Mental Capacity Law Newsletter September 2015: Issue 58

Court of Protection: Practice and Procedure

Introduction

Welcome to the September 2015 Newsletters: Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on the *Re X* saga, clarification over DoLS and conditional discharges, scrutiny of DoLS scrutinisers, an important decision on withdrawal of treatment, and a guest article by Dr Gareth Owen on capacity and brain injury;

(2) In the Property and Affairs Newsletter: an important decisions on P's use of funds for school fees in the context of mutual dependency, successive deputies, adverse costs orders and interest free loans, bad LPA behaviour, and family members as deputies;

(3) In the Practice and Procedure Newsletter: clarification over the (lack of) funding of s49 court reports, the importance of participation in proceedings, and habitual residence;

(4) In the Capacity outside the COP Newsletter: CRPD Committee's guidelines on article 14, assisted suicide, and litigation capacity in other proceedings;

(5) In the Scotland Newsletter: questionable policies and article 8 ECHR, the Education (Scotland) Bill, new guidance and ordinary residence, and new DOL guidance.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here.

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For all our mental capacity resources, click here. Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

Section 49 reports are free

RS v LCC & Ors [2015] EWCOP 56

Summary

Somewhat surprisingly, the question of the responsibility of NHS bodies/local authorities to provide s.49 MCA reports at no cost to the parties has not been the subject of a reported judgment until now (although I am aware of both unreported judgments and observations expressed by judges in the course of hearings). District Judge Bellamy has now stepped into the breach, although, as he noted, the difficult questions arising the provision of s.49 reports and their consequences for public bodies may ultimately have to be considered elsewhere.

The detailed facts of the case are of not relevant. Suffice it to say to say that, during the course of a s.21A application, the court required a s.49 report to be provided by the mental health Trust responsible for P, addressing her capacity "as the gateway to the jurisdiction of the court." The relevant NHS Trust declined to provide the report, both on the basis that it was impossible to provide it, and – more fundamentally – that it was inappropriate for the evidence sought to be provided by way of an order under s.49. The Trust's objections were both specific to the nature of the evidence sought and more generally directed to the application of s.49 in respect of individuals for whom they already had a clinical responsibility. The Trust advanced 10 reasons to support their view that it was inappropriate for the required evidence to be obtained by way of Section 49. As District Judge Bellamy then addressed each of these reasons in turn, it is convenient to set out each of the objections together with his conclusions on each point in turn:

(1) The Trust has no clinical involvement or knowledge of P (other than the information contained in the applicant's enclosed letter). P is not a patient under the Mental Health Services of the Trust.

> *Conclusion: While I note the argument there is no such distinction* [i.e. between patients and non-patients] *drawn within the powers given in Section 49 and the accompanying Rules or Practice Direction. In my view it would be wrong for the court to undertake such distinction either in the preparation of its orders generally or in this order in particular.*

(2) There appears to be a clear dispute on capacity the outcome of which may have a significant impact on P's future care and welfare. Such a dispute should properly be resolved by way of a jointly instructed independent court expert. It is not appropriate to seek quasi expert evidence through Section 49.

> *Conclusion: The dispute as to capacity has arisen following a report from a consultant psychiatrist dealing with matters pertaining to a lasting power of attorney. There is an existing assessment by a consultant psychiatrist Dr Loosmore and a very experienced social worker. A question has therefore arisen in relation to RS as to the extent or otherwise of her capacity. It is a matter well suited for determination by Section 49 which is a proportionate response as opposed to an instruction to an independent expert. Such direction would have additional funding and cost consequences particularly in the instant case where*

three of the parties are either publicly funded or public bodies and the fourth is privately paying albeit acting in person. Furthermore a Section 49 Report would [or should at any rate] incur significantly less delay.

(3) *A Section 49 Report is not a joint instruction and therefore can potentially leave open a dispute in the event that the evidence is not accepted by all parties. We understand that the first Respondent was not in agreement that Section 49 is appropriate.*

Conclusion: A Section 49 Report is a direction of the court. If a letter of instruction cannot be agreed the court will deal with any such dispute. It was the court's direction and not that of any specific party.

(4) *The Trust's consultants are not court experts: they do not have the expertise in preparation of Medico Legal reports and should not be expected to do so, particularly where it is not in connection with a patient under their care.*

Conclusion: The Rules and in particular the Practice Direction are clear as to the contents and format of a report. If that format is followed specific medico legal experience is not required. However, given the significant growth in the volume of work undertaken by the Court of Protection and in particular Section 21A or related challenges, it is no doubt a level of expertise that all consultant psychiatrists particularly dealing with the elderly will acquire if they have not already done so.

(5) *We understand a report in the proceedings has been prepared on a private instruction by Dr Gonzalez (of the Trust). There is a potential conflict of interests in seeking a further report from a consultant of the Trust.*

Conclusion: The court can see no potential conflict of interest in another consultant of the Trust preparing a report. Again the duty of the author of the report is fully set out in the Rules and Practice Direction.

(6) *The request was a publicly funded body into proceedings of which it has no involvement.*

Conclusion: The provisions of Section 49 are clear. There is a wide range in power to direct a report from an NHS body as the court considers appropriate. It is common for Section 49 Reports to be directed in this way.

(7) *Complying with the request places a significant and disproportionate burden on limited NHS resources.*

Conclusion: The court has sympathy with the effect of its order upon the Trust. However as is noted earlier no provision is made within Section 49 in relation to fees or expenses incurred by the author of the report (be it NHS body, Trust or otherwise). What the court will do is to carefully consider resources and listen to any argument from the Trust particularly in relation to the time for compliance and the scope of the work to be undertaken. That would appear to be both a reasonable and proportionate approach.

(8) *A consultant would need to cancel clinics to make time to prepare the report; putting vulnerable patients at risk.*

Conclusion: While this is noted the answer to 7 would seem to cover this.

(9) *There is no provision for costs of the report in order to enable the Trust to employ locum cover for the report author. The Trust is already under significant pressure to reduce its locum cover:*

Conclusion: I have already dealt with this in 7 above.

(10)Even where locum cover can be sourced this can be detrimental to patients if they are not able to see their usual consultant with whom they have built a trusting professional relationship. Consistency of care is an important factor in mental health care and should be maintained wherever possible.

Conclusion: As stated above every effort will be made to accommodate the preparation and extent of the report so as to limit wherever possible the disruption in healthcare provided by a consultant to his patients.

District Judge Bellamy therefore declined to vary or alter the principle behind the original order directing the s.49 report, although he noted that: "i*t must be right that compliance with any order is subject to reasonable adjustment on application by the Trust in relation to the scope and extent of any report ordered and the time for compliance. However such applications must be made promptly and supported by evidence on behalf of the Trust or NHS body*."

Comment

On the very specific facts of this case, an immediate question comes to my mind as to why District Judge Bellamy did not seek a report (under s.49) from a Special Visitor. If the issue to be addressed was that of P's capacity, and the court felt that it needed independent expertise in order, the obvious route to obtain that evidence is undoubtedly that provided for by the Special Visitor route. There may well have been reasons not apparent on the face of the judgment why such a course was not open to him, and, if so, then the course adopted would appear to have been both proportionate and reasonable. The conclusion that a public body cannot seek to recoup the costs of preparation of such a report is also undoubtedly correct.

The case, though, does raise a wider point about the importance of s.49 reports that may be at risk of being lost in the (understandable) concerns expressed by public bodies as to the time and resources that may be required where they are directed to provide such reports. The Court of Protection is a strange beast. It is regularly said to be inquisitorial in its jurisdiction: see, e.g. *Re G* [2014] EWCOP 1361 at paragraph 26. However, by comparison with the Family Division/Family Court, which is also said to discharge an inquisitorial jurisdiction, the Court is strangely underpowered – there is, in particular, no equivalent to a children's guardian (whether a consequence is that the role of litigation friend in the COP is being distorted is something Alex is working on at present). If COP judges are to be put in a position where they are able properly to assess the questions of P's capacity and best interests, it is crucial that they are, themselves, able to identify and call for such evidence as they see fit. Section 49 is therefore vital, both as regards the ability to call for reports from (Special) Visitors and for evidence from NHS bodies/local authorities. There is undoubtedly a price to be paid in consequence by such bodies, but, societally, it is a small one to pay for the proper determination of such cases.

Short note: learning disability and participation

In *Re Jake (A Child)* [2015] EWHC 2442 (Fam), Sir James Munby P has strongly reiterated the need to ensure that parents with learning disabilities are not excluded from proceedings relating to the welfare of their children. In a case concerned

with the medical treatment of a gravely ill 10-month old child, where the court ultimately endorsed an agreed order providing for the withholding of certain treatments in the event of deterioration, Sir James Munby P emphasised that:

> "*the fact that, sadly, both the father and, to a greater extent, the mother have their own difficulties is absolutely no reason at all why their views, their wishes, their feelings should not be taken fully into account by everybody involved in the process, whether treating clinicians or lawyers. Of course they have been fully involved in the process throughout, very properly, by the treating clinicians. [I emphasise] the point that the fact that the parents may lack capacity does not in any way … reduce the importance of listening to – whether it is the lawyers listening to or the doctors listening to – the views of the parent.*
>
> *The fact is, on the fundamentals, these parents, faced with this dreadful situation, very much understand the fundamental dilemmas and the fundamental problems. In relation to the fundamentals, they are, so far as I am aware, in just as good a position as any other parent to have views and to express those views. I would be very concerned if the thought … got about that somehow one pays less attention in these terrible and tragic circumstances to the views, wishes and feelings of parents just because they may have limitations than one would to other parents."*
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> *45. That leads on to the second point:*
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> *the demonstration that [the parents] may not be able to assess and evaluate all the hypotheticals on a range of possible future scenarios has got to be taken within sensible bounds. One asks, rhetorically, how many parents in this situation would actually be able to grapple with these profound issues which are, in part, tied up with very profound medical issues.*

This is very much (and correctly) in line with sentiments expressed previously by other judges, most fully Peter Jackson J in *An NHS Trust v Mr and Mrs H & Ors* [2012] EWHC B18 (Fam), in which the pithy point was made that in the analysis of welfare for purposes of s.4 MCA 2005 (which he applied by analogy): "*It is the validity of the views that matter, not the capacity of the person that holds them*."

Short note: habitual residence

In *Re NH (1996 Child Protection Convention: Habitual Residence)* [2015] EWHC 2299 (Fam), Cobb J gave some useful guidance about the circumstances in which a child will be considered to have no habitual residence for purposes of the 1996 Hague Child Protection Convention ('Hague 34'). The guidance is of relevance to practitioners concerned with adults with impaired capacity because:

(1) The authorities are clear that 'habitual residence' should be given consistent interpretation in instruments concerned with family law matters, including those concerned with the international protection of adults: see *An English Local Authority v SW* [2014] EWCOP 43;

(2) The 2000 Convention on the International Protection of Adults ('Hague 35') to which Schedule 3 to the MCA 2005 effectively incorporates into English law, is expressly intended to the mirror to Hague 34.

Cobb J noted that (as has also been held to be the case with Hague 35 and Schedule 3) habitual residence is to be assessed at the date of the hearing, rather than at the date of the issue of

the application. He further noted (at paragraph 39) that:

> "*It will, I consider, be a relatively rare case where it is impossible to establish a child's habitual residence; such a conclusion is likely to reflect a material level of rootlessness in a child, which is not common and may indeed be indicative of some interference with the child's emotional and/or physical welfare and development.*"

However, he noted that it would be wrong for him to "*strain to find facts to establish a habitual residence simply to achieve an outcome more generally contemplated by the 1996 Convention, particularly where the potential target of the determination is a country which does not itself support that conclusion*."

In reaching the conclusion that the English courts were entitled (and indeed required) to exercise the 'jurisdiction of necessity' to make welfare decisions in the case of a child with whom England and Wales had only tenuous connections, Cobb J identified a list of factors, but was ultimately most swayed by the fact that the authorities of the country of the child's previous habitual residence had (for reasons that are irrelevant here) made clear that they would not regard him as continuing to be so habitually resident, and specifically contended, indeed, that the child was one whose habitual residence could not be established.

Not all the factors identified by Cobb J in *NH*'s case would be equally relevant in the case of an adult with impaired capacity. In particular, it is questionable whether the purposes and intentions of their parents will be of relevance (save, potentially, where the adult is entirely dependent upon the parents for their care, as this may then factor into whether it can be said that their residence is likely to be permanent in the place of asserted habitual residence). However, the general observations and approached adopted are useful by analogy for those still finding their feet in the terra only slightly cognita of Schedule 3 to the MCA and Hague 34.

Unfairly disparaging of Counsel

Re G (A Child) [2015] EWCA Civ 834

In this case, a judge's findings of fact were set aside due to her unfair conduct of a trial and disparaging remarks made about counsel. The Court of Appeal recognised that judges had to manage hearings robustly and that this required intervention at times. However, in this case, the frequency of the judge's interventions, and their hostile nature and tone, created an impression of unfairness. Her findings were set aside and the case remitted to a different judge. The points made about case management apply equally in the Court of Protection and are all the more pertinent as the court's case load continues to swell.

Vulnerable Witness Consultation

The Family Procedure Rule Committee has published a new draft Part 3A of the Family Procedure Rules 2010 on Children and Vulnerable Persons: Participation in proceedings and giving evidence. The Committee is current seeking views on the draft rule and on some specific questions.

The consultation follows a report published by the Children and Vulnerable witness Working Group in March 2014. The working group was established by Sir James Munby to review judicial guidance for judges meeting children, including

consideration of how the voices of children and young people could be brought further to the fore in the family courts. The deadline for responding is 25 September 2015.

The full consultation document can be found here.

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Conferences at which editors/contributors are speaking

The Mental Capacity Act 2005 – Ten Years On

Alex will be delivering his paper, '(Re)presenting P', and Neil will be delivering, 'The (not so?) great confinement' at this major conference hosted by the University of Liverpool on 9 and 10 September 2015. For further details and to book, see here.

Court of Protection Practitioners' Association National Conference

Alex will be speaking at COPPA's national conference on 24 September 2015. For further details, and to book, see here.

Queen Mary University

Jill will be a discussant at the Rethinking Deprivation of Liberty in a Health and Social Care Context Conference at Queen Mary University of London on 30 September 2015.

Bromley Safeguarding Adults Board 2015 Conference

Annabel is speaking at this conference on 6 October 2015 about the role of the Court of Protection.

Jordan's Court of Protection Conference

Alex will be delivering, 'More Presumptions Please? Wishes, feelings and best interests decision-making' at Jordan's Annual Court of Protection Conference on 13 October 2015. For further details, and to book, see here.

Seventh Annual Review of the Mental Capacity Act 2005

Neil and Alex will both be speaking (along with Fenella Morris QC) at this annual fixture in York on 15 October 2015, under the auspices of Switalskis solicitors. For further details, and to book, see here.

Taking Stock

Neil will be speaking on 16 October 2015 at this annual fixture, arranged by Cardiff Law School and the University of Manchester, at the Royal Northern College of Music. For further details, and to book, see here.

Community Care Live

Annabel is presenting a legal masterclass on the Mental Capacity Act 2005 and Alex will be on a panel discussion on deprivation of liberty at

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.

Community Care Live 2015 in London on 3-4 November 2015. For further details, and to register for this event, see http://www.communitycare.co.uk/live/

Other conferences and training events of interest

Our friends Empowerment Matters are hosting an IMCA conference on 12 November at the Smart Aston Court Hotel in Derby, entitled 'Interesting Times – developments for IMCAs in practice and law.' For more details and to book, see here.

The charity, Living Well Dying Well, is holding its first annual national conference, 'Doing Death Differently' in London on 7 November 2015. For more details and to book, see here.

Peter Edwards Law have released details of their autumn training courses on matters MCA and Care Act related. The full details of (very well received) courses can be found here.

Chambers Details

Our next Newsletter will be out in early 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 Newsletter in the future please contact marketing@39essex.com.

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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, 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. 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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Annabel appears frequently in the Court of Protection and is instructed on behalf of the Official Solicitor, individuals, local authorities, care homes and health authorities. Her COP practice covers the full range of issues in health and welfare, property and affairs, and medical treatment cases, with particular expertise in international cross-border matters. Annabel also practices in the related fields of human rights and community care. 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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