Mental Capacity Law Newsletter October 2015: Issue 59

Court of Protection: Health, Welfare and Deprivation of Liberty

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Introduction

Welcome to the October 2015 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: further upheaval in the *Re X* procedure, a paradigm best interests decision, clarity as to CTOs and a further clash between the COP and public law;

(2) In the Property and Affairs Newsletter: overseas deputies and changes to the OPG's supervision model;

(3) In the Practice and Procedure Newsletter: the (indemnity) cost of getting it wrong and COP statistics;

(1) In the Capacity outside the COP Newsletter: the appointment of the Chair of the National Mental Capacity Forum, a new toolkit for advance decisions, Jersey's draft capacity law and the social model of disability as it applies in relation to dementia;

(2) In the Scotland Newsletter: the Glasgow Sheriff Court Practice Note critically dissected and MWC monitoring reports analysed.

We also take this opportunity to invite you to our seminar on capacity, competence, clients and witnesses on 3 November, and also to highlight our new guidance note on best interests assessment.

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

Table of Contents

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.

Deprivation of liberty applications: all change (again)

Re NRA & Ors [2015] EWCOP 59 (Charles J)

Article 5 ECHR – Deprivation of liberty

Summary

Re NRA is the latest instalment in the *Re X* saga, in which the Court of Protection attempts to deal with the fallout from the judgment of the Supreme Court in *Surrey County Council v P and others (Equality and Human Rights Commission and others intervening), Cheshire West and Chester Council v P and another (Same intervening) [2014] UKSC 19 [2014] AC 896* ("*Cheshire West*"). In it, Mr Justice Charles, the Vice President of the Family Division, reaches the following key conclusions, the background to which are explained in more detail below:

1. The streamlined "*Re X*" procedure devised by Sir James Munby P should be reintroduced, subject to a number of improvements aimed at drawing more information from social services authorities at the outset;

2. Family members, in particular family members that have been devoted to caring for P for years, are generally to be trusted by the Court as capable of advocating for P's best interests;

3. In the large number of cases in which there is every reason to trust the judgment of family members, P need not therefore be joined as a party to proceedings. To do so would add no value and would, on the contrary, cause some detriment. This finding marks a clear disagreement with the Court of Appeal in *Re X*;

4. In practice it may be preferable for family members to be formally appointed as representatives under the new COPR 3A, because in that capacity the Court can exercise a degree of direction over them, they have a formal status, and there is an identified person who is responsible for, e.g., keeping P's arrangements under review;

5. Where there was no suitable family member to consult then, rather than falling back on joining P as a party, the Court should fill the deficit itself by taking on a more inquisitorial role, principally though the increased use of s.49 reports and witness summonses.

Background

By way of background, Sir James Munby, the President of the Family Division, had tried in *Re X* [2014] EWCOP 25; [2015] 1 WLR 2454 to develop a streamlined paper procedure for non-controversial deprivation of liberty applications, to deal with the expected increase in such applications following *Cheshire West*. On appeal, the Court of Appeal (a) decided that the President's rulings were, for technical reasons, a procedural nullity and therefore of no effect, but (b) expressed the *obiter* view that, in any event, the President had erred in finding that P did not need to be joined as a party in all cases involving a deprivation of liberty. On the contrary, each of the judges of the Court of Appeal considered (*obiter*) that P did need to be a party, with all the procedural consequences that flowed from that.

The issue for the Court in Re NRA

The problem with which the Court of Protection therefore continued to be faced after *Re X* was (a) that a system was still needed in which P had Article 5-compliant procedural safeguards in

cases involving a deprivation of liberty; but (b) those safeguards had not to be not so onerous that they diverted resources away from frontline services, caused unnecessary interventions in the lives of P and those who care for P, or resulted in so much delay that they no longer provided a practical and effective procedural guarantee after all.

Charles J's solution

Charles J considered that the three things that needed to be done in any welfare case were to:

1. Elicit P's wishes and feelings and make them known to the Court without causing P unnecessary distress;

2. Critically examine, with P's best interests in mind, and with a detailed knowledge of P, the pros and cons of the proposed care package and whether it was the least restrictive available option;

3. Keep the implementation of the care package under review and raise points relating to it and to changes in P's behaviour or health.

Charles J drew on his long experience in the Family Division to conclude that family members, particularly those who had cared for P and fought their corner for many years, would in general be the best placed to fulfil the three tasks above. And that being the case, he considered that it made no difference what hat the family member wore in so doing: whether they advocated in their own right, whether they did so as litigation friend for P, or whether they acted as P's Rule 3A representative. Either way, P would have the necessary procedural guarantees, without the need for an overly burdensome or interventionist process involving joining P as a party.

In light of this conclusion, Charles J had the unenviable task of departing from the forceful logic of a unanimous Court of Appeal in *Re X* that, for the reasons given in that case, Article 5 required the joinder of P as a party in all cases involving a deprivation of liberty. Under the telling subheading "*Flaws and gaps in the reasoning of the Court of Appeal*", Charles J did so by holding that the Court of Appeal in *Re X* had failed to properly appreciate that, first, joining P as a party in all cases was unworkable in practice and so did not provide the practical and effective procedural safeguard sought and, second, that welfare cases in the Court of Protection were to be distinguished from all other deprivation of liberty cases in that:

1. The determinative issue in such cases is not whether P should be deprived of their liberty, but whether a particular arrangement is the least restrictive option in their best interests. They were not, as such, cases about whether P should be deprived of their liberty. The fact that such an arrangement is a deprivation of liberty was only relevant to the frequency of review required, not to the substantive issues the Court has to determine;

2. As such arrangements are necessarily in P's best interests, they differ qualitatively from, for example, imprisonment following criminal conviction or detention under the Mental Health Act 1983;

3. The issues in the Court of Protection are more investigatory than adversarial.

Charles J did not ignore the possibility that a streamlined procedure could allow some cases to slip through the net. But this consideration was outweighed by the facts that (a) the vast majority of the time this would not be the case; (b) in a

non-contentious case, little value was to be added by invoking the full panoply of procedural safeguards associated with P having party status; (c) no system, however much safeguarding it offered, would pick up all problem cases; and (d) having a full procedure in all cases was detrimental in that it diverted resources away from frontline services, interfered to an unnecessary degree in private family arrangements, and was unworkable.

Improvements to the Re X process

Charles J essentially agreed that the current *Re X* forms properly direct the minds of the authors to the key issues and elicits the correct information for the Court. However, he considered that it would be an improvement to the forms if they required the key provisions of the care package to be summarised, and the questions currently asked in the form to be answered by reference to that summary. The summary should in particular include the level of supervision (1:1, 2:1 etc), the periods of the day when supervision is provides, the use or possible use of sedation or restraint, the use of assistive technology, and what would happen if P were to try to leave. The form should also include:

1. if the proposed placement has not yet taken place, information about any transition plan;

2. if P is already living at the placement, the date P moved there, where he or she lived before, why the move took place, and how the move was working,

3. any recent change or planned change in the care package and the reasons for it';

4. an explanation as to why the identified sedation or restraint are or may be used, and why they are the least restrictive measures to deal with the relevant issues;

5. information as to any tenancy agreement, and who has the authority or needs to apply for the authority to sign it on P's behalf,
6. a question about why it is thought the case is not controversial and can be dealt with on the papers;

7. a question directed to participation of family and friends over the years, the nature of the care they have provided, their approach to issues relating to its provision in the past, and so the reasons why it is thought that they will provide objective and balanced support for P in his or her best interests;

8. a question that requires the reasons why family and friends support the care package to be set out;

9. a question directed to the willingness of a family member or friend to be a litigation friend or a Rule 3A representative and their ability to keep the care package under review;

10. questions directed to the suitability of family members of friends for such appointment that direct the author of the answers to particularise the answers by reference to the history of P's care;

11. a question on what options have been considered and why the care package advanced has been chosen as the appropriate one;

12. any conflicting interests, e.g. between different service users, within the proposed placement;

13. an analysis of and reasons for any restrictive practices, as to which the production of actual care notes rather than a lengthy summary could be very informative;

14. information, perhaps by way of statement, from actual carers.

Where there is no family member available

Finally, Charles J considered what would happen where no family member was available. He recognised the need for some kind of independent scrutiny of the local authority's arrangements, and considered that absent such scrutiny the necessary procedural safeguards for P would probably be lacking. His solution, ultimately, is that such scrutiny is to be provided by the Courts. Judges considering such applications should pick up on the absence of a family member on whom it could rely, and should seek instead to obtain further (independent) information by ordering s.49 reports and making witness summonses.

Comment by Ben Tankel[1]

One sympathises very much with the concerns expressed by Mr Justice Charles about the ability of the system to cope with the fallout from *Cheshire West*, and his attempt to provide a workable solution to the logistical problems that that judgment has caused. His judgment is unorthodox, however, in that it is so clearly policy-driven: it expressly weighs up the risks of a streamlined procedure versus the costs of a full procedure, and opts for policy reasons (albeit supported by careful reference to the law) for the former. One might well ask whether, notwithstanding the unparalleled experience of the presiding Judge, the Court is the body best placed to make policy decisions of this nature.

There is a further query as to whether, in cases in which there is no family member available, the proposed solution of a more inquisitorial Court of Protection expects too much of district judges with their busy lists and piles of box work. Will District Judges really have the time to identify and follow up, of their own volition, potential problem cases? There is perhaps reason to doubt that, given the time and other pressures on them, they may not.

These reservations notwithstanding, it seems likely that, for now at least, *Re NRA* will lead to the reintroduction of the streamlined *Re X* process (currently on hold following the judgment of the Court of Appeal in *Re X*), modified to a greater or lesser degree. But given the clear difference of view between the Court of Appeal in *Re X* and Charles J in *Re NRA*, the question of whether P should be joined as a party remains wide open. *Re NRA* is very unlikely to be the last word on the matter.

Practice update

As at the point of going to press, the precise procedures to be implemented by the Court of Protection to reflect the judgment of Charles J (and the timing of the necessary amendments to the DOL 10 form) are not yet clear. Further, we should note that it is not immediately clear from the judgment whether Charles J envisaged that it would be possible for the court to make the necessary appointment of a family member/friend as a Rule 3A representative and to make the order authorising the deprivation of liberty at one and the same time, or whether there would need to be two stages to the process. However, given the overall tenor of the

[1] Junior Counsel for the Official Solicitor, who also prepared the summary above, for which we are very grateful.

judgment, we suggest that, in implementing the judgment, the courts will be likely to be striving to minimise the number of steps required where such can properly be done. We will update our guide when we are able to do so; in the interim we strongly suggest that:

1. applications for orders authorising uncontentious deprivation of liberty outside care homes and hospitals continue to be brought on the COP DOL 10 form, but that the accompanying witness statement also addresses the questions outlined above;

2. steps are taken to identify, where possible, a family member or friend who would be in a position to fulfil the representative and review roles identified by Charles J, and confirmation that such family member/friend is in agreement with the arrangements. Ideally, a statement from the family member/friend should be submitted with the application. This will potentially enable the court to make the order authorising the arrangements on the first occasion that the judge has the chance to consider the papers.

Capacity is not an off-switch

Wye Valley NHS Trust v Mr B [2015] EWCOP 60 (Peter Jackson J)

Best interests – P's wishes and feelings

Peter Jackson J has made clear just how far along we have come on the journey to recognising the dangers of treating capacity as a cliff-edge off which one falls into the clinging embrace of paternalism.

The case concerned Mr B, a 73 year old with a long standing history of mental illness together with, in more recent years, poorly controlled Type II diabetes. Mr B had for many years experienced persistent auditory hallucinations in which he heard the voices of angels and of the Virgin Mary. Although he did not consider himself to belong to any particular religion, he considered that Mary wished him to be a Catholic. After the death of his long-term partner in 2000, he had lived by himself for many years, the judge describing his situation as that of "*an isolated but not unsociable person with an interest in the outside world whose mental illness did not cause him undue distress*."

Mr B developed a chronic foot ulcer that did not heal despite various interventions. In July 2014, he was admitted to hospital. A sustained period of time in hospital (alternating between general and psychiatric settings) then ensued. Throughout this time, Mr B continued to resist medication for his diabetes and antibiotics for his foot, with the consequence that by the time his mental health had begun to recover in August 2015 his physical health had markedly deteriorated. He was becoming tired and lethargic and the infection was becoming systemic. His foot was not only infected but putrefying and the bone itself had become infected (osteomyelitis). He was refusing all treatment, but allowed his dressings to be changed. Eventually it became impossible to manage his physical health in a psychiatric unit and he was transferred to a general hospital ward on 12 September.

An application was made by the treating NHS Trust to the Court of Protection for declarations and decisions as to Mr B's medical treatment and, specifically, authority to the Trust to carry out an amputation upon his leg. It was clear from the evidence before the court that, in the position Mr B was now in, not carrying out an

amputation would lead within a matter of days to Mr B succumbing to an overwhelming infection within a matter of days; conversely, his life-expectancy if the operation was successful would (very tentatively) be in the order of around 3 years.

Peter Jackson J accepted the clear evidence before the court that Mr B lacked the capacity to make treatment decisions upon his foot in light of his compromised ability to understand the information about his damaged foot and a clear inability to weigh the relevant medical evidence as part of the process of reaching his decision.

The question for the court was therefore whether it was in his best interests for the amputation to proceed. As an integral part of this question, Peter Jackson J had to consider what weight to place upon Mr B's wishes and feelings as well as his religious beliefs.

The Trust submitted that the views expressed by a person lacking capacity were in principle entitled to less weight than those of a person with capacity.

Peter Jackson J accepted that this was true "*only to the limited extent that the views of a capacitous person are by definition decisive in relation to any treatment that is being offered to him so that the question of best interests does not arise*." Importantly, however, he went on: "*once incapacity is established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due*."

Rightly, Peter Jackson J emphasised that:

> "*11. This is not an academic issue, but a necessary protection for the rights of people with disabilities. As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an 'off-switch' for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view*.
>
> *12. In this case, the Trust and the Official Solicitor consider that a person with full capacity could quite reasonably decide not to undergo the amputation that is being recommended to Mr B, having understood and given full thought to the risks and benefits involved. However, the effect of their submissions is that because Mr B himself cannot balance up these matters in a rational way, his wishes and feelings are outweighed by the presumption in favour of life. It is, I think, important to ensure that people with a disability are not – by the very fact of their disability – deprived of the range of reasonable outcomes that are available to others. For people with disabilities, the removal of such freedom of action as they have to control their own lives may be experienced as an even greater affront that it would be to others who are more fortunate.*
>
> *13. In some cases, of which this is an example, the wishes and feelings, beliefs and values of a person with a mental illness can be of such long standing that they are an inextricable part of the person that he is. In this situation, I do not find it helpful to see the person as if he were a person in good health who has been afflicted by illness. It is more real and more respectful to recognise him for who he is: a*

person with his own intrinsic beliefs and values. It is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.

14. Further, people with Mr B's mental illness not uncommonly have what are described by others as 'religious delusions'. As appears below, he describes hearing angelic voices that tell him whether or not to take his medication. Delusions arising from mental illness may rightly lead to a person's wishes and feelings being given less weight where that is appropriate. However, this cannot be the automatic consequence of the wishes and feelings having a religious component. Mr B's religious sentiments are extremely important to him, even though he does not follow an established religion. Although the point does not arise for determination in this case, I approach matters on the basis that his Article 9 right to freedom of thought and religion is no less engaged than it would be for any other devout person.

15. This is another manifestation of the principle that the beliefs and values of a person lacking capacity should not be routinely undervalued. Religious belief has been described as a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science: R (Hodkin and another) v Registrar General of Births, Deaths and Marriages [2014] AC 610 at [57]. Religious beliefs are based on faith, not reason, and some can strongly influence the believer's attitude to health and medical treatment without in any way suggesting a lack of mental capacity. Examples include belief in miraculous healing or objections to blood transfusions. There may be a clear conceptual difference between a capable 20-year-old who refuses a blood transfusion and an incapable elderly man with schizophrenia who opposes an amputation, but while the religiously-based wishes and feelings of the former must always prevail, it cannot be right that the religiously-based wishes and feelings of the latter must always be overruled. That would not be a proper application of the best interests principle."

Perhaps equally importantly, Peter Jackson J directed himself by reference to the principle in s.4(4) MCA 2005 that so far as is reasonably practicable, the person must be permitted and encouraged to participate as fully as possible in any decision affecting him:

"18… In this case, given the momentous consequences of the decision either way, I did not feel able to reach a conclusion without meeting Mr B myself. There were two excellent recent reports of discussions with him, but there is no substitute for a face-to-face meeting where the patient would like it to happen. The advantages can be considerable, and proved so in this case. In the first place, I obtained a deeper understanding of Mr B's personality and view of the world, supplementing and illuminating the earlier reports. Secondly, Mr B seemed glad to have the opportunity to get his point of view across. To whatever small degree, the meeting may have helped him to understand something of the process and to make sense of whatever decision was then made. Thirdly, the nurses were pleased that Mr B was going to have the fullest opportunity to get his point across. A case like this is difficult for the nursing staff in particular and I hope that the fact that Mr B has been as fully involved as possible will make it easier for them to care for him at what will undoubtedly be a difficult time."

Mr B's wishes and feelings, as relayed to Peter Jackson J in his meeting with him were starkly framed:

"I don't want an operation.

> *I'm not afraid of dying, I know where I'm going. The angels have told me I am going to heaven. I have no regrets. It would be a better life than this.*
> *I don't want to go into a nursing home, [my partner] died there.*
> *I don't want my leg tampered with. I know the seriousness, I just want them to continue what they're doing.*
> *I don't want it. I'm not afraid of death. I don't want interference. Even if I'm going to die, I don't want the operation*."

As Peter Jackson J said, "[a]*ll this was said with great seriousness, and in saying it Mr B did not appear to be showing florid psychiatric symptoms or to be unduly affected by toxic infection*."

When it came to conducting the best interests balancing exercise in light of these considerations, Peter Jackson J came to the clear conclusion that an enforced amputation would not be in Mr B's best interests. His conclusions in this regard make clear the extent to which the judge sought to recognise Mr B as an "individual human being" (to use Lady Hale's phrasing from *Aintree*):

> "*43. Mr B has had a hard life. Through no fault of his own, he has suffered in his mental health for half a century. He is a sociable man who has experienced repeated losses so that he has become isolated. He has no next of kin. No one has ever visited him in hospital and no one ever will. Yet he is a proud man who sees no reason to prefer the views of others to his own. His religious beliefs are deeply meaningful to him and do not deserve to be described as delusions: they are his faith and they are an intrinsic part of who he is. I would not define Mr B by reference to his mental illness or his religious beliefs. Rather, his core quality is his 'fierce independence', and it is this that is now, as he sees it, under attack.*
>
> *44. Mr B is on any view in the later stages of his life. His fortitude in the face of death, however he has come by it, would be the envy of many people in better mental health. He has gained the respect of those who are currently nursing him.*
>
> *45. I am quite sure that it would not be in Mr B's best interests to take away his little remaining independence and dignity in order to replace it with a future for which he understandably has no appetite and which could only be achieved after a traumatic and uncertain struggle that he and no one else would have to endure. There is a difference between fighting on someone's behalf and just fighting them. Enforcing treatment in this case would surely be the latter.*"

Comment

We have no doubt that this case will profoundly have affected the professionals involved, and we have a great deal of sympathy for them. How we should feel in relation to Mr B is not something that we think it is right to pontificate upon – save for noting that our instinctive reactions may say a great deal about how we view the world (and, indeed, perhaps, our views about any world beyond).

More broadly, the approach endorsed by Peter Jackson J to the construction of best interests decisions on behalf of those lacking capacity is one that is light years removed from the paternalistic model that still remains so prevalent in many settings (including, in some cases, the courtroom). Road-testing in training has already shown how useful the phrase "capacity is not an off-switch" is in exploring the meaning of the term 'best interests.'

Our only quibble with the judgment is with Peter Jackson J's assertion (in respectfully casting doubt

upon the Law Commission's provisional proposal to amend s.4 MCA so as to provide that an incapacitated person's wishes and feelings should be assumed to be determinative of his best interests unless there is good reason to depart from the assumption) that "[a]*ll that is needed to protect the rights of the individual is to properly apply the Act as it stands*." Our quibble has three bases.

The first is that, on the ground, the fact that there is no hierarchy within the s.4 checklist routinely does lead to undervaluing of the individual's wishes and feelings and decisions being made that are very far from right for that individual as an individual human being.

The second is that, whether or not one agrees with the precise wording of the provisional proposal, we would suggest that it is (as it is designed to do) deliberately framed as to seek to bring the MCA into some form of closer compliance with the CRPD. It is very clear, wesuggest, from work done by the Essex Autonomy Project and others, both that (1) the CRPD requires that decision-making regimes are framed so as respect the rights, will and preferences of the individuals to which they are subject; and (2) that the MCA as currently drafted does not do so, primarily because it does not give a specific place in the hierarchy under the s.4 checklist to wishes and feelings. It is perhaps noteworthy in this regard that the Mental Capacity Bill before the Northern Ireland Assembly in its equivalent of s.4 requires "special regard" to be had to the person's wishes and feelings – this has very deliberately been framed to seek to respond to the CRPD. It may be other language could be used to encapsulate the approach (Wayne Martin and Alex suggested some in our evidence to the Northern Ireland Assembly). We would, however, suggest that (a) some such approach will be required in due course to bring our legislation into compliance with the CRPD; and (b) pending such legislative amendment, the courts can and should consider interpreting the MCA in such a way as to ensure appropriate respect for the wishes and feelings of P where they can be reliably identified and where the proposal is to seek to do other than that which P wishes to happen in the name of their best interests.

The third is that, as discussed elsewhere (see, most recently, the article Alex co-wrote with Cressida Auckland in the Elder Law Journal [2015] 3 ELJ 293 entitled "*More presumptions please? Wishes, feelings and best interests decision-making*") we would contend that we do not necessarily even have to look to the CRPD to find ourselves constrained to construe the MCA on the basis that it requires a closer focus upon identifying the individual's wishes and feelings and, where they can reliably be identified, to take those wishes and feelings as our guide to constructing a best interests decision on their behalf. If – as Peter Jackson J himself has said previously (see *Re E* at paragraphs 124 and 125) – a person does not lose their right to respect for private life and their autonomy merely because they lose capacity – then simple application of the principles of Article 8 ECHR would seem to dictate that questions of proportionality and necessity must arise every time that the proposal is to override an individual's clearly identified wishes and feelings. Indeed, Peter Jackson J could be said to have recognised this himself in *E* in the context of a discussion of Article 8 ECHR where he held that "*E's wishes and feelings, as described above and written down by her in an attempt to control her treatment, are clear. They are not the slightest bit less real or felt merely because she does not have decision-making capacity. I agree with the submission of Mr Bowen QC and Mr*

Broach that particular respect is due to the wishes and feelings of someone who, although lacking capacity, is as fully and articulately engaged as E" (paragraph 127, emphasis added).

We would not want it to be thought, though, that this quibble in any way detracts from my respect for the actual decision that Peter Jackson J took on the facts of this case which was a model of best interests decision-making.

Disclaimer: insofar as they relate to the Law Commission's provisional proposals, the views expressed here are expressed in Alex's personal capacity (being now a consultant to the Commission's project on Mental Capacity and Deprivation of Liberty).

Now for CTOs – the MHA and the MCA overlap

PJ v A Local Health Board and Others [2015] UKUT 480 (AAC) (Charles J)

Mental Health Act 1983 – CTOs – Interface with MCA

Summary

Charles J, sitting as President of the Upper Tribunal (Administrative Appeals Chamber) has extended the conclusions reached in *KD v A Borough Council and the Dep of Health* [2015] UKUT 251 (AAC) (guardianship) and *SSJ v KC and C Partnership Foundation Trust* [2015] UKUT 376 (AAC) to consider the question of the interaction between the MHA and the MCA in the context of CTOs.

In PJ, Charles J was concerned with a man on a CTO who was required to live at a care home and abide by the regime there, which included 15 minute observations at the care home. He had both escorted and unescorted leave as part of his risk mitigation plan. Charles J recorded that PJ's RC stated that the conditions of his care plan were non-mandatory and reports indicate that this is what PJ was told. There was also evidence that PJ had expressed (a) a wish to have greater freedom to see his family and his girlfriend without restrictions and that these wishes had not been complied with, and (b) the view that he was generally happy with and at the Care Home. A psychiatric report dated 25 April 2014 recorded that PJ had expressed his understanding of the CTO in the following terms: *"in my language it means if you **** up its goodbye everything."*

PJ sought discharge of the CTO before the MHRT for Wales on the basis that the arrangements for care under the CTO amounted to an unlawful deprivation of liberty in breach of Article 5; and, on this basis, the MHRT should exercise its discretionary power to discharge. The MHRT refused the application, holding that he was not deprived of his liberty in the following terms:

> *"4.9 The Tribunal has carefully considered the legal argument made in this case and the evidence given to the Tribunal. Each case must be considered on its merits, particularly so with regard to the issue of "Deprivation of Liberty". It appears to us that the current Case Law and Guidance [note, it is not clear what guidance this refers to, the decision being given on 2 May 2014], which it is noted has "yet to be fully tested", essentially considers whether the person concerned is "subject to continuous supervision and control" and "whether they are free to leave". From the evidence received, relating to these specific matters, it is clear to us that the Applicant has significant time where he is not supervised and there is a flexible and progressive plan in place, to encourage and enable more time to be spent "unsupervised". Therefore, we find*

> *that this is not "deprivation" of liberty but rather a "restriction" of liberty, which is necessary and proportionate, based on the evidence, and considering the likelihood of the Applicant suffering harm and the seriousness of that harm. Since this element is not satisfied (in our view) the Tribunal does not need to deal with the "freedom to leave" issues."*

The MHRT upheld the CTO, concluding as follows:

> *"4.11 The Tribunal accepts that there is a "need" because the Applicant's historic nature of illness, and current "uncertainties", based on the risks that have been evident and the need for treatment through on-going therapy, structure and support. The CTO is a framework, which can also enable monitoring, review and recommendations and the Tribunal believes that this must take precedence over any human rights issue". (emphasis added by Charles J).*

PJ appealed to the Upper Tribunal. As Charles J noted, there were two main issues, namely whether the MHRT erred in law in concluding that PJ:

1. was not deprived of his liberty, and

2. if he was, that the CTO framework must take precedence over any human rights issues.

This summary focuses primarily on the first issue, as the most important regarding the interaction between the MHA and the MCA.

Deprivation of liberty

As he had done in *YA*, Charles J emphasised the different components of the elements of the test for deprivation of liberty. In terms of the subjective element – i.e. whether capacitous consent has (or can) be given – to an objective confinement, Charles J noted (at paragraph 47) that he had addressed questions of capacity in *YA* in the context of representation before MHTs, and, importantly, that the approach set out there showed that: "*the fact a person is objecting does not mean that they have capacity to consent to their care regime or a part of it. Also an objection does not of itself indicate whether a person with capacity is or is not consenting to the care regime. So PJ's graphic description of the effect of the conditions of a CTO and their breach together with his objections to aspects of it do not indicate whether or not he has consented to it (or his capacity to do so)*" (paragraph 48).

Turning to the objective deprivation of liberty, Charles J noted that the 'acid test' was expressed by Baroness Hale as a composite test with two parts. "*She envisages that a person who is not free to leave may not be not under such (my emphasis) continuous supervision and control as to found a conclusion that he or she is deprived of his or her liberty.*" Importantly, however, he noted that Baroness Hale did: "*not divide up the two parts in the way that the MHRT did by considering the degree of supervision and control in isolation and then not going on: i) to consider it with, or ii) to consider at all whether PJ was free to leave (or effectively alter the conditions that limited his freedom action).*" (paragraph 68).

Further, Charles J noted that *"taking this approach to the key issue as identified by Baroness Hale, the MHRT overlooked that the fact that a person may have unescorted leave in the community does not mean that he is not deprived of his liberty if the leave is regulated and controlled, and he is not free to leave in the sense of removing himself permanently in order to live where and with whom he chooses*" (paragraph

70). Charles J further referred in this regard to *Stanev* and the earlier decision in *Ashingdane* with its clear statement that a compulsory patient is deprived of his liberty in the hospital where he is detained (and so not free to leave), irrespective of the openness or otherwise of the conditions.

Charles J therefore held (paragraph 73) that the MHRT erred in law: (1) in its approach to the assessment of the degree of supervision and control required; and (2) by divorcing that consideration from the freedom of PJ to leave (or to effectively refuse to abide by the relevant conditions). Charles J further held that the MHRT overlooked, and so failed to take into account, the guidance given in *Cheshire West* that the reason or purpose of the relevant conditions was not relevant to the assessment of whether the objective element of a deprivation of liberty was satisfied.

Charles J noted that an alternative argument was advanced by the Health Board that, on a proper analysis of the provisions of the MHA, PJ "*was free to leave" because the conditions were unenforceable and so any error of approach in law by the MHRT was immaterial. This argument was that PJ was "free to leave" because the only sanction for breach of the relevant conditions was that such a breach would be taken into account in exercising the power of recall to hospital. Counsel contrasted the position under guardianship where there is a statutory power to return the patient to the placement (see s.18(3) of the MHA)*." As Charles J noted, this could have been run as an argument in *RB* and *KC*, but was not.

In response to this argument, Charles J reminded himself that the Strasburg law operates on the *Guzzardi* principle that the starting point in assessing whether there has been a deprivation of liberty is "t*he concrete situation" of the person and the consideration of "a whole range of criteria such as the type, duration, effects and manner of implementation of the [restrictive] measure in question (see Guzzardi v Italy (1980) 3 EHRR at paragraph 92 and 93)*." As Charles J noted "[i]*n my view, that principle and approach is a powerful pointer:*

> *i. to the conclusion that it is the practical situation on the ground created by a care and treatment regime, and so the practical impact on the freedom of the relevant person to act as he or she wishes, that matter when assessing whether objectively patients are deprived of their liberty, and*
>
> *ii. against the conclusion that the lack of provisions relating to the direct enforcement of, and so the specific performance by the patient and those delivering the regime of care, of restrictive conditions have weight."*

Charles J held that from the starting point of the ECtHR cases encapsulated in the *Guzzardi* principle "*a distinction based on the statutory power to return someone subject to guardianship to his or her placement is not warranted. Such an approach would be too technical. As would one based on a distinction between the suspension of the original detention (as with a CTO) and the continuation of it (as with the conditional discharge of a restricted patient)*" (paragraph 77). In his view, therefore, "*the 'free to leave' issue based on the lack of a provision for direct enforcement of relevant conditions in the MHA and the practical effect of the power of recall needs to be considered on the alternative bases, that an objectively assessed deprivation of liberty (a) is or can be made lawful, and (b) is not and cannot be made lawful*." Charles J observed that:

1. If and so long as the implementation on the ground of the relevant restrictions would be lawful it seemed "tolerably clear that the relevant person is not 'free to leave' even though the reality of enforcement is the exercise of the power of recall (or a resetting of conditions)."

2. However, where the implementation of the restrictions would not be lawful, the position was less clear. Charles J's view was that the "*pragmatic force of those risks and consequences is that for the purposes of Article 5 it cannot be said that the relevant person is 'free to leave*.'" He acknowledged, however, that an alternative view could be founded in the approach taken by Holman J in *R(SH) v MHRT* [2007] EWHC 884 (Admin), [2007] MHLR 234.

Because PJ had been discharged from his CTO, Charles J held that there was no point in remitting the issue for determination to the MHRT, even though it had erred in law.

It is important to note that Charles J declined to answer whether PJ was, in fact, deprived of his liberty. He acknowledged, as the Health Board did, that it was difficult to see how a further analysis of the facts would found the conclusion, applying *Cheshire West*, that PJ was not objectively confined. However, Charles J did not accept the premise that PJ had the relevant capacity to consent to the care regime and was objecting to it, holding that both aspects would have required further examination.

Charles J therefore held that it would not be appropriate for him to seek to utilise this case to seek to convert his obiter conclusions in the *KC* case relating to the ability of a patient with capacity to give a valid consent for the purposes of Article 5 to something more under the guise of general guidance, or the guidance he would have given if I had remitted this case. He noted, though, that there was little doubt that this issue will arise in a case in which it will be part of the ratio.

The role of the MHRT

As Charles J noted, the approach adopted by the MHRT assumed the existence or possible existence of a breach of human rights and so here a deprivation, or possible deprivation, of PJ's liberty in breach of Article 5. So it was a conclusion that a MHRT and a First-tier Tribunal can and indeed should (1) ignore possible breaches of Convention rights, or (2) permit, or effectively permit by doing nothing directed to it, an unlawful state of affairs (i.e. a breach of Convention rights) to continue.

Charles J agreed with the submission made on behalf of PJ that both conclusions were an error of law. In summary, his conclusions were that, in determining whether to discharge a patient on a CTO under s.72(1)(c), to adjourn proceedings or to exercise the discretionary power of discharge, the MHT/MHRT must take into account whether the implementation of the conditions of a CTO will or may create a breach of Article 5 (or any other Convention right).

> *"141. In my view, if the tribunal concludes that the relevant medical treatment is not being and could not be provided without a breach of the patient's Convention rights and so lawfully:*
>
> *i) the tribunal would not be satisfied that lawful and appropriate medical treatment was or would become lawfully available under the CTO, and*

so s. 72(1)(3)(c) satisfied, and

ii) if my construction and application of s. 72(1)(c) is wrong the tribunal should nonetheless exercise its discretion to bring an end to that unlawful situation by discharging the CTO."

The position would be different, Charles J considered, if an issue remained to be decided as to whether there is a breach of a Convention right and/or the terms of the terms of the CTO could be changed so as to avoid a breach of Convention rights (e.g. by avoiding an objectively assessed deprivation of liberty).

"143. In those circumstances the underlying purposes of the MHA to support moves from hospital to the community and the obvious strength of the points made, for example, in paragraph 23 of the GA case (and which I suspect understandably underlay the conclusion of the MHRT on the impact of human rights) to the effect that if, subject to issues of its lawfulness, there is treatment that satisfies ss. 17A(5) and s. 72(1)(c) the CTO should be upheld, point powerfully in favour of the tribunal providing an opportunity for the patient, MHA decision makers and the providers of the patient's care and support regime to take steps to provide that the implementation of the relevant conditions is lawful.

144. That opportunity could and in my view generally should be provided by the grant of an adjournment with directions as to what should be addressed and possibly the giving of a non-statutory direction.

145. On that basis, it would only be in cases in which the problems relating to breach of Convention rights could not be resolved that the tribunal would have to discharge the CTO with the possible consequences that (a) the patient would have to remain in or be returned to hospital and so be deprived of a route towards a return to the community, or (b) the patient would leave hospital on a different basis.

146. Issues equivalent to those mentioned in paragraphs 45 to 49 and 60 to 66 of the KD case, and in paragraphs 58 to 73 of the KC case may well arise in connection with whether there should be an adjournment and if so what directions or recommendations should be made by the tribunal. As those passages show:

i) if the Court of Protection is to be involved there is a need for the MHA decision maker to identify the terms of any care regime and, in particular, what is needed to protect the public,

ii) issues may arise on who should determine relevant issues of capacity and Rule 2 of the Tribunal Procedure Rules 2008 is likely to be relevant to their determination, and

iii) although the First-tier Tribunal and the MHRT are investigative tribunals the parties have the primary duty to provide and advance the relevant evidence and argument."

Check list

Charles J then gave a check list of for First-tier Tribunals and MHRTs when an issue arises whether the implementation of the conditions of a CTO that are needed to protect the patient or the public will cause a breach of Article 5 and thus an unlawful deprivation of liberty. He noted

that a number of the questions gave rise to issues for another day (for instance as to whether a patient with the relevant capacity can consent to what would otherwise be a deprivation of liberty).

Permission to appeal

Charles J made clear that his approach to the jurisdiction of the Tribunal of necessity required him to disagree with the "minimalist" approach of Upper Tribunal Jacobs to its jurisdiction taken in three cases ((*SH v Cornwall Partnership NHS Trust* [2012] UKUT 290 (AAC), *GA v Betsi Cadwaladr University LHB* [2013] UKUT 0280 (AAC) and *NL v Hampshire* [2014] UKUT 0475 (AAC). Both because of this and because of the difference in approach that he took to previous UT decisions about capacity to consent to deprivation of liberty, he gave permission to all those concerned to appeal (whether or not they had been before him in the actual hearing). At present, we do not know whether this opportunity will be taken up.

Guardianship

Although not part of his decision, it is should be noted that Charles J made it very clear that he does not agree with the judgment of Upper Tribunal Judge Jacobs that guardianship, alone, cannot create a deprivation of liberty. He had doubted whether that was right in *KD*, but he now went further and record that in his view "*that analysis is wrong because what matters is the position on the ground caused by the implementation of the care regime which the MHA decision maker has to take into account (see paragraphs 10 and 77 hereof and paragraphs 60 to 64 of the KC case)*" (paragraph 130).

Comment

Deprivation of liberty

There is at present continued and vigorous discussion about the elements of the 'acid test,' which is fascinating (in its way) for the lawyers, but utterly unhelpful for frontline health and social care professionals.

Charles J's observations as to the approach adopted by the MHRT may be of assistance here beyond the context of the MHA. They suggest (and we suggest rightly) that:

1. It is inappropriate to take too narrow a view of the individual aspects of the 'acid test';

2. As was anticipated in the Law Society Guidance might be the case (see paragraph 3.19):

    a. questions of temporary freedom to come and go might better fall to be considered by reference to questions of supervision and control where that freedom properly analysed amounts to regulated and controlled 'leave' granted by the authorities in charge of the institution; and

    b. the 'freedom to leave' aspect of the test might fall to be considered by reference to whether the person can remove himself permanently in order to live where and with whom he chooses;

3. The primary question is whether the person is free to leave their placement permanently. If they are not free to leave (applying an approach focused on the realities, not technicalities), then the presumption is that they will be considered

to be deprived of their liberty unless they not under such supervision and control as to fall into the limited class of case envisaged as 'possible' by Baroness Hale. We consider that this makes sense, not least because – by definition – a situation in which a decision has been made that a person should live in a particular place is very likely then to be a situation in which those who have made that decision will need to ensure that decision is implemented. Put another way, if a decision has been made that a person is to be cared for in a particular care home, it is more likely than not that steps will also be included in the care home which are aimed at ensuring that they should remain there and receive appropriate care and treatment. Those steps will, of necessity, include elements of supervision and control;

4. At least where a patient is subject to the MHA 1983, and subject to detention, conditional discharge, guardianship or a CTO, it is very likely that questions of confinement will arise as significant constraints are likely to be in place upon the freedom of the individual to relocate permanently. It will only be in an unusual case, we would suggest, that a person who is subject to residence conditions under the MHA would not also be under such supervision and control as to not satisfy the acid test; it would be very difficult (if not impossible) to imagine a situation where a detained patient would not satisfy the test.

As to the question of consent, it is very clear that we need to focus on the need to identify with care precisely whether the person: (1) has the capacity to consent to the arrangements amounting to a deprivation of liberty; (2) does validly consent to those arrangements. I hope very much that a case will arise shortly in which the ability of a person with capacity validly to exercise limited choices in the context of the MHA 1983 will fall for determination, as it is of such wide application. In the interim, we suggest that the case of *LDV* still continues to be of relevance in deciding questions of capacity to consent to confinement.

The role of the MHT/MHRT

Charles J's judgment makes clear that there is a very stark distinction between a minimalist model, adopted by Upper Tribunal Judge Jacobs, and the maximalist model adopted in *PJ* (and indeed earlier in *KC*). For our part, the approach adopted by Charles J is compelling, not least for offering the best opportunity for the effective protection of Convention rights of those subject to the MHA 1983 and one we hope that is validated by the higher courts sooner rather than later.

The court and the public authority: how far is too far?

North Yorkshire Council v (1) MAG (2) GC (3) A Clinical Commissioning Group (District Judge Glentworth; no neutral citation, 13 July 2015)[2]

COP jurisdiction and powers – interface with public law proceedings

Summary

MAG was a young man born on 2 November 1980 and was 34 years old. As a result of perinatal trauma he suffered from autism, ataxic cerebral palsy, hearing and visual impairments

[2] The judgment should be available shortly on MHLO.

and a learning disability. There was no dispute that it MAG lacked capacity to make the decisions regarding his residence and care. North Yorkshire County Council (NYCC) sought an order that it was in his best interest for MAG to be deprived of his liberty and reside in his current placement.

MAG had lived at his current placement since 2006. The property was a one bedroomed ground floor flat. He could not stand independently and the flat was too small to accommodate the use of his wheelchair. At home he mobilised by pulling himself along the floor and up on to chairs and his bed which had resulted in painful bursitis in both knees and calluses to his knees and ankles. It was agree that MAG was deprived of his liberty for the purposes of Article 5(1).

NYCC commenced proceedings in September 2011. The case had been before the Court for four years, during which time the Official Solicitor had requested the local authority to identify alternative accommodation options. NYCC sought final declarations on the basis that there were no immediate alternative residential options and it was in MAG's best interests to continue to be deprived of his liberty in his current placement. Relying on the recent Court of Appeal case of *Re MN* [2015] EWCA Civ 411 (reported in our May 2015 newsletter), the local authority argued that the Court had no jurisdiction to require it to find another property which would not ordinarily be available to MAG. The accommodation and his care package had the effect of depriving MAG of his liberty in that he was not permitted to leave unaccompanied and was under continuous supervision and control.

The Court was not willing to accept the local authority's argument. In particular, the Court found on the evidence that NYCC had not been willing to find alternative accommodation unless the Court decided that it was in MAG's best interests to move. The judge made the following criticisms of the local authority:

> *"36. I accept that there was culpable delay on the part of NYCC in finding a less restrictive property for the following reasons:*
>
> *i) it took almost two years from the commencement of proceedings before the local authority finally accepted that it was responsible for meeting MAG's accommodation needs;*
>
> *ii) the local authority sought to abrogate its responsibility by expecting the care provider to search for an alternative;*
>
> *iii) I accept the conclusion of Christine Hutchinson at paragraph 4.1.2 of her report of 16 March 2014 that NYCC, '… missed an important step in the process of best interests which is to determine whether alternative accommodation should be sought or not'.*
>
> *iv) a lengthy and detailed piece of work was necessary to consider a range of options for the nature and location of a long term accommodation move but there was a failure to approach the task with energy and imagination;*
>
> *v) The Housing Provider were not provided with all the material relevant to their decision making;*
>
> *vi) the property search criteria were unnecessarily restricted because no consideration was given to shared outdoor areas. GC identified a property which was discounted on the basis that it had a communal area rather than a self-contained garden;*

vii) no alternative was ever likely to be found whilst MAG remained in the Bronze category of housing need."

Ultimately, the Court refused to grant the order authorising a deprivation of MAG's liberty in his current placement. In relation to *Re MN*, the Court agreed with the Official Solicitor that the decision could be distinguished when the issue is the right to liberty under Article 5. The Court was clearly unwilling to endorse a care regime which risked breaching MAG's right to liberty where it was not satisfied that NYCC had taken all the steps necessary to ensure that there was no breach of its obligations.

Comment

This is a forthright decision from a District Judge who was clearly unwilling to accept at face value what she was being told by the local authority. The case is under appeal, and we will provide an update as and when we can.

It is, however, perhaps interesting that it was felt necessary to distinguish *Re MN*. On a proper analysis, we suggest that the two decisions sit easily together (and, indeed, sit together with that of Charles J in *Re NRA*, decided subsequently). The Court of Protection must be careful not to order or to be seen to order a public authority to provide alternative care arrangements (unless the judge is also wearing an Administrative Court hat). However, there is nothing to prevent a judge (1) probing in detail whether the arrangements put to it for endorsement actually do represent the least restrictive alternative; and (2) declining to 'collude' in a breach of Convention rights where not properly satisfied that they do. District Judge Glentworth did, essentially, exactly the same as did Munby J (as he then was) in *A Local Authority X v MM* [2007] EWHC 2003 (Fam), in which the court was faced with a situation in which the consequence of the arrangements made by the local authority for MM amounted (the court considered) to a breach of her Article 8 rights. Munby J held that:

> *"In the first instance it is for the local authority to prepare a care plan spelling out in appropriate detail and precision what it proposes to do in order to modify the current arrangements in such a way as to avoid a breach of Article 8; specifically, if it wishes to pursue its plan for MM to remain at her current placement, what it proposes to do in order to facilitate her sexual relationship with KM. The care plan can then be considered by the court. The court cannot be compelled to accept the local authority's plan, any more than it is obliged to accept the plan propounded by a local authority bringing care proceedings under Part IV of the Children Act 1989. On the contrary, the court is required to act in the best interests of the vulnerable adult and must not – is forbidden by section 6 of the Human Rights Act 1998 to – endorse a plan which in its view involves a breach of Article 8."*

Neil Allen represented MAG in this case on behalf of the Official Solicitor. Proceedings being ongoing, he has had no involvement with the writing of this report.

DoLS statistics – one year on from *Cheshire West*

The HSCIC has published its annual report on DoLS statistics in England for the period 1 April 2014 and 31 March 2015, the first full year since the decision in *Cheshire West*.

The key findings are as follows:

- There were 137,540 DoLS applications received by councils between 1 April 2014 and 31 March 2015, the most since the safeguards were introduced in 2009. This is a tenfold increase from 2013-14 (13,700);

- 62,645 applications were completed by councils during the year, almost five times as many as the previous highest volume – 13,040 in 2013-14;

- The percentage of applications that were not signed off rose from 8% in April 2014 to 67% in March 2015.

- In 2014-15, there were 147 completed applications per 100,000 adults in England. Application rates varied considerably by region, with a rate of 389 applications per 100,000 adults in the North East, whereas the other eight regions had between 110 (East Midlands) and 150 applications per 100,000;

- There were 52,125 granted applications in 2014-15, 83 per cent of all completed applications. This the highest percentage granted since DoLS were introduced. Between 2010 and 2014 between 55 and 60 per cent of applications were granted;

- There was some regional variation, with only 61 per cent of applications approved in the South West. All other regions saw at least 80 per cent of applications granted, with the highest approval rate in the North East (93 per cent);

- The most frequent reasons for an application to not be granted were not satisfying the mental capacity requirement (cited in 2,895 applications) and the best interests assessment (2,525 applications);

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Conferences at which editors/contributors are speaking

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.

Society of Solicitors in the Shires of Selkirk & Peebles

Adrian is doing a seminar on the AWI for the Society in Melrose on 22 October. For further details, and to book, see here.

Royal Faculty of Procurators in Glasgow

Alex and Adrian will be participating in a half-day seminar for the RFPG in on 28 October on Scotland in the wider world: adult incapacity challenges from Europe and beyond. 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 Community Care Live 2015 in London on 3-4 November 2015. For further details, and to register for this event, see here.

Cross-Border Guardianship

Adrian and Jill will be participating in a half-day seminar for CPP Seminars Scotland on 4 December at Brodies LLP in Edinburgh. For further details, and to book, see here.

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Neil Allen
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Anna Bicarregui
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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.

Other conferences and training events of interest

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.

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 Court of Protection Practitioners Association (CoPPA) London sub-group (of which Katie Scott is a Committee member) is holding a launch event on Thursday 19 November at Brewin Dolphin, 12 Smithfield Street, London, EC1A 9BD from 5pm onwards. The event is entitled ""Mutual Dependence and Gratuitous Care," and the guest speaker will be Denzil Lush, Senior Judge at the Court of Protection. Spaces are limited and available on a first come first served basis here; the venue and drinks reception are kindly sponsored by Chase de Vere.

Chambers Details

Our next Newsletter will be out in early November. 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, 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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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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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. 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.