Mental Capacity Law Newsletter December 2014: Issue 52

Court of Protection: Practice and Procedure

ThirtyNine
ESSEX STREET

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Introduction

Welcome to the December Mental Capacity Law Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: Mostyn J takes on the Supreme Court over Article 5; the vexed OFSTED Guidance; the *Re X* process; guardianship and *Cheshire West*;

(2) In the Property and Affairs Newsletter: decisions on planning for survivorship of attorneys, inheritance tax planning, retainers and the survival of the common law tests for testamentary and gift-making capacity;

(3) In the Practice and Procedure Newsletter: an important case on habitual residence; a *cri de coeur* about case management; and what to do where a litigation friend is no longer in funds;

(4) In the Capacity outside the COP Newsletter: prosecutions under s.44 MCA 2005; the battle of the UN Committees as to deprivation of liberty; the Law Commission's report on kidnapping and false imprisonment and legislative change post-Winterbourne View

(5) In the Scotland Newsletter: an update on the position relating to powers of attorney, an important case on whether a local authority complaints procedure excludes the possibility of judicial view and Lady Hale in Glasgow.

As matters stand, our commitments mean that it is unlikely we will be able to bring you a Newsletter in January. If no Newsletter appears, a 'watching brief' on important developments will be maintained by Alex on his website. In the meantime, happy holidays to all!

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

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COP jurisdiction and powers – International

Summary

The issue in this case, decided some time ago, but only recently made available on Bailii, was where an incapacitated adult (SW) was habitually resident for the purposes of determining whether the English court had jurisdiction to deal with applications under the MCA 2005.

The English Local Authority and the Scottish Local Authority submitted that SW was habitually resident in Scotland. The Official Solicitor submitted that she was habitually resident in England.

SW was a 36 year old woman who was born and lived in Scotland until 2009. In 2006 she had sustained hypoxic brain injury following a hypoglycaemic attack. She was in a rehabilitation unit in Scotland and subject to a compulsory treatment order until 2009. In 2009 a rehabilitation facility in England was identified. SW was keen to move to the facility and contacted the facility herself to see if there was a vacancy. In July 2009 SW moved from the hospital in Scotland to a hospital in England under a compulsory treatment order. She then immediately moved to the rehabilitation facility under a community treatment order. It was clear from the evidence that SW wanted to move to the facility in England even though she was moved using a series of compulsory orders.

In 2010 SW had moved from the rehabilitation facility to specialist supported accommodation. From that time SW lived in a one bedroom flat with support. SW was in a relationship with someone who lived in one of the other supported living flats. At some point after 2010 SW had started to express a desire to move from her current accommodation. SW had stated very clearly that she wanted to move. More recently she had said she did not want to live in Scotland. When SW was asked by her solicitor in March 2013 where home was she replied "I would have to say here these days". In January 2014 she told her solicitor that she wanted to move from where she was living as soon as possible but did not wish to move back to Scotland.

SW's care was jointly funded by Scottish public authorities. She also continued to have an allocated social worker from Scotland.

The English COP proceedings were started because there appeared to be a real prospect that SW's mother and stepfather would remove her from her home in England and take her back to Scotland in circumstances where it was said that there was a significant prospect that her health would be put at risk because they could not adequately care for her. The application proceeded (without the issue of habitual residence having been decided) on the basis that even if SW was not habitually resident in England, the court had jurisdiction under the MCA 2005, schedule 3, para 7(1)(c) because SW was present in England and the matter was urgent.

The judge held that it was clear from the evidence that SW lacked the capacity to decide where to live and the true nature of her care needs. She did not appreciate the level of support and assistance which she needed.

The judgment set out the legal framework in detail.

The Local Authorities focused on the 'integration test' and submitted that SW was not sufficiently integrated in England on the basis that her placements in England had been determined for her to varying degrees and the fact that she did not like living in her current placement.

The judge agreed with counsel for the OS that the local authorities had adopted too narrow a focus when addressing the circumstances of the case.

Importantly, Moylan J held that the definition of 'habitual residence' under the MCA 2005 should be the same as that applied in other family law instruments including Brussels IIa (Council Regulation (EC) No 2201/2013). If a different approach were taken as between adults and children, he considered, habitual residence would not even be applied consistently within Brussels IIa. It was plain that different factors would or may have differing degrees of relevance but the overarching test should be the same.

Furthermore, Moylan J held, the determination of habitual residence should be kept as free as possible from analytical complexities or constructs. It was a question of fact.

Moylan J noted that the Supreme Court in *A v A (Children: Habitual Residence)* [2014] 1 FLR 111 and Re LC (Childen) [2014] UKSC 1 had referred to the test or question as being whether there was some sufficient degree of integration in a social and family environment. Moylan J did not accept that was intended to narrow the court's focus to that issue alone as an issue of fact. It was not a free-standing, determinative factor and in particular not to the exclusion of all other factors. As the CJEU held in Proceedings brought by A [2010] Fam 42 the national court must conduct an 'overall assessment' in the light of the factors set out in paragraphs 38 – 41 of its judgment.

In Mercredi v Chaffe [2012] Fam 22 the Court of Justice stated that the place of habitual residence "must be established taking account of all the circumstances of fact specific to each individual case".

Integration, as an issue of fact, could be an emotive and loaded word. It was not difficult to think of examples of an adult who was not integrated at all in a family environment and only tenuously integrated in a social environment but who is undoubtedly habitually resident in the country where they are living.

"Degree of integration," as with centre of interests, Moylan J held, was an overarching summary or question rather than the sole or even necessarily the primary factor in the determination of habitual residence. The broad assessment which was required properly to determine whether the quality of residence was such that it had become habitual in that it has the necessary degree of stability in order to distinguish it from mere presence or temporary or intermittent residence. This meant a sufficient, or some, degree of integration, not as a limited factual assessment but as a question to be answered by reference to the factors referred to by the CJEU and the Supreme Court.

Given that SW had been living in England since 2009 and had been living in her own flat since December 2010 there would need to be some compelling countervailing factors in order for it to be held that she was not habitually resident in England.

Counsel for the OS had set out a series of facts as pointing to SW being habitually resident in England (see paragraph 61 of the judgment) and those facts taken together with her long residence in England were not counterbalanced by the fact that she had been moved to England pursuant to a compulsory treatment order, her place of residence had been largely determined for her and the fact that she did not like her current placement.

By virtue of its duration, Moylan J found, SW's residence had acquired effective stability in the sense used by the Court of Justice. Many people would rather not be living where they are and might wish to be living elsewhere. However, at least after a person has been loving in one place for a significant period of time it will be difficult not to come to the conclusion that they are sufficiently integrated into their environment for them to be habitually resident there. To conclude otherwise would place too much weight on an assessment of SW's state of mind and the extent to which she feels settled.

Moylan J therefore held that SW was habitually resident in England and the court had jurisdiction to deal with applications under the MCA 2005.

Comment

This judgment helpfully sets out in detail all the recent case law on the issue of habitual residence but also forcefully reiterates that it is primarily a question of fact to be assessed in the round and on the particular circumstances of the case before the court.

The judgment is also of importance for its very clear statement that the tests for habitual residence should be aligned as between adults lacking capacity and children, and as between the Hague Conventions (at least those in the family sphere) and the EU legislation covering the same terrain.

It would be interesting to ask as a counter-factual in this case whether it would have made any difference had the relevant Scots authorities sought to time-limit SW's placement in England. Whilst on the facts of this case it would appear clear that SW's habitual residence must have changed, would the same have applied had she been placed in England for a long-term, but nonetheless finite, rehabilitation placement? It is possible that this question will be looked at later this month in the context of another cross-border case upon which we hope to report in our next issue.

The time has come to think again

Cases A and B (Court of Protection: Delay and Costs) [2014] EWCOP 48 (Peter Jackson J)

Practice and procedure – Other

Summary

This brief judgment from Peter Jackson J highlights concerns about the cost and duration of Court of Protection proceedings, based on two anonymised cases, the detailed facts of which are not given but in which both the Official Solicitor acted as litigation friend for the "P"s concerned.

Case A lasted for 18 months and Case B for five years, each incurring overall costs at a rate of around £9,000 per month. The judge identifies two particular problems which lead to cases taking too long and costing too much: '*the search for the ideal solution, leading to imperfect but decent outcomes being rejected*' and '*a developing practice...of addressing every conceivable legal or factual issue, rather than*

concentrating on the issues that really need to be resolved'.

The judge also noted that:

> *"16. There is also a tendency for professional co-operation to be dissipated in litigation. This was epitomised in Case A, where the litigation friend's submission focussed heavily on alleged shortcomings by the local authority, even to the extent that it was accompanied by a dense document entitled "Chronology of Faults". But despite this, the author had no alternative solution to offer. The role of the litigation friend in representing P's interests is not merely a passive one, discharged by critiquing other peoples' efforts. Where he considers it in his client's interest, he is entitled to research and present any realistic alternatives."*

The judge concludes:

> *"18. The main responsibility for this situation and its solution must lie with the court, which has the power to control its proceedings. The purpose of this judgment is to express the view that the case management provisions in the Court of Protection Rules have proved inadequate on their own to secure the necessary changes in practice. While cases about children and cases about incapacitated adults have differences, their similarities are also obvious. There is a clear procedural analogy to be drawn between many welfare proceedings in the Court of Protection and proceedings under the Children Act. As a result of the Public Law Outline, robust case management, use of experts only where necessary, judicial continuity, and a statutory time-limit, the length of care cases has halved in two years. ...*
>
> *19. I therefore believe that the time has come to introduce the same disciplines in the Court of Protection as now apply in the Family Court.'*

Comment

No doubt further consideration will be given (above all by the Ad Hoc Rules Committee, sitting at the moment) to the proposal advanced by the judge as the number of Court of Protection cases continues to increase.

We would echo the need for greater focus and discipline in welfare cases, but we would wish any steps towards the implementation of (in particular) the PLO in the COP only to be taken after careful consideration of whether the COP has the resources to enable the necessary degree of judicial continuity. The resources are only just available to ensure that the family courts are able to match the demands placed upon practitioners under the PLO; at present, we very much doubt whether they are properly present to allow the COP to match any equivalent demands.

Funding and the Official Solicitor

Bradbury & Ors v Paterson & Ors [2014] EWHC 3992 (QB) (Foskett J)

Practice and procedure – Other

Summary[1]

The application raised a novel point about what the Court should do when the Official Solicitor concludes that he can no longer continue to act as litigation friend for a protected party in civil litigation because the anticipated source of funding for the Official Solicitor's costs ceases to be available.

[1] Note: Alex was and remains involved in this ongoing litigation as Junior Counsel for the Official Solicitor; he was not involved in the drafting of this case summary/comment.

The first defendant, Ian Paterson, was a surgeon. The claimants alleged that he had acted negligently in respect of surgery for breast cancer. It was said that towards the end of 2013, Mr Paterson had become increasingly unwell and solicitors acting for him obtained a psychiatric report which concluded that he lacked capacity to litigate.

The Medical Defence Union ("MDU") had originally agreed to fund the cost of Mr Paterson's litigation but had subsequently revised their decision and informed the Official Solicitor and other parties that it would no longer fund the litigation (or presumably indemnify Mr Paterson in respect of any of the claims).

As a result of the changed funding situation, the Official Solicitor applied to the court pursuant to CPR r.21.7 for an order that he be discharged as Mr Paterson's litigation friend in each of the five claims and at the same time the solicitors who had been acting for Mr Paterson applied to come off the record pursuant to CPR r. 42.3.

McGowan J granted both applications at a hearing at which neither the claimants nor the 2nd and 3rd Defendants were present or to which any written representations were addressed. The effect of the applications was that the proceedings had to be stayed as the litigation could not proceed where P was without a litigation friend.

An application was made for the court to set aside or vary the order of McGowan J.

It was argued on behalf of the claimants that the CPR did not allow the Official Solicitor to come off the record, leaving the protected party without a litigation friend.

The judge did not accept the argument of the claimants, preferring instead the submissions made on behalf of the Official Solicitor that:

> *"*27. […]. *Subject only to the requirement (in CPR 21.7(2)) that the litigation friend provides evidence in support of his application for an order terminating his appointment,* […] *there is no further requirement in CPR 21.7 requiring, for example, that he identifies a substitute. Indeed [*Counsel for the Official Solicitor] *submits that CPR 21.7(1)(b) would be otiose if there were such a requirement" (paragraph 27)*
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> *28. It does seem to me that Miss Morris' submission on the construction of the rules is correct. She supplements that submission by contending that it is clear that any litigation friend must (a) consent at the outset to his appointment (see paragraph 23 above) and (b) continue to consent throughout the duration of that appointment. She says that, apart from anything else, a litigation friend who is unwilling to continue to act is, by definition, a person who is most unlikely to continue to satisfy the criteria set out in CPR 21.4(3) (which applies also to those appointed by court order: CPR 21.6(5)) of being a person who can "fairly and competently conduct the proceedings on behalf of the … protected party" and "has no interest adverse to that of … the protected party." A litigation friend who is being required to act on an unwilling basis will, she submits, almost by definition have an interest adverse to the protected party because his primary interest will be in bringing the litigation to an end as speedily as possible regardless of whether this is in the interests of the protected party. She also says, looking at matters more widely than the position of the Official Solicitor, that the reading of CPR 21.7(1) for which Mr de Navarro contends would "have a chilling effect on the ability of litigation friends to accept invitations to act." She suggests that this would be particularly so*

> *where a case involves public funding where the criteria for such funding change on a regular basis and where, in any event, reassessment by the Legal Aid Agency of those who are publicly funded "but are on the cusp of having sufficient means not to be eligible" for such funding not infrequently leads to revaluation and the withdrawal of funding. She suggests that no litigation friend who needed to instruct lawyers to act for him would be prepared to act unless he had a cast iron guarantee that the costs of doing so would be met whilst acting as a litigation friend".*
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> […]
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> *30.* […] *I do not think that there is any warrant for the conclusion that the consent of any person to act as a litigation friend is irrevocable, certainly under the regime provided for by the CPR."*

The judge considered the funding arrangements of the Official Solicitor (which will be familiar to those reading the Newsletter) namely that he requires funding to be provided in order for him to instruct solicitors and that money will either come from the public purse where a person is eligible, from that person's own funds or from a third party (such as an insurer).

In this case, following the removal of funding from the MDU there were no readily apparent sources of funding. The judge noted that the Official Solicitor had made an approach to Mr Paterson's two attorneys appointed under a lasting power of attorney (believed by the Official Solicitor to be for property and affairs), but they have indicated that they were not proposing to fund the litigation.

The judge held that McGowan J "*was entirely justified (and almost certainly obliged) to make the orders asked of her relating to the cessation of the involvement of the Official Solicitor and* [solicitors acting for Mr Paterson]".

The judge then went on to wrestle with the unfortunate consequences of such a decision, namely the stay of the proceedings, holding that "*some way must be found of injecting new life into the proceedings to enable the claims to be considered properly*." The judge set down a number of directions designed to find ways of ensuring that the civil proceedings could continue and the Official Solicitor be put in funds to allow him to accept a further invitation to act as litigation friend, indicating that, in extremis, "*the High Court would, in my view, have the power under its general case management provisions and/or the inherent jurisdiction of the court to direct that one or more of the parties to the litigation should fund the Official Solicitor's costs of instructing lawyers for Mr Paterson, the initial outlay to be recoverable as part of the costs of the litigation in due course*" (paragraph 46(c)).

Comment

This case provides useful clarification that:

1. where a funding source is no longer in place, a litigation friend (whether the Official Solicitor or another) is entitled to seek to withdraw and such an application should be granted;

2. that whilst civil proceedings cannot proceed in the absence of a litigation friend for the protected party, the court will be creative and pragmatic in attempting to move the litigation forward. The proposition advanced at paragraph 46(c) is, we suspect, likely to be one that is examined further in due course, either in this case or another; and

3. The Official Solicitor, whilst "litigation friend of last resort" cannot be compelled to act absent proper funding for the costs of instructing legal representatives (or, in the cases in which he acts as 'in-house' solicitor, for those legal costs).

The case is also, we suggest, of equal application in the Court of Protection given the material identical wording of CPR r.21.7 and COPR r.144.

Toolkit for vulnerable witnesses and parties

The Advocates' Gateway has published a toolkit for advocates interacting with vulnerable witnesses and parties in the Family Courts. Many of the same issues will arise in relation to cases in the Court of Protection and under the inherent jurisdiction, where parties may have mental disorders or learning disabilities. The toolkit's aim is to '*support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair.*' The toolkit is essential reading for all lawyers involved in the Court of Protection: '*all advocates have a responsibility to assist the court to identify and appropriately respond to the vulnerability of parties and other witnesses'.*

Fee accounts

The Fee Account system is up and running in the Court of Protection (and the High Court). Firms that have to pay court fees on a frequent basis may wish to sign up to the scheme which will enable faster and more efficient payment methods to be used instead of cheques. To register or for further details, email FeeAccountPayments@hmcts.gsi.gov.uk.

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Conferences at which editors/contributors are speaking

Intensive Care Society State of the Art Meeting

Alex will be speaking on deprivation of liberty safeguarding at the Intensive Care Society's State of the Art Meeting on 10 December 2014. Details are available here.

Talk to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Wigtown on 10 December.

Capacity and consent: complex issues

Jill will be speaking at the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see here.

Royal Faculty of Procurators

Adrian will be speaking at a half-day private conference for the Royal Faculty of Procurators in Glasgow on 11th February, at a one-hour lunchtime adult incapacity session on 25th February and with Alex on 13th May 2015.

IBC Planning for the International Older Client Event

Adrian will be speaking at the IBC Planning for the International Older Client event in London on 12th March 2015.

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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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early February. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of 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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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 2009), 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 human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. 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 practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.