings, and the limits on the duty to secure life;

(5) In the Scotland Report: Mental Welfare Commission reports on the use of the Mental Health Act during COVID-19 and advance statements, and thoughts about SIDMA.

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

Policy round-up

The Government has published its response to its recent public consultation on reforming the MHA 1983. Of particular relevance for those working with the MCA 2005 is that the consultation showed no significant support for the proposal set out in the White Paper that non-objecting patients would be subject to the DOLS/LPS, not the MHA 1983, nor overall agreement on what alternative changes to the interface would improve the application. In addition, the proposal to change the interface was a key concern for a number of stakeholders and organisations who responded. The Government is therefore not proposing to take forward reform of the interface at this time. Instead, the Government will seek to build the evidence base on this issue through robust data collection, to better understand the application of the interface. In addition, the Government will continue to engage with stakeholders to understand what support and guidance could help improve application of the current interface.

The DHSC has responded to CQC's "Out of Sight, Out of Mind" report on the use of restraint, seclusion and segregation in care services. It has also responded to the report and recommendations from Baroness Hollins and the Oversight Panel's review of the Independent Care (Education) and Treatment Reviews for people with a learning disability and autistic people in inpatient settings.

The Commons Health Committee has published its report on the treatment of autistic people and

people with learning disabilities, recommending that "the Trieste model of care is implemented for autistic people and people with learning disabilities by the Department of Health & Social Care and NHS England & Improvement. All new long-term admissions of such people to institutions should be banned except for forensic cases."

In the context of the launch of both the National Disability Strategy and the National Strategy for autistic children, young people and adults, the Government has published "Shaping future support: the health and disability green paper," considering the options for addressing short- and medium-term issues in health and disability benefits The consultation on the green paper closes on 11 October 2021, and can be accessed here.

More broadly, the Government is pushing ahead with legislative plans to integrate health and social care in the Health and Care Bill (discussed with reference to LPS elsewhere in this report), and the well-publicised proposals in relation to funding changes, discussed in this 'rapid reaction' webinar by members of our public law team (including Arianna, one of our editors).

The inherent jurisdiction, deprivation of liberty and children

In *Re T (A Child)* [2021] UKSC 35 Supreme Court (Black, Lloyd-Jones, Arden, Hamblen and Stephens SCJJ), through gritted teeth held that the inherent jurisdiction could be used as an "imperfect stop gap" to authorise the deprivation of liberty of children and young people in the face of a "scandalous" lack of appropriate accommodation making use of the route of s.25 Children Act 1989 impossible. For more detail, see Alex's summary of the judgment here.

The language used by the Supreme Court justices in this case is stark, as was their reluctance to give judicial 'cover' for the failures of the state to provide adequate resources. However, through gritted teeth, they found it effectively impossible to ignore the alternative that not enabling the High Court to exercise its inherent jurisdiction to authorise deprivation of liberty in these circumstances would be worse.

It is perhaps to be regretted that the Supreme Court did not have the benefit of sight of the judgment of MacDonald J in *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam) – arising in slightly different, but conceptually similar circumstances. However, had they done so, it is difficult to see that they would not have endorsed his conclusion that the High Court could not be asked to authorise deprivation of liberty where the arrangements were (as he described):

> *so inappropriate that they constitute a clear and continuing breach of his Art 5 rights. Within this context, the fact there is no alternative cannot by itself justify the continuation of those arrangements. All the evidence in this case points to the current placement being manifestly harmful to Y. Within that context, the absence of an alternative cannot render what is the single option available in Y' best interests and hence lawful.*

MacDonald J has continued to hand down judgments in this area. See *North Yorkshire County Council v M & Ors (Medium Secure Bed)* [2021] EWHC 2171 (Fam) where he was, in effect:

> *being required to adopt the role of mediator, or at least facilitator, between NHS England and two NHS Mental Health Trusts, in order to procure medium secure tier 4 provision that the NHS is responsible for providing and for a child who has twice been assessed as being in urgent need of that provision. As Ms Khalique QC observed on behalf of M, viewed in the context of the impact on M of the protracted nature of these proceedings, this is profoundly depressing in circumstances where each day M spends in a placement that is not able to meet her needs further compounds the difficulties under which she already labours.*

See, also *MBC v AM & Ors (DOL Orders for Children Under 16)* [2021] EWHC 2472 (Fam) , where MacDonald J, at speed, had to address the impact of the coming into force of the to force on 9 September 2021 of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, amending the Care Planning, Placement and Case Review (England) Regulations 2010 to prohibit the placement of a looked after child under the age of 16 in unregulated accommodation. MacDonald J concluded that:

> *in cases in which the question before the court is whether the court should authorise, under its inherent jurisdiction, the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended, I am satisfied that the following principles will apply:*
>
> *i) It remains open to the High Court to authorise under its inherent jurisdiction the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended.*
>
> *ii) In deciding whether to grant a declaration authorising the deprivation of liberty, the existence or absence of conditions of imperative necessity will fall to be considered in the context of the best interests analysis that the court is required to undertake when determining the application for a declaration on the particular facts of the case.*
>
> *iii) Whilst each case will turn on its own facts, the absence of conditions of imperative necessity will make it difficult for the court to conclude that the exercise of the inherent jurisdiction to authorise the deprivation of the liberty of a child under the age of 16 in an unregulated placement is in that child's best interests in circumstances where the regulations render such a placement unlawful.*
>
> *iv) It is not appropriate to define what may constitute imperative considerations of necessity. Again, each case must be decided on its own facts.*
>
> *v) The court must ensure the rigorous application of the terms of the President's Guidance, which will include the need to monitor the*

progress of the application for registration in accordance with the Guidance. Where registration is not achieved, the court must rigorously review its continued approval of the child's placement in an unregistered home. Ofsted should be notified immediately of the placement. Ofsted is then able to take immediate steps under the regulatory regime.

Independent advocacy in restricted settings

Advocates play an essential role in safeguarding the rights of those in restricted settings, but there are real concerns about the quality of advocacy, which has been described as "very variable." A group of advocacy providers and advocates therefore came together to explore the causes of this variability – the result is the Black Belt Advocacy report entitled, "Independent advocacy in restricted settings for people with a learning disability and autistic people." In summary, the key findings were that:

- Inconsistent and poor commissioning has meant that independent advocacy is not resourced and funded to the level it needs.
- Advocates' skillsets tend to be limited, particularly in relation to understanding autism and understanding the broader context (most obviously the Transforming Care programme).
- There is a reticence to work with families due to the focus on the individual and the failure to see that person in the context of their families and communities.
- Mental health providers do not give advocates sufficient support.
- The risk that advocates were not as independent from the mental health system as they should be – such independence is necessary to keep that system in check.
- Advocacy should focus on building longer term relationships with an individual rather than adopting a model of issue based advocacy.

For more detail on the importance of advocacy for those in restricted settings and the implications of the group's findings, you can read the report here.

Dependent drinkers and legal tools

A new briefing for Alcohol Change by Mike Ward and Professor Michael Preston-Shoot outlines how professionals can use legal frameworks (including the MCA 2005) to manage and support vulnerable dependent drinkers. Full disclosure, Alex was on the expert reference group.

Suicide and the duty to secure life (1)

R (Morahan) v Her Majesty's Assistant Coroner for West London [2021] EWHC 1603 (Admin) (QBD (Admin Court) (Popplewell LJ, Garnham J, and HHJ Teague QC))

Mental Health Act 1983 – interface with MCA

Summary

Tanya Morahan was aged 34 when she died of cocaine and morphine toxicity. Over the preceding 10 years she experienced mental illness and was diagnosed with paranoid schizophrenia. On 25 June 2018, she was discharged from MHA s.3 and became a voluntary inpatient. Five days later, with her

clinicians' agreement, she left the ward to clean up her flat to rehabilitate into the community. She was returning to the ward to take evening medication. She left the unit for the last time on 3 July and was found dead in her flat on 9 July 2018. The issue before the court was whether there was a duty to hold a *Middleton* inquest (ie enhanced Article 2 ECHR investigative duty) in such circumstances.

The court helpfully summarised the key principles regarding the positive Article 2 operational duty:

> *38. The positive operational duty arises where the state agency knows or ought reasonably to know of a real and immediate risk to an individual's life, and requires it to take such measures as could reasonably be expected of it to avoid such risk (Osman paras 115, 116). In this context:*
>
> *(1) Risk means a significant or substantial risk, rather than a remote or fanciful one. In Rabone the risk in question was one of suicide and was quantified as being 5%, 10% and 20% on successive days, which was held to be sufficient (see paras 35-38).*
>
> *(2) An immediate risk to life means one that is "present and continuing" as opposed to "imminent" (Rabone para 39).*
>
> *(3) The relevant risk must be to life rather than of harm, even serious harm (G4S Care and Justices Services Ltd v Kent County Council [2019] EWHC 1648 (QB), paras 74-75 and R (Kent County Council) v HM Coroner for the county of Kent [2012] EWHC 2768 (Admin) at paras 44-47).*
>
> *(4) Real focuses on what was known or ought to have been known at the time, because of the dangers of hindsight (Van Colle at para 32).*
>
> *(5) Overall, in the light of the foregoing considerations viewed cumulatively, the test is a stringent one (see Van Colle, per Lord Brown of Eaton-under Heywood at para 15; and G4S, paras 71-73). It will be harder to establish than mere negligence, but that is not because reasonableness here has a different quality to that involved in establishing negligence; rather it is because it is sufficient for negligence that the risk of damage be reasonably foreseeable, whereas the operational duty requires the risk to be real and immediate: see Rabone at paras 36-37.*
>
> *39. It is also clear that the existence and scope of the duty must not impose an impossible or disproportionate burden on state agencies in carrying out their necessary state functions and must take into account the individual's rights to liberty (article 5) and private life (article 8): see Osman at para 116, Rabone at 104 and Fernandes de Oliveira at paras 111, 125, 131.*

The duty exists in "*certain well-defined circumstances*" which have developed from prison settings to those detained under the MHA 1983 (*Savage*) to voluntary patients (*Rabone*). The issue, therefore, was whether the duty arose on the facts of Tanya Morahan's case. Having analysed the case law, the court derived the following three points of interest:

1. The existence or otherwise of the operational duty is not to be analysed solely by reference to the relationship

between the state and the individual, but also, and importantly, by reference to the type of harm of which the individual is foreseeably at real and immediate risk. So there may be an operational duty to protect against some hazards but not others.

2. The foreseeable real and immediate risk of the type of harm in question is a necessary condition of the existence of the duty, not merely relevant to breach. Without identifying such foreseeable risk of the type of harm involved, it is impossible to answer the question whether there is an operational duty to take steps to prevent it.

3. In cases where vulnerable people are cared for by an institution which exercises some control over them, the question whether an operational duty is owed to protect them from a foreseeable risk of a particular type of harm is informed by whether the nature of the control is linked to the nature of the harm. Detention can increase the risk so the control is linked to it:

> *67 …The same is true of voluntary mental patients in relation to the risk of suicide where their residence at the institution is not truly voluntary if and because the mental condition for which they are being treated itself enhances the suicide risk. It does so not only as the potential result of incarceration, if not truly voluntary, but often also because, as was identified in both Rabone and Fernandes de Oliveira, the mental condition which the institution assumes control for treating impairs the patient's capacity to make a rational decision whether to take their own life. The nature of the control is again linked to the risk of harm. Where, however, there is no link between the control and the type of harm, to impose an operational duty to protect against the risk would be to divorce the duty from its underlying justification as one linked to state responsibility. It would also undermine the requirement identified in Osman that the positive obligations inherent in article 2 should not be interpreted so as to impose a disproportionate burden on a state's authorities. The control by the state could not justify the imposition of the duty by reference to state responsibility if the risk were of a type of harm which is unconnected to the control which the state has assumed over the individual. A psychiatric hospital owes no duty to protect a patient, whether voluntary or detained, from the risk of accidental death from a road traffic accident whilst on unescorted leave.*

The court concluded that no operational duty was owed to Tanya to protect her against the risk of accidental death by the recreational taking of illicit drugs. There was no real and immediate risk of death from such cause of which the Trust was or ought to have been aware. There was no history to suggest suicide risk or accidental overdose. She had abstained from taking drugs whilst on leave of absence from her s.3 detention. And there was nothing to suggest that permitting Tanya to continue her rehabilitation into the community after her absence on 30 June/1 July gave rise to a real and immediate risk of death by overdose.

Furthermore, there was no relevant assumption of responsibility. The Trust had not assumed

responsibility for treatment of Tanya for drug addiction of a life threatening nature. The responsibility it assumed was for treatment of her paranoid schizophrenia and potentially exacerbating effects of substance misuse. Her mental health condition was not linked to the harm. Nor was she vulnerable to suicide: her vulnerability was unconnected to the harm. Nor was there an exceptional risk, as opposed to an "ordinary" one. It was a risk to which she was exposed in the same way as any other recreational drug user irrespective of her status as a patient at the hospital. Nor should her position be equated with that of a detained patient. Unlike *Rabone* (who was "an involuntary patient in all but form"), Tanya was a voluntary patient rehabilitating into the community and there were no grounds for MHA detention on the final day she left the ward on 3 July 2018. That she failed to return to the ward a second time and missed her medication for an increasing period as the days passed was insufficient to create the operational duty.

Comment

The circumstances in which the State is obliged to take reasonable precautions to prevent a person's suicide continues to fascinate. The present case illustrates how fact-sensitive the elements of the operational duty are in determining legal liability. Patient status seems to continue to influence the law's development here. Melanie Rabone's status was described as that of an involuntary patient in all but form, whereas the voluntariness of Tanya's position was said to be quite different. It is argued here, based upon the *Mammadov* decision, that the operational duty is not confined to hospital detention and *could* be owed to those who are suicidal in the community *if* the *Osman* elements are proven. Much is at stake in these cases: on the one hand the law does not want to encourage defensive practice; but, on the other, there is a need to hold public bodies to account for failing to take reasonable precautions where they know or ought to know of a real and immediate risk to life

Suicide and the duty to secure life (2)

As noted above, the High Court in Tanya Morahan's case considered the case of *Fernandes de Olivera*, in which the European Court of Human Rights had taken a rather more nuanced approach to the obligations imposed by Article 2 ECHR than that which had been anticipated by the Supreme Court in *Rabone*. That calibration was reiterated in *Ražnatović v Montenegro* [2021] ECHR 723, a decision handed down on 2 September 2021, in which, applying the approach set down in *Fernandes*, the court found that it had not been established that the authorities in Montenegro knew or ought to known at the material time that there was an immediate risk to the life of the person who then took their own life. The court therefore found that it did not need to assess the second part of the test, namely whether the authorities had taken the measures which could reasonably have been expected of them.

In the context of these cases, questions of confidentiality and capacity often play a difficult role:

- A new guide (SHARE: consent, confidentiality and information sharing in mental healthcare and suicide prevention) builds on a DHSC consensus statement, to promote "*the lawful sharing*

of relevant information and the amplification of professional judgement within the current regulatory and best practice environment. This is under the precept that it is commonly better to seek consent to share information than not;"

- Some may find useful this blog by Alex on capacity and suicide, focusing in particular upon the (mis)use of the presumption of capacity.

Ordinary residence and s.117 MHA 1983

The DHSC has confirmed that it has been granted permission to appeal against the decision of the High Court in the Worcestershire case concerning ordinary residence in the context of s.117 MHA 1983.

Religious opposition to withdrawal of treatment

Fixsler & Anor v Manchester University NHS Foundation Trust & Anor [2021] EWCA Civ 1018 (Baker, Carr and Elizabeth Laing LJJ)

Other proceedings – family (public law)

Summary[1]

The Court of Appeal has reiterated the principle that the child's welfare is the paramount consideration when making a decision regarding their medical treatment – or a withdrawal of it and that no single factor takes precedence when deciding where his or her best interests lie.

Baker LJ, in a judgment with which Carr and Elizabeth Laing LJJ agreed, upheld the decision of MacDonald J that it was in the best interests of a two year old girl with catastrophic brain injuries not to continue life-sustaining treatment.

Alta Fixsler was born to Hasidic Jewish parents who moved to the UK four years prior to their daughter's birth. The family were all citizens of Israel, albeit that it was accepted that Alta was habitually resident in the UK.

Alta suffered a severe brain injury at birth with the result that at the time of the hearing in 2021 her life expectancy was limited to between six months and two years. The Court of Appeal sets out in its judgment the severity of her disabilities, which included an inability to self-ventilate, to protect her airway, to maintain body temperature or to swallow. Alta was mechanically ventilated via tracheostomy and fed via tube.

Manchester University NHS Foundation Trust, the hospital in which Alta had been born and where she had lived throughout her life, brought the application because the treating team wished to withdraw treatment and move to a palliative care regime.

All the medical experts, including a consultant paediatrician instructed by the parents independently agreed that continuing treatment was not in Alta's best interests. All, save the parents' expert, who considered Alta to be in PVS and therefore unable to experience pain or anything at all, agreed that she was in consistent pain. One expert provided evidence that ongoing treatment would result in the accumulation of deeply unpleasant and painful comorbidities including worsening respiratory function,

[1] Note, Tor having been involved in these proceedings, she has not contributed to this note.

dystonia and spasticity and associated pain, pressure sores and epileptic seizures.

Her parents did not agree with the medical consensus. They did not accept that she had no conscious awareness; rather, they contended that she was able to respond to their touch. They wished for her to be transported to Israel where she could continue her treatment and where, accepting that her life would be short, she would be buried in accordance with Jewish religious practices. Her treating clinicians contended that the journey would be painful to her and thus, not in her best interests.

The case was heard at first instance by MacDonald J. Alta's parents sought to rely on his earlier judgment in *R (Raqeeb) v Barts Hospital Foundation Trust* [2019] EWHC 2530 (Fam) in which he refused to grant an application to withdraw treatment from a profoundly brain damaged five year old from a devoutly Muslim family, to support their arguments that the court should pay particular attention to the role of Alta's Jewish heritage and the importance, in this context, of the continuation of life-sustaining treatment.

At first instance, MacDonald J made the order in May 2021, authorising a withdrawal of treatment. The parents immediately filed a notice of appeal and an oral hearing was held on 23 June 2021. The key issue in the appeal was the extent to which substituted judgment should play a role in best interests decision-making.

At first instance the parents argued that it was not only appropriate but imperative "*that an assessment of the various dimensions of Alta's best interests must take into account particular religious, cultural and ethical context of this case provided by the fact that Alta is an Israeli citizen, the fact that the family intended to emigrate with Alta to Israel and the family's Orthodox Jewish beliefs and cultural values*". Further, that whilst the right to freedom of religion of a family under Art 9 of the ECHR may be circumscribed where it conflicts with the child's best interests, the assessment of what those best interests are in the first place must be informed by these considerations, and by a recognition that religious and ethical frameworks governing these sensitive matters differ. Accordingly, they argued that any assessment should start from the assumption that Alta would share the values of her parents, of her brother, and of her wider family and community.

Dismissing the appeal, Baker LJ reiterated the application of the s.1(3) Children Act 1989 checklist to children's cases rather than the s.4 MCA 2005 criteria (see paragraph 79). He also reiterated that no single factor can take priority over any other:

> *81. Under s.1(3)(d), the court is required to have regard to the fact that Alta is from a devout Hasidic family which has very clear beliefs and practices by which they lead their lives and that, if she had sufficient understanding, she too would very probably choose to follow the tenets of the family religion. I agree with Mr Simblet that this is a central part of her identity – of "who she is". It is unquestionably an important factor to be taken into consideration. But it does not carry pre-eminent weight. It must be balanced against all the other relevant factors.*
>
> *82. None of the factors in the checklist has any presumption of precedence. The weight to be attached to each factor*

> *depends on the circumstances of the case and the final decision is that of the court. Whilst in an individual case the child's wishes and feelings, and her background and characteristics, including the religious and cultural values of the family of which she is a member, may attract particular weight, in all cases they start with an equal value to that of all the other relevant factors.*
>
> *84. Mr Simblet's submissions come close to inviting the court to replace the best interests test with substituted judgment. He was, in effect, substantially repeating the argument put forward by counsel in Raqeeb, elevating the beliefs and values of Alta, as identified by the parents, to being the "key driver" of the court's best interests decision and giving those beliefs and values pre-eminent weight in the balancing exercise. Such an approach would be contrary to both case law and statute. The starting point must be the assumed point of view of the child, but that does not oblige the court to give the child's assumed views and beliefs pre-eminent weight in the analysis."* (emphasis added)

As to the significance of Alta's Jewish faith, the Court of Appeal noted the specific facts of the *Raqeeb* case, the age of Tafeeda Raqeeb (5) in contrast to that of Alta and the evidence put before the court as to her actual and engaged adherence to her parents' faith: holding,

> *86. In my judgment, the judge was entitled in the present case to refuse to assume that Alta would share the values of her family in circumstances where she never has had, nor ever will have, the ability to understand anything of the original culture into which she was born.*
>
> *As he said (at paragraph 95 of the judgment in this case) Alta is*
>
> > *"not of an age, nor in a condition to have knowledge of and to adopt her parents' values, from which she could extrapolate a position on the complex issues that arise in this case."*
>
> *In the case of a very young child in Alta's condition, the element of substituted judgment in the best interests decision is very limited and in this case is certainly outweighed by other factors, including in particular the fact that she is suffering consistent pain.*

As to the subject of pain, with which the first instance proceedings were significantly concerned, Baker LJ held at paragraph 63:

> *I do not accept that pain has to be "unbearable" or "intolerable" for an application to withdraw treatment from a child to succeed. What is required is a balancing of all factors relevant to the child's welfare. Any significant degree of pain will be a factor to be weighed in the balance. Manifestly, the greater the likely degree and intensity of pain, the greater the weight it will be likely to carry.*

Having failed to convince the judge at first instance as to their medical case, the appellant parents sought permission from the appeal court to adduce evidence from four new experts – three from the US, one from Israel. That application, including one to rely on a legal opinion regarding Israeli law, was refused on *Ladd v Marshall* grounds on the basis that none of the material could not have been obtained for use at trial and that it would not have an

important influence on the result of the case (paragraph 54).

Comment

This judgment does not break any particularly new ground but is a useful reiteration of first principles: that a child's welfare is always paramount; and a clarification as to the appropriate statutory test in cases concerning children: it is the Children Act checklist, not the MCA.

Having lost the appeal (and their application to the European Court of Human Rights having been rejected), it appears that the parents and the Trust are now in dispute about where Alta should be allowed to spend her final days,

A further judgment on the withdrawal of life-sustaining treatment from a minor was handed down by Cobb J during the summer recess. *Guy's & St Thomas' NHS Foundation Trust & Anor v M & Ors* [2021] EWHC 2377 (Fam) concerned an unopposed application by a hospital Trust and a local authority to withdraw life-sustaining treatment from a 14 year old boy, R, who, suffered a chronic respiratory collapse from which he had failed to recover as a result of a degenerative genetic condition. While in full health, R was described by Cobb J in a characteristically sensitive judgment as "*brilliant*" and "*capable of many things*"; following his collapse it was noted that he was "no longer able to do the things he enjoyed" and had "*entirely lost the ability to actively participate in life*" (paragraph 24). His parents (for different reasons) lacked capacity both to make decisions about their son's medical treatment; the local authority, who had parental responsibility by virtue of a care order, did not thereby have authority to make decisions about life-sustaining treatment, and it appears that it was a combination of these two factors which led to the application being made to court.

Relying on and citing heavily from MacDonald J's judgment in *Fixsler,* Cobb J held:

> *31. I have looked at his welfare in the widest sense, not just medical, but social, emotional, and psychological. His best interests are of course my paramount concern, and I make this decision exercising my own independent and objective judgment, albeit greatly assisted by the wealth of medical expertise and experienced which has been marshalled in this case. I have of course started from the strong presumption in favour of taking all steps to preserve R's life because the individual human instinct to survive is strong, and must be presumed to be strong in the patient. The presumption however is not irrebuttable, and I am satisfied that in this case it is outweighed by the pain and suffering, and the other current and likely medical burdens on R, of simply sustaining his breath of life. Tragically, he has no means of recovering from his present state. In my judgement he must now be allowed an opportunity for a peaceful, dignified and calm passing surrounded by those who care most for him.*

The CRPD and the 2000 Hague Convention on the International Protection of Adults

Alex has co-authored a report for the UN Special Rapporteur on the Rights of Persons with Disabilities on the interaction between the CRPD and the 2000 Hague Convention on the

International Protection of Adults. The report can be found here, and the statement by the Special Rapporteur and the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, can be found here.

World Congress on Adult Capacity

The World Congress on Adult Capacity 2022 organising committee has announced that the conference to be held in Edinburgh next year will be in person – for more details, and to register interest, see the Congress website here.

Voting and the ECtHR

Perhaps somewhat surprisingly, the Grand Chamber of the European Court of Human Rights is reported to have declined to accept the reference from the decision in *Caamaño Valle v Spain* concerning voting and mental incapacity covered here.

Research corner

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle. This month we highlight an article from the Mental Health and Justice Project appearing in the Journal of Medical Ethics: Broad concepts and messy realities: optimising the application of mental capacity criteria. This article, building on earlier work discussed in this "in conversation" shedinar between Alex and Dr Nuala Kane, moves simple description of the types of rationales used before the Court of Protection to identify whether a person can or cannot make a decision to seek to identify how those rationales should be used in pursuit of greater transparency and accountability.

We also highlight an article appearing on the SCIE website (free, but registration required) on Resident to Resident harm in care homes and other settings: a scoping review. This provides a useful survey of an often underexamined phenomena.

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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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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.

Arianna Kelly: **arianna.kelly@39essex.com**

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a 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.

Scotland editors

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.

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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