

More presumptions please? Wishes, feelings and best interests decision-making

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As the UN Convention on the Rights of Persons with Disabilities (CRPD) gains impetus, questions are increasingly being raised over the extent to which the Mental Capacity Act 2005 (MCA) complies with its key tenets. In this article, we argue that the way the MCA is being applied in the Court of Protection does go some significant way towards providing a CRPD-compliant model of best interests decision-making, giving proper respect for the ‘rights, will and preferences’ of the individual lacking capacity. Through examining the case-law, we suggest that it is possible to see a trend emerging whereby much greater emphasis is being given to identifying, and giving priority to, the wishes and feelings of the individual concerned in the best interests assessment, such that clear and convincing justification is required before they are departed from. It seems then that without even needing to invoke the CRPD, our courts have organically created (or identified) the very presumption that the Essex Autonomy Project Report considered compliance with the CRPD to require. We also suggest that approach to be one that is already mandated by Art 8 of the European Convention on Human Rights (ECHR), much more familiar territory for most lawyers and judges.

Introduction

As the UN Convention on the Rights of Persons with Disabilities (CRPD) gains impetus, questions are increasingly being raised over the extent to which the MCA 2005 complies with its key tenets. In one key regard this is especially true.

Article 12(4) CRPD dictates that the ‘rights, will and preferences’ of the individual must be respected in any measures relating to the exercise of legal capacity. As set out below, what ‘respect’ means in this regard is hotly contested, but the working presumption is the MCA as worded fails to afford it.

In this article, though, we suggest that the way the MCA is being applied in the Court of Protection does go some significant way towards providing a CRPD-compliant model of best interests decision-making (even if, for the most part, this is unacknowledged by the judges themselves). Put another way, it may be that we can, in fact, already discern from the case-law an understanding of what ‘respect’ might look like. Importantly, we

will also suggest that approach is one that is already mandated by Art 8 of the European Convention on Human Rights (ECHR), much more familiar territory for most lawyers and judges.

We readily acknowledge at the outset that this is a very modest contribution to a debate commenced by others, even prior to the current focus on the CRPD. Two examples we would note, in particular, are the seminal article by Jonathan Herring entitled ‘Losing It? Losing What? The Law and Dementia’ (2009) 21(1) *Child and Family Law Quarterly* 3–29 – a shorter version of this article entitled ‘Legal Issues surrounding dementia’ also appeared in [2011] Eld LJ 182), and the work of Mary Donnelly (see in particular *Healthcare Decision-Making and the Law* (Cambridge University Press, 2010)). We hope, though, that it is a contribution that may help bring some of the more theoretical discussions into the court room.

5 Articles **Background**

The MCA was the result of many years of dedicated reform effort, commencing with a Law Commission Consultation Paper in 1991. While the need to have a mechanism in place to make decisions on behalf of those lacking the cognitive capabilities to do so was not seriously under debate (the wisdom of substituted decision-making was scarcely questioned until the paradigmatic shift brought about by the CRPD), the basis on which such decisions were to be made was less clear. Drawing on the frameworks in place in other jurisdictions and under the pre-existing common law, two alternative mechanisms were suggested to facilitate the making of these decisions. Substituted judgment (or surrogate decision-making) attempts to reach the decision which the person would themselves have made if they had capacity. The alternative is an objective assessment of what is in their ‘best interests’. While the ‘best interests’ assessment had dominated healthcare decisions since the decision of *Re F (An Adult: Sterilisation)* [1990] 2 AC 1, it may be noted that in at least one domain, that of statutory wills, the status quo prior to the MCA was one of substituted judgment, whereby the judge was required to consider the ‘antipathies’ and ‘affections’ of the particular person concerned (*Re D(J)* [1982] Ch 237).

After much consultation, it was the objective mechanism that found favour with the Law Commission, who highlighted the difficulties posed by substituted judgment when making decisions for those who have never had capacity (*Mental Incapacity*, Law Com No 231 (HMSO, 1995), para 3.25), as well as the effect it had of giving a lower priority to the person’s present emotions than those anticipated in the person had they had unimpaired capacities (para 3.29).

The result of this long drafting process was (for these purposes) ss 1(5) and 4 MCA 2005 which provide – in combination – the requirement that decisions should be made in the person’s ‘best interests’, taking into account a number of relevant factors. Crucially, under s 4(6), the decision-maker must, ‘so far as is reasonably ascertainable’, consider:

- (a) the person’s past and present wishes and feelings (and, in particular, any relevant written statement made by her when she had capacity),
- (b) the beliefs and values that would be likely to influence his decision if she had capacity, and
- (c) the other factors that she would be likely to consider if she were able to do so.

Section 4(6) is only one of the list of factors in the ‘checklist,’ however. In addition, the decision cannot be made merely on the basis of the age or appearance of the person lacking capacity (s 4(2)); the likelihood of the person regaining capacity must be considered (s 4(3)); and the individual must, as far as is reasonably practicable, be permitted and encouraged to participate in the decision (s 4(4)). The decision-maker must never be motivated by a desire to bring about death (s 4(5)), and must take account ‘if it is practicable and appropriate to consult them’, the views of others engaged in the care of the person, or interested in their welfare (s 4(7)).

On the face of the statute, no one of these factors is to take priority, indeed, the Report of the Joint Committee on the Draft Mental Incapacity Bill (HL 189–1, HC 1083–1 (TSO, 2003)) was clear that this was deliberate: determining the best interests of the individual ‘required flexibility’ best achieved by ‘enabling the decision-maker to take account of a variety of circumstances, views and attitudes which may have a bearing on the decision in question’. It was for this reason that they did not recommend any weighting or giving priority to the factors involved in determining best interests (at para 89). In a similar vein, as the government identified, there was a deliberate policy decision that ‘a prioritisation of the factors would unnecessarily fetter their operation in the many and varied circumstances in which they might fall to be applied’ (*Government Response to the Scrutiny Committee’s Report on the Draft Mental Incapacity Bill* (February 2004) Cm 6121, p 15).

This approach was carried through into the Code of Practice accompanying the MCA.

While the individual's wishes and feelings, beliefs and values 'should be taken fully into account', they will 'not necessarily be the deciding factor' (para 5.38).

Notwithstanding the Law Commission's insistence that, 'the two tests need not be mutually exclusive', instead pushing for a compromise 'whereby a best interests test is modified by a requirement that the substitute decision-maker first goes through an exercise in substituted judgment' (*Mental Incapacitated Adults and Decision-Making: A New Jurisdiction*, Law Com No 128 (HMSO, 1993), 2.4), the approach adopted in the MCA did, in the view of Lewison J, 'mark a radical change in the treatment of persons lacking capacity' (*Re P (Statutory Will)* [2010] Ch 33, [2009] COPLR Con Vol 906, at [36]).

Such a change was not unanimously accepted – indeed, that approach was heavily criticised by the Scottish Law Commission as not giving 'due weight to the views of the adult, particularly to wishes and feeling which he or she had expressed while capable of doing so' (*Report on Incapable Adults*, Scottish Law Commission Report No 151 (1995), para 2.50), and the Adults with Incapacity (Scotland) Act 2000 was very deliberately framed around the principles of benefit, not best interests.

The court record may however demonstrate this concern should be seen as more theoretical than real.

The case-law evolution

Given the decision not to prioritise any of the factors in s 4, it is of little surprise that the case-law on the relative weight that should be ascribed to a person's wishes and feelings superficially lacks coherence.

We suggest, however, that a dialogue can be seen emerging in the case-law between two lines of thought: on the one hand that a rebuttable presumption exists in favour of giving effect to a person's wishes and feelings; and on the other that the individual's wishes and feelings represent just one factor in the balance sheet which should not receive special consideration.

This dialogue found its roots in *Re S and S (Protected Persons), C v V* ([2009] WTLR 315, [2008] COPLR Con Vol 1074) where talk of 'presumptions' first emerged. Her Honour Judge Marshall QC forcefully remarked (at [57]):

'... where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (ie whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this.'

It would, in Her Honour Judge Marshall's view (at [58]), take significant detriment to P to be sufficient to outweigh the 'sense of impotence' and 'frustration' of having one's wishes overruled. She questioned (at [55]):

'What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?'

Her Honour Judge Marshall's conclusions at para [57] could be criticised for the apparent ease with which the presumption she identified could be rebutted on grounds reflecting the concerns of others. However, her approach nonetheless represented a serious attempt to grapple with the balance between empowerment and protection contained in the MCA. As she noted, the empowering ethos underlies much of the Act, including the presumption of capacity in s 1(2); the duty to support the person in making their own decision (s 1(3)); and the duty on the decision-maker to involve the

individual in decisions (s 4(4)). We will return to Her Honour Judge Marshall's judgment in our concluding section.

The approach espoused by Her Honour Judge Marshall was however, short-lived. No sooner had the judgment been handed down in *Re S and S*, than Lewison J responded in *Re P* ([2009] EWHC 163 (Ch), [2009] COPLR Con Vol 906 at [41]), that Her Honour Judge Marshall 'may have slightly overstated the importance to be given to P's wishes'. Lewison's approach found favour with Munby J in *Re M (Statutory Will), ITW v Z and Others* ([2009] EWHC 2525 (Fam), [2009] COPLR Con Vol 828) the latter specifically endorsing the 'compelling force' of the judgment at [28]. Relying on the drafting of the Act, Munby J was clear that (at [32]): '[t]he statute lays down no hierarchy as between the various factors which have to be borne in mind', and (at [35]) while 'P's wishes and feelings will always be a significant factor to which the court must pay close regard', 'the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific'. Munby J indicated that the important considerations in determining the weight to be ascribed to the wishes and feelings of the individual were (at [35](iii)):

- 'a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings ...
- b) the strength and consistency of the views being expressed by P;
- c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to;
- d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
- e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.'

The case-law that follows is largely characterised by a dialogue between these two competing views: while *VAC v JAD and Others* [2010] EWHC 2159 (Ch) and *NT v FS and Others* ([2013] EWHC 684, [2013] COPLR 313, noted at [2013] Eld LJ 239) faithfully reiterate the words of Munby J in *ITW*, giving no especial weight to the person's own wishes, other judgments are more sympathetic in this regard. *Re G(TJ)* ([2010] EWHC 3005 (COP), [2010] COPLR Con Vol 403) is a powerful example (see the article on the implications of this case by S Hamilton at [2011] Eld LJ 331). Drawing on the previous case-law, and the work of the Law Commission pre-MCA, Morgan J concluded that the best interests assessment can encompass substituted judgment, and in the absence of any countervailing factors, respect for what the court can identify to have been P's wishes can define what would be in her best interests. While the 'court is not obliged to give effect to the decision which P would have arrived at' [37], they are obliged to consider it, and it may be that it is in the best interests of P for the court to give effect to the wishes which P would have formed on the relevant point, if he had capacity. While talk of 'presumptions' is notably absent, the approach initially espoused by Her Honour Judge Marshall certainly seems to underpin the general tenor of the judgment.

It was against this backdrop, that the MCA first came before the Supreme Court in *Aintree University Hospital NHS Foundation Trust v James* ([2013] UKSC 67, [2013] COPLR 492, noted at [2014] Eld LJ 32). A crucial decision in many respects, the scrutiny given to the MCA has, we suggest, redefined the role of wishes and feels in the best interests calculation. The purpose of the best interests test was, in the view of Lady Hale, 'to consider matters from the patient's point of view' (at [45]):

'Insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.'

In placing the emphasis on the patient's own views, and by stressing the importance of considering decisions from the perspective of the individual concerned, the Supreme Court lent powerful support to the view of Her Honour Judge Marshall in *Re S and S*, and more recently, Morgan J in *Re G(TJ)*. It confirmed the place of the individual at the centre of the assessment, recognising the subjectivity that any assessment of an individual's best interests must inevitably entail.

At almost exactly the same time as the judgment in *Aintree* was handed down, an almost quintessentially '*Aintree-compliant*' judgment was given in *Re M (Best Interests: Deprivation of Liberty)* ([2013] EWHC 3456 (COP), [2014] COPLR 35, noted at [2014] Eld LJ 38), where Peter Jackson J had to decide whether it was in the interests of the individual to be forced to reside in a care home against her wishes to return home, in order to ensure the management of her diabetes. In deciding that she should be entitled to return home, Peter Jackson J acknowledged that 'the court must surely have regard to the person's own assessment of her quality of life', rather than tirelessly striving to prolong life at all costs (see para [38]).

Re M is not alone in this regard. Decisions in *Westminster City Council v Sykes* [2014] EWCOP B9, and *Newcastle-upon-Tyne Foundation Trust v LM* [2014] EWHC 454 (COP) show the individual increasingly taking centre stage in determinations about their best interests. Hayden J's scrupulous search to identify the wishes and feelings that the individual would have had as to the continuation of artificial nutrition and hydration (ANH) in *Sheffield Teaching Hospitals NHS Foundation Trust v TH and Another* [2014] EWCOP 4 was remarkable. No less remarkable was the criticism in the same case of the approach of the Official Solicitor. Hayden J felt constrained to record that 'the Official Solicitor's lawyers appear not to share my analysis of the cogency and strength of TH's wishes regarding his treatment' and continued (at [55]):

'... I confess that I have found this surprising. If I may say so, they have

not absorbed the full force of Baroness Hale's judgment in *Aintree* and the emphasis placed on a "holistic" evaluation when assessing both "wishes and feelings" and "best interests". They have, in my view, whilst providing great assistance to this court in ensuring that it has the best available medical evidence before it, focused in a rather concrete manner on individual sentences or remarks. To regard the evidence I have heard as merely indicating that TH does not like hospitals as was submitted, simply does not do justice to the subtlety, ambit and integrity of the evidence which, in my judgment, has clearly illuminated TH's wishes and feelings in the way I have set out.'

Hayden J concluded his judgment by making the important point that (at [56]):

'... whatever the ultimate weight to be given to TH's views it is important to be rigorous and scrupulous in seeking them out. In due course the clarity, cogency and force that they are found to have will have a direct impact on the weight they are to be given. "Wishes" and "best interests" should never be conflated, they are entirely separate matters which may ultimately weigh on different sides of the balance sheet.'

Although, as Hayden J – entirely properly – indicated in *TH*, wishes and best interests are not synonyms, we would suggest that it would be quite possible to contend that the courts are increasingly narrowing the distinction (or, putting it another way, moving towards substituted judgment).

The recent decision of Pauffley J in *United Lincolnshire NHS Trust v N* [2014] EWCOP 16, [2014] COPLR 660, and its striking contrast to the approach previously adopted by Baker J in the case of *W v M* [2011] EWHC 2443 (Fam), [2012] COPLR 222 (noted at [2011] Eld LJ 360), encapsulates this shift in attitude. Both cases concerned the continued treatment of patients in a minimally conscious state (MCS). Whilst there are grounds to distinguish the two, in both the ultimate question was the same, namely whether the

continued provision of artificial nutrition and hydration (ANH) was in the patient's best interests. In *W v M*, Baker J held that the 'conventional' balance sheet should be applied to determining where a patient's best interests lay in continuing life-sustaining treatment. Despite accepting evidence from her family that she would not wish to live like that, even having been presented with details of a specific incident where M expressed views to the effect that it would be 'better to let Tony Bland die', Baker J ultimately concluded that 'it would in my judgment be wrong to attach significant weight to those statements made prior to her collapse'. As there was no evidence that she had specifically considered the question of withdrawal of ANH, or the continuance of treatment when in an MCS, the sanctity of life should prevail (at [249]).

It is not clear that N's comments in *United Lincolnshire* were any more carefully considered than those of M when it came to determining what she would have wanted in the position she now found herself. The evidence, centring around a single conversation N was reported by her daughter to have had with a friend, where both professed they would not wish to live with a reduced capacity if they were involved in a car accident, was scarcely more convincing, yet Pauffley J appeared to accord much greater weight to it than Baker J was prepared to do. While setting out the strong presumption in favour of life that *W v M* adhered to, she went on to draw heavily from the judgment of Lady Hale in *Aintree*, highlighting the need for the court to 'put themselves in the place of the individual patient and ask what his attitude is or would be likely to be'. For all that she followed the balance sheet approach of *W v M*, her approach was markedly different: even in the absence of an applicable advanced decision, 'what the views of the patient might be, and what the views of the family are, are highly material factors when considering best interests, although not determinative' (at [58]), drawing on the dicta of Waller LJ in the pre-MCA authority of *An NHS Trust v (1) A and (2) SA* [2006] LS Law Medical 29. In the circumstances, Pauffley J was 'utterly convinced' (at [66]) that continued

treatment would not be in N's best interests, and accordingly sanctioned not only the decision not to seek to restart ANH, but also the withdrawal of intravenous fluids and dextrose.

We could give further examples where courts have sought loyally to put themselves in the shoes of P – that of Cobb J in *An NHS Trust v Ms X* [2014] EW COP 35, [2015] COPR 11 being one (see paras [58] and [59]). However, we must certainly acknowledge that there are clearly outliers to the trend identified above. In *The Mental Health Trust and Others v DD and Another (No 1)* [2014] EW COP 11, for instance, Cobb J was forced to decide whether to accede to DD's wishes and allow for a home birth without social or health care assistance, despite an 'extraordinary and complex' obstetric history including three caesarean sections and thrombo-embolic disease. Having adopted the approach of Hayden J in *Sheffield Teaching Hospital NHS Trust*, and quoted extensively from *Aintree*, Cobb J nonetheless held that:

'while giving due weight to her wishes, and her fundamental rights . . . I nonetheless come to the clear conclusion that it would be in her best interests that she should be delivered of her baby by caesarean section.' (at para [137])

Cobb J in subsequent judgments (the last being *Sheffield Teaching Hospital NHS Trust*), authorised a series of increasingly draconian measures including, ultimately, forced sterilisation of DD.

Cobb J in DD's case was confronted with a series of dilemmas that we would suggest would sorely tax the Committee on the Rights of Persons with Disabilities – the CPRD being noted in passing in his judgment, but not addressed directly by him, being an unincorporated international instrument with no direct effect (*Sheffield Teaching Hospital NHS Trust* at [102]). His analysis can be criticised in many ways, but not – we suggest – for its lack of rigour.

We perhaps cannot be so charitable about the other major outlier, *RB (By His*

Litigation Friend the Official Solicitor v Brighton and Hove City Council [2014] EWCA Civ 561, [2014] COPLR 629. The case concerned – in form – a challenge to a standard authorisation for deprivation of liberty under Sch A1 granted in favour of a man in a care home who wished to leave to resume independent living, and, in particular to continue drinking. In substance, it concerned the question of the justification for preventing an individual continuing to live in the same fashion that they had prior to any doubts being raised as to their capacity, in circumstances where it was clear that his wishes remained entirely consistent pre – and post – the contended loss of capacity to make the decision.

The Court of Appeal’s analysis of the place of RB’s wishes and feelings was scant in the extreme (at [81]):

‘The MCA section 4(6)(a) requires both the Council and the court to take those wishes into account. I do so. Unfortunately it is not possible for the time being to comply with those wishes.’

Their analysis as to the balance between protection and empowerment in the Act was even shorter (at [83]):

‘Without proper safeguards a regime of compulsory detention for medical purposes would be unacceptable, indeed Orwellian. However, the carefully drawn provisions of the MCA together with the reviewing function of the court ensure that the power to detain is not misused. *In the present case deprivation of liberty is necessary in order to protect RB from seriously injuring himself. That must be in his best interests.*’ (our emphasis)

It will, of course, be the case that judges to some extent reverse-engineer the weight to be placed on wishes and feelings depending on what may result. They are, after all, only human: while the judge may comfortably hand back the decision over where to reside to the incapacitated individual, a potentially self-destructive choice – especially one that may involve more than one life (as in *DD*) may lie less comfortably within a moral

framework that will be acceptable to most judges. The decision in *RB v Brighton and Hove Council* however, remains hard to explain, and we await with very considerable interest the views of the Strasbourg court upon the application outstanding to that court on RB’s behalf.

Although we accept that some may consider that we are seeking to impose an artificial coherence upon case-law (and there will always be anomalies), we suggest that a trend is readily discernible: greater emphasis is undoubtedly being given to identifying the wishes and feelings of the individuals concerned (in particular those wishes identified prior to the loss of capacity); these wishes are taking on a much higher priority in the assessment of best interests; and clear and convincing justification is required before they are departed from.

Nowhere is this perhaps more evident than in a decision from November 2014 that appeared on Bailii in late June 2015. In *Re Jones* [2014] EW COP 59 (a statutory will case), District Judge Eldergill noted (at [64]–[65]):

‘As Baroness Hale made clear in *Aintree*, the purpose of the best interests test is to consider matters from the particular individual’s point of view. Occasionally there may be circumstances such as those referred to by the President [in *Re M, ITW v Z and Others* [2009] EWHC 2525 (COP)] or the avoidance of post-death litigation which justify departing from a person’s clear past and present wishes and beliefs. However, in the ordinary case the Mental Capacity Act is not a vehicle for imposing on people views, wishes and feelings that clearly are contrary to those they held before losing capacity, do not hold now and would not hold if they regained capacity, however right those views may be, and however unworthy P’s views are according to most people’s standards.

The onset of mental incapacity is not an opportunity for moral correction.’

Or, in similar vein, in *Re DT; Public Guardian v IT and Others* [2015] EW COP

10, [2015] COPLR 225 (noted at [2015] Eld LJ 138), where the Public Guardian sought to remove DT's sons as his attorneys under an EPA, against his express wish to retain them as attorneys. Senior Judge Lush felt little hesitation in allowing himself to be reminded of the presumption set out by Judge Marshall in *Re S and S* (making no reference to Lewison J's qualification in *Re P*, or the subsequent decision of Munby J in *ITW*). In the absence of anything 'irrational, impracticable or irresponsible in DT's wish that his sons should continue to act as his attorneys', Senior Judge Lush found, there was nothing to 'justify overriding his wishes' (at para [46]).

Where are we going from here?

This is not the place to engage in a detailed discussion of the requirements of the CRPD (ably covered by Lucy Series in 'Comparing old and new paradigms of legal capacity' [2014] Eld LJ 62). As noted at the outset, one particular flashpoint however, is as to the meaning of the requirement in Art 12(4) of the Convention, which requires states to 'ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person'. Strictly interpreted, this may be taken to rule out substitute decision-making altogether. By its nature, a decision taken on behalf of someone may well conflict with, or override, the wishes of that individual. Certainly this is the position adopted by the UN Committee on the Rights of Persons with Disabilities in its first General Comment (GC1) On equal recognition before the law', April 2014 (GC1, at para 29):

'All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests'

As the Essex Autonomy Project (EAP) has identified in its report *Achieving UNCRPD Compliance* (summarised in Wayne Martin's article 'The MCA under scrutiny: meeting the challenge of CRPD compliance' [2015] Eld LJ 32), the definition of 'respect' – the word in the Convention – is ambiguous.

However, it would seem to fall somewhere short of a requirement that one 'complies' or 'adheres to' the individual's wishes. Nonetheless, the EAP suggested that the current requirements of s 4(6)(a) MCA 2005 do not go far enough. The EAP has proposed that the MCA be amended to establish a rebuttable presumption that, when a decision must be made on behalf of a person lacking in mental capacity, and the wishes of that person can be reasonably ascertained, the best interests decision-maker shall make the decision that accords with those wishes. We would certainly agree that such would be an improvement, although we would also add that (a) the MCA should make clear that rebutting that presumption requires justification; and (b) even if what is required to rebut that presumption need not be set out expressly in statute, the principle must be that, the further the departure from P's wishes, the more compelling the justification required.

As we have sought to demonstrate in this article, however, it is possible to argue that, without even needing to invoke the CRPD, our courts have organically created (or identified) the very presumption that compliance requires. Indeed, in their paper, the EAP draw considerable inspiration from the approach of Her Honour Judge Marshall in *S and S* (as do we, although we would be cautious about adopting the bases she identified for departing from the presumption for the reasons set out above).

Importantly, further, we suggest that, for those for whom the sun-lit uplands of CRPD compliance are still a conceptual step too far, we suggest that a presumption of the nature identified here reflects a construction, perhaps the only construction, of the MCA that sits comfortably with Art 8 ECHR. The right to respect for private and family life has been broadly construed, encompassing every individual's autonomy, as well as 'the physical and psychological integrity of a person' (*YF v Turkey* (2004) 39 EHRR 34 at para [33]). This right, possessed by all in equal measure, is not limited to those with capacity: *Re E* [2012] EWHC 1639 (COP), [2012] COPLR 441 at [124]. We suggest that it is clear that going

against the autonomous expression of the will, even that of someone lacking capacity, infringes Art 8. Applying standard Strasbourg principles, convincing justification must be given before such an infringement can be accepted. As noted above, it may in due course be that Strasbourg will pronounce upon this question in RB's case.

We should emphasise, finally, that we do not doubt that valid reasons may well be given to override the presumption we identify (whether that presumption is erected in reliance upon the ECHR or the CRPD). There will remain cases where compliance with known wishes and feelings will create

such obviously adverse effects on the individual that the courts are right to hesitate before following through. As identified above, *DD* is perhaps the quintessential 'hard' case. Further, there will inevitably be cases where, whatever the quality of the support provided, an individual declines to amend a self-destructive decision. In such cases there is no middle ground: either a person's wishes will be given effect, or they will not. We make no apology for putting ourselves in the camp of those who agree that there will be circumstances in which they should not be – but we need to be better in identifying to the person and to society why not. 'Respect' can mean no less.