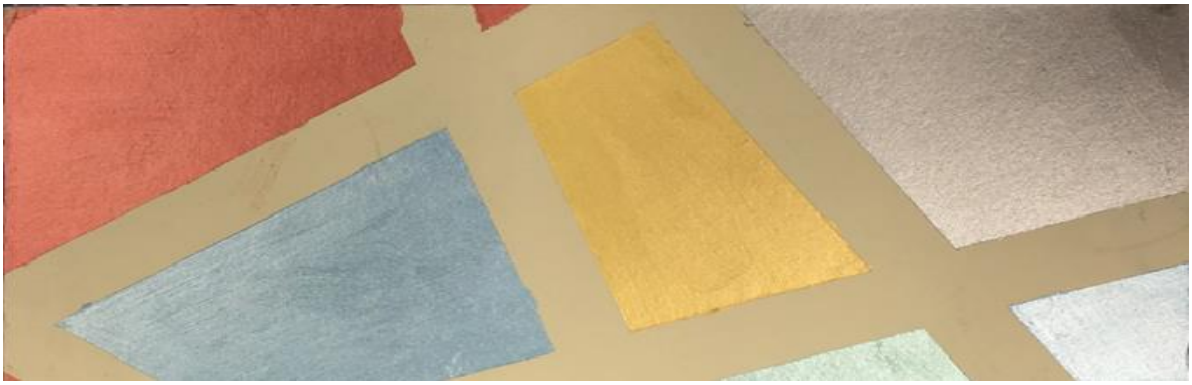
Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

January 2018 | Issue 82



Welcome to the January 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, a further round in the *Re X* saga, a briefing note on PJ/MM, the Chief Coroner's annual report and Manuela Sykes' obituary;

(2) In the Property and Affairs Report: case-law and OPG guidance on gifts, and whether its effect on a will is information relevant to the test of whether a person has capacity to marry;

(2) In the Practice and Procedure Report: fluctuating capacity in the face of the court, Court of Protection statistics and a useful case for human rights claims arising out of the misuse of the MCA;

(3) In the Wider Context Report: interim guidance on CANH withdrawal, the NICE consultation on decision-making and capacity, an important study on everyday decision-making under the MCA and a book corner with recent books of interest;

(4) In the Scotland Report: Court of Protection orders before the Scottish courts and an update on the Scottish Government consultation on adults with incapacity;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Re Y update

The Supreme Court has confirmed the hearing date – 26 and 27 February – for the Official Solicitor's appeal against the decision of O'Farrell J *Re Y* [2017] EWHC 2866 (QB) that it was not mandatory to bring before the Court of Protection the withdrawal of CANH in the case of a man with a prolonged disorder consciousness in circumstances where the clinical team and Mr Y's family were agreed that it was not in his best interests to receive that treatment.

In the interim, clinical practitioners, in particular, will want to have regard to the interim guidance issued by the General Medical Council, British Medical Association and Royal College of Physicians that we cover in the 'Wider Context' section of the Report.

Deckchairs on the DOL Titanic?

Re KT & Ors [2018] EWCOP 1 (Charles J)
Article 5 – deprivation of liberty

Summary

Charles J has returned – again – to the vexed question of how *Re X* applications (now, strictly, COPDOL11 applications) can proceed where there is no-one can properly play the part of Rule 3A (now Rule 1.2(5)) representative. Charles J considered four test cases of the now nearly 300 that have now been stayed in accordance with his decision in *Re JM* [2016] EWCOP 15, there being no family member or friend is available for appointment as P's Rule 1.2(5) representative.

Background

In early 2017, the Government Legal Department had written to local authority applicants in stayed cases to indicate that (1) the most appropriate course of action was for the local authority to identify a professional advocate; but (2) where one was not available, the local authority should liaise to take forward the process of commissioning a Court of Protection General Visitor to complete a report under s.49 MCA 2005. The GLD letters indicated that Ministers had agreed to provide funding to HMCTS to enable greater use of visitors by the COP. On the basis of these letters, two applicant local authorities sought to lift stays in four cases, which were listed before Charles J as test cases.

Charles J, it is fair to say, was unimpressed by the letters, noting that they were devoid both of detail as to extra funding, and also how and why it was now said that a professional advocate had or had always had been a practically available option in a significant number of cases. Following directions made in the test cases, the Secretary of State filed submissions which asserted that local authority

applicants owed a duty under section 6 of the Human Rights Act 1998 "*to facilitate the speedy resolution of the application by (for example) ensuring that a professional advocate is appointed to represent P's interests so far as necessary*". It was asserted that this duty: "*falls into the same category as the DOLS duties which were considered in Liverpool City* Council," the unsuccessful judicial review brought by local authorities to seek to compel greater funding to discharge their DOLS obligations. As Charles J noted that, this was a radical departure from the position that had previously been taken by the Secretary of State in *JM*, where it had been agreed that local authority and other applicants do not owe a statutory duty to provide representation for P in the COP.

Whose obligation to provide representation for P?

Charles J expressed the preliminary view that the Secretary of State's argument as to the obligation of local authorities under the HRA was wrong, running counter to the decision on the obligations of a local authority in *Re A and C* [2010] EWHC 978 (in particular at paragraph 96) and its application in *Staffordshire County Council v SRK and others* [2016] EWCOP 27 and [2016] EWCA Civ 1317. However, even if they did owe such a duty, Charles J held that this did not assist the Secretary of State because the central, statutory, obligation lay with the Secretary of State for Justice to ensure that the COP, as a public authority, acts lawfully and so can apply a Convention compliant and fair procedure.

Visitor as Convention-compliant procedure?

Charles J agreed with the agreed position of both the applicant local authorities and the Secretary of State that the appointment of a Visitor would provide a fair and Convention compliant procedure because it would provide the essence of P's Article 5 procedural rights, which had been identified in *Re NRA & Others* [2015] EWCOP 59 as requiring an independent person to: (1) elicit P's wishes and feelings and make them and the matters mentioned in s.4(6) MCA 2005 known to the Court without causing P any or any unnecessary distress; (2) critically examine from the perspective of P's best interests, and with a detailed knowledge of P, the pros and cons of a care package, and whether it is the least restrictive available option; (3) keep the implementation of the care package under review and raise points relating to it and changes in P's behaviour or health. Charles J set out draft directions which could be made in cases where a Visitor was proposed. Charles J acknowledged that there were both advantages and disadvantages to the appointment of a Visitor over a family member or friend, the advantages being the independence and expertise of the visitor, the disadvantages being the absence of a more regular review on the ground by someone who knows P and wants to promote their best interests.

Having conducted a detailed review of the (depressing) evidence before him, Charles J did not consider that the offer to fund Visitors by the Secretary of State was likely to offer anything but a short-term or a very partial solution to the issue. However, he held that this should not stop it being used for so long as it was available in practice.

Order of preference

In light of the matters set out above, Charles J had to resolve an issue as to whether, where no family member/friend is available to as Rule 1.2(5) representative, the second choice should be a Visitor (the local authorities' position) or a professional representative (the Secretary of State's position). In reality, as he noted, the dispute was based upon the budgetary battle between local and central government. In the abstract, Charles J considered, the appointment of a professional who could act independently as a Rule 1.2(5) representative and carry out regular reviews of P's placement and care package on the ground would in most cases be likely to have advantages over the appointment of a Visitor because it would provide a better basis of and for review and equivalent expertise and independence to that provided by a Visitor.

However, given that there was no evidence that professional representatives were practically available in most cases, Charles J held that if he had to make a choice, he would choose a Visitor. He recorded the sensible acceptance by the Secretary of State that generally the COP can and should accept an assertion from an applicant authority that a professional Rule representative is not available for appointment at face value.

Joinder of the Crown/further stays

Charles J has no intention of letting the Government off the hook, noting at para 91 that:

> *In cases where a visitor is appointed (or some other available procedure is adopted to enable an application or review to proceed) there is no need to, or purpose for joining, or continuing the joinder of, the Crown. But, as soon as any such practically available process is no longer available I consider that, for the reasons given in JM and earlier in this judgment the COP should join the Crown to and stay such applications and reviews.*

Way ahead

Charles J suggested that the Secretary of State, the Public Guardian and the COP (through the Senior Judge) try to agree a process by which the stays are lifted in the approximately 330 stayed cases on the same basis as in these cases. He indicated that in cases in which local authorities (or, presumably, other applicants) have not sought to lift the stay, an appropriate course would be for the Secretary of State to apply to lift the stay in a manner that ensures that a visitor will be available for appointment in each case. However, he left the ultimate decision as to how best to clear the backlog to the triumvirate set out above.

Comment

The decision in *Cheshire West* has huge resource implications. The Law Commission has estimated the cost of full compliance at £2.155 billion per year. One of the local authorities before the court, Wolverhampton, had brought 24 applications over the past 3 years, and estimated that that three times the present number should have been brought, the numbers being likely to increase with service users moving to supported living. The Law Commission had estimated that around 53,000 people are

deprived of liberty outside hospitals and care homes, and calculated that this would cost local authorities and the NHS £609.5 million per year to authorise by obtaining welfare orders from the COP. Only a very small fraction of these applications are being made, although between January and March 2017, there were 969 applications relating to deprivation of liberty, up 43% on the equivalent quarter in 2016 (678). Of these, 600 were *Re X* applications.

In the circumstances, it is hardly surprising that Charles J considered that funding to provide an additional 200 Visitor reports a year hardly scratched the surface of the problem. As he recognised, his analysis of the position represents, in essence, the re-arranging of deckchairs on the legal Titanic. LPS – and/or or a radical rethinking of the law relating to deprivation of liberty – cannot come soon enough.

Briefing note on MM/PJ

NHS England has issued a note which considers the implications of these two judgments for the Transforming Care programme which reflects government policy to reduce the need for long term detention in hospital and meeting needs of those with learning disability and/or autism wherever possible in the community. The *PJ* decision (on community treatment orders) arguably makes it easier to achieve this aim but the *MM* decision (on conditional discharges) poses challenges to it, for almost a quarter of TCP inpatients are subject to restrictions under the Mental Health Act 1983.

The note summarises the Court of Appeal's decision. Reflecting one of the potential difficulties with the judgment, the note states that it is not appropriate for the tribunal to investigate or determine whether there is an objective DoL as a consequence of a CTO.

For restricted patients lacking the relevant capacity, the note stresses the need to secure the DoL authorisation before the conditional discharge. Illustrating the risks to patients, it states "[t]*here is the argument that to present the possibility of discharge from hospital to someone only to then advise that it would be unlawful amounts to emotional abuse, and managing a patient's expectations appropriately is essential*."

For restricted patients, the following guidance is given on the responsibilities of responsible clinicians and multi-disciplinary teams in:

- *ensuring the robustness of capacity assessments in relation to proposed accommodation, care and support. Ensure you all agree on the salient points and the methodology of communication and information giving before anyone embarks on a capacity assessment rather than trying to deal with differences of view on the outcome.*

- *the clarity and robustness of purpose of any control and supervision. Ensure you are all agreed on the risks and the appropriate steps to mitigate / manage these, have the restrictions been reduced as far as possible? Is further positive risk testing required? Then consider the various legal structures that might be able to authorise the restrictions (e.g. MoJ/tribunal conditions; offender*

> *licence; tenancy agreement etc). Also be clear about what the commissioner and MDT will expect in terms of action by the provider if the person doesn't comply with the restrictions and care plan; all of this will enable you all to understand what the supervision and control elements are and whether they are continuous (NB as above, the purpose of the restrictions is irrelevant to whether or not they amount to a DoL).*

The briefing also notes that "*perhaps perversely, this situation (whereby the Court of Protection could authorise a post discharge DoL and therefore facilitate discharge for a patient who lacks capacity, while a patient with capacity may have no such route available where the post discharge package amounts to a DoL) creates an incentive for patients and their representatives to argue that they lack capacity, and/or that the restrictions post discharge do not amount to a DoL. The assessment of capacity may therefore pose greater challenges*." Finally, along with a useful flowchart, the briefing helpfully provides some suggested wording for conditions of discharge.

We wait to hear whether the Supreme Court will give permission to MM and PJ to appeal the respective judgments in their two cases.

Chief Coroner's Report

The Chief Coroner published his Fourth Annual Report (for 2016-2017) to the Lord Chancellor on 30 November 2017. We only report on those aspects that relate to DOLs.

The report notes that (i) 241,211 deaths were reported to coroners in 2016, the highest figure to date. This is an increase of 4,805 (2%) from 2015. (ii) The number of cases that required investigation and inquest in 2016 was 40,504, an increase from the previous year. (iii) The average time of all cases from death to inquest completed had fallen from the previous year and was now 18 weeks.

It was noted that the number of DoLS cases will have affected these statistics (readers may recall that the previous Chief Coroner had issued guidance which stated that if a person died while 'DOL'd' under the statutory scheme, they had died in state detention and there was therefore a duty to report the death to the Coroner and for the Coroner to investigate the death).

The DOLs effect was thought to be particularly acute because there has been a 58% increase in reported DOLS cases from the 7,183 cases in 2015 to 11,376 reported in 2016. DOLs cases accounted for over 11,300 inquests in 2016. Investigating such a high number of DOLs cases has brought the average time for an inquest to be completed down as (i) a post-mortem examination will rarely be required in such cases and (ii) the inquests should normally be completed within a week.

The DOLs effect will not be seen in the 2017 – 2018 statistics as a result of the Policing and Crime Act 2017. People subject to authorisations under DoLS will no longer be considered to be 'otherwise in state detention' for the purposes of Section 1 of the Coroners and Justice Act 2009, and coroners will no longer be under a duty to investigate a death solely because a DoLS authorisation was in place: see the revised guidance here. We will see what impact that has upon the numbers of inquests in the

2017-2018 annual report; it will also be of interest to see whether that report shows how many referrals have been made for deaths in the 'grey zone' where an application has been made for an authorisation but not yet granted. Their situation was not addressed in the guidance but has caused considerable head-scratching on the ground. As ever, the most sensible course of action is for local protocols to be developed with each coroner.

Manuela Sykes

Manuela Sykes, the subject of one of the most celebrated Court of Protection cases, died at the end of the last year, her obituary in the Guardian can be found here. We would strongly urge you to read it, bearing in mind District Judge Eldergill's observations that:

She has always wished to be head. She would wish her life to end with a bang not a whimper. This is her last chance to exert a political influence which is recognisable as her influence. Her last contribution to the country's political scene and the workings and deliberations of the council and social services committee which she sat on.

Two new team publications

Finally, two publications for you:

- We have updated our guide to Judicial Authorisation of Deprivation of Liberty, to take account of changes in both substance and procedure (in particular the renumbering of rules and forms post 1 December);
- A discussion paper prepared by Alex (not binding on his fellow authors!) on 'valid consent' in the context of deprivation of liberty, designed to promote consideration of whether there is a (non-discriminatory) way to re-insert the concept of coercion into the definition.

PROPERTY AND AFFAIRS

Gifts, LPAs and costs

Re MB [2017] EWCOP B27 (HHJ Parry)

Mental capacity – residence

Summary

In three decisions, published together on Baillii at the end of 2017, District Judge Batten made rulings in relation to LPAs concerning PP.

In the first of the decisions, the judge had to consider the application made by one of two joint and several attorneys for ratification of gifts.

The Applicant, BB, was PP's son-in-law and held a joint and several LPA with a solicitor, CD, for PP's property and affairs. They also held an LPA for health and welfare.

BB's application was made after the Public Guardian had investigated various gifts BB had made out of PP's estate. At the end of the Public Guardian's investigation, he required BB to make an application for retrospective ratification of gifts, failing which the Public Guardian would seek the removal of the attorneys. PP, at the date of the first judgment in 2015, was 78 years old, living in a care home and lacked the capacity to make decisions for herself as to her property and affairs. Her income was above her annual outgoings by just short of £7,000 per annum. She had assets that totalled approximately £1million, after deduction of the challenged gifts.

The main gift that was in issue was a gift of £324,000 to BB's wife, PP's daughter (JB). It was said that this was some form of IHT planning. There were other, less significant gifts that the court considered, totalling just over £10,000. The largest of these was £6,000, again to JB.

The Official Solicitor was appointed PP's litigation friend and opposed the application for ratification. The judgment refers, of course, to s.12 MCA 2005 that sets out the limited powers of attorneys under LPAs to make gifts on behalf of a donee who lacks capacity to make gifts. Broadly, this is the "*customary occasions*" power, where the value of each gift on such an occasion is not unreasonable, having regard to all the circumstances and, in particular, the size of the donor's estate.

The court also referred to the well-known guidance of Senior Judge Lush in *Re Meek* [2013] EWCOP 2966.

The judge had little difficulty in coming to the view that the gift of £324,000 was outside BB's powers given by s.12 MCA. The reasoning is set out at paragraphs 109 to 125.

The court in the same passage then went on to consider whether to ratify the gift. Again, with no hesitation, the court refused so to do. There were various reasons: one was the fact that although PP's estate was sufficient, at the moment, to cover her outgoings, that might not persist because she might need nursing care. She was only 78 and her mother was still alive at 100. Furthermore, when she learnt of the gift, she had expressed "*shock and surprise*". Yet further, when she made a will in 2011, having capacity so to do, she had given half of her residuary estate to JB and the other to her grandchildren. There was no evidence that PP wanted to privilege JB to any greater extent than set out in her will. There had been no history of giving to JB or, indeed, any other family member.

Having come to the decision to refuse to ratify the gift of £324,000, the court had to consider what to do. BB and JB had used £160,000 of the gift to purchase their current home. They were also very much involved in looking after PP from 2011 when she had moved to be near them. The court, therefore, ordered BB to restore £164,000 of the gift and directed a statutory will or codicil so that the remaining £160,000 would be brought into hotchpot.

As regards the smaller gifts, the court did not require repayment of the £6,000 or the other smaller gifts, but directed that equivalent payments should be made to those grandchildren who had not been beneficiaries and that no further gifts would be permitted, save gifts of the annual small gift allowance, currently £250, to be made to all PP's grandchildren in each tax year.

The court then adjourned the question of what to do about the LPAs. This led to the second judgment on the application of the Official Solicitor as litigation friend for PP for the revocation of both LPAs.

In that second judgment, DJ Batten first drew attention to s.22 MCA, that gives only limited powers to the court to revoke a LPA. It is not wholly a "*best interests*" decision and the court only has jurisdiction (so far as is relevant here) where the donee of the LPA has behaved or is behaving in a way that contravenes his authority or is not in P's best interests, or proposes to behave in a way that would contravene his authority or would not be in P's best interests. Once that jurisdictional hurdle is overcome, then the court has the power (although not the duty) to revoke the LPA, a decision which is taken in P's best interests.

So far as BB was concerned, the court had little difficulty in holding that he had exceeded his authority. So far as CD was concerned, the judge concluded that she had not contravened her authority, but had not acted in PP's best interests because she had not taken decisive action when she learnt of the gift to JP of £324,000 and had failed to provide in her role as professional attorney sufficient oversight of BB and ensure that he was acting in PP's best interests.

The judge then went on to consider whether or not, the jurisdictional hurdle having been overcome, it was in PP's best interests that BB and CD should remain as attorneys of the property and affairs LPA. Again, with no hesitation, the court held that it was not and ordered the appointment of a deputy for property and affairs from the Public Guardian's panel of deputies.

So far as the health and welfare LPA was concerned, a different decision was reached. There was recognition of the fact that it had been PP's choice to appoint BB and CD as her health and welfare attorneys and did not find that they had acted in contravention of their authority or not in PP's best interests. In those circumstances, the court did not revoke the LPA for health and welfare.

The court then turned to the costs of the ratification application. The court held that BB's conduct took the case outside the general rule in relation to costs of property and affairs applications set out in the then Rule 156, namely that such costs are charged on the estate and applied Rule 159, which allowed the court to depart from that general rule, having regard to all the circumstances, especially including conduct. The court found that BB's conduct justified an order that BB pay his own costs and the costs of the Official Solicitor, apart from £4,000 plus VAT which should come from PP's estate in recognition that a prospective application for approval of gifts may have been appropriate.

So far as the costs of the revocation application were concerned, those were adjourned for written submissions and the final judgment of the three gives the decision in relation thereto. In relation to the application for revocation of the property and affairs LPA, the court applied Rules 156 and 159, and decided that the conduct of both BB and CD had justified a departure from the general rule. In the result, they were ordered to pay their own costs and the costs of the Official Solicitor as litigation friend of PP.

Finally, in relation to the application for the revocation of the LPA for health and welfare, the court applied the ruling of Senior Judge Lush that such an application falls to be decided under Rule 156. As the LPA for health and welfare had not been revoked, the court ordered that the costs of that application should come out of PP's estate and allowed 10% of BB's and CD's costs to come out of PP's estate.

Comment

These decisions are useful illustrations of the problems that can arise where attorneys do not understand the limits of their authority in relation to gifts (as to which see also the OPG's updated guidance note, discussed further below). The case is somewhat surprising in that one of the attorneys was a solicitor and it seems that she had failed to acquaint the non-professional attorney with his responsibilities. There had also, it seems, been a failure of oversight.

The refusal to ratify the large gift and the revocation of the property and affairs LPA would appear, on the face of it, to have been almost inevitable and underline the fact that the court is often reluctant,

even on a prospective application, to approve gifts of substantial parts of P's estate simply for the purpose of IHT planning, especially where that might leave P vulnerable to running out of money for nursing and care costs.

The order made on the gift application is interesting in that it shows flexibility in the court's response to its refusal to ratify the gift, allowing the donee to keep part of the gift, but bringing it into hotchpot instead. Whilst this course of action was plainly eminently sensible, it does – for the more technically-minded – raise a question as to the precise jurisdictional basis upon which the court could make it. The Court of Protection was not, here, making decisions on behalf of P, but purporting to direct what others should do with P's property. On one view, the court should have authorised PP's litigation friend to begin restitution proceedings in the Chancery Division. However, this would have an absurdly complex and expensive exercise, and it is hardly surprising that the court wished to take pragmatic steps to resolve the situation. We have no doubt that, had the question been asked (as it appears not to have been) thought would have been given as to precisely how it could have been done: perhaps the answer is that it was exercising its imported High Court powers under s.45(1) MCA 2005 "in connection with its jurisdiction" in effect to grant injunctive relief against the defaulters.

Capacity to marry – the effect on a will

Re DMM [2017] EWCOP 32 and [2017] EWCOP 33 (HHJ Marston QC)

Mental capacity – marriage

Summary

HHJ Marston QC has answered a question as to the salient information relevant to the capacity to marry that, somewhat surprisingly, had not previously been answered. The case concerned a retired insurance broker, DMM with Alzheimer's disease. He had once been married, ending in divorce, and had then cohabited with a woman, SD, for 20 years. He had made a will in 2013 and previously executed an EPA appointing EJ, one of his adult daughters from his marriage, as attorney; in 2013, he executed a health and welfare LPA in EJ's favour. It is implicit from the judgment that plans must have been afoot for DMM and SD to marry, because EJ brought an application under Part 4A Family Law Act 1996; these were transferred to the Court of Protection, with an interim injunction made to prevent the proposed marriage. The case was listed for a preliminary hearing before HHJ Marston QC to decide the preliminary issue as to whether the:

> *legal test for whether a person has capacity to marry includes a requirement that the person should be able to understand, retain, use and weigh information as to the reasonably foreseeable financial consequences of a marriage, including that the marriage would automatically revoke the person's will.*

It was agreed that the effect of the marriage of DMM to SD would automatically revoke the will that he previously made. If SD lacked the capacity to make a new will (or a statutory will was not made on his behalf), the effect of revocation combined with the effect of the statutory intestacy provisions would mean his children would receive less and SD more.

The evidence was that DMM (who was not at that stage a party or represented in any way before the court) might not have the capacity to understand the effect of the remarriage upon his will. The question was therefore whether, as a matter of law, such understanding was required as a component part of the test.

HHJ Marston QC reviewed the authorities and held, at paragraph 7, that:

> *It is clear to me that DMM has to be able to understand the information relevant to a decision (to marry) and that information includes information about the reasonably foreseeable consequences of deciding one way or the other. The effect of the marriage making the will invalid is not just a reasonably foreseeable consequence of marriage, it's a certain consequence of marriage which will have financial consequences to the parties. Is a financial effect on the parties relevant to capacity to marry? In London Borough of Southwark v KA [2016] EWCOP 20 Parker J said "P must understand the duties and responsibilities that normally attached to marriage, including that there may be financial consequences and that spouses have a particular status and connection with each other." She also made it quite clear that this did not mean for example that you had to understand financial remedy law before you got married. She said "the test for capacity to marry is not high or complex. The degree of understanding of the relevant information is not sophisticated and has been described as rudimentary. I must not set the test too high." One does not need a refined analysis as the President said [in Sheffield CC v E and another [2004] EWHC 2808 (Fam)]. There is also quite clearly a policy issue involved here, the test must not be set too high because that would be an unfair, unnecessary and discriminatory bar against those with capacity issues potentially denying them that which all the rest of us enjoy if we choose, a married life.*

HHJ Marston QC noted that there had been discussion in the reported cases as to whether it was necessary to understand that a reasonable foreseeable consequence of marriage is that your financial position might be affected by marriage, particularly if it failed and there were financial remedy proceedings. He noted *"importing that into capacity to marry is setting too high a standard, too refined an analysis, asking to take too many hypothetical situations into consideration."* However, he continued (at paragraph 10):

> *that seems to me to be very different from the fact that your will is going to be set aside if you marry. That is a statement of fact not a hypothetical situation, you don't have to know what the situation will be if you die intestate, all you need to know is "What you wanted to happen on 11 December 2013 cannot happen because your will is invalid because of the marriage". If you cannot understand that how are you said to be able to understand, retain, use and weigh information as to the reasonably foreseeable consequences of the marriage? It is said in Miss Bond's argument that this is focussing on the testamentary consequences of the marriage, in my view it's not, it's focussing on the factual consequences of marriage. I therefore find that the fact that a second marriage*

revokes the will is information that a person should be able to understand, retain, use and weigh to have capacity to marry.

Matters then proceeded, recorded in a second judgment. DMM was then joined as a party, represented by the Official Solicitor. Dr Hugh Series was instructed to report upon DMM's capacity in light of the determination set out above as to the information relevant to the test. He was clear that DMM did have this capacity, clearly retained and understanding the fact that the will would be revoked, he might not be able to make a new one, and that, in consequence, his children might receive less and SD more. HHJ Marston QC therefore made a declaration to the effect that DMM had the capacity to marry, stayed for a short period to enable an application for permission to appeal to the Court of Appeal to be made – an application which did not come to pass.

Comment

On one view, it would have been helpful had the Court of Appeal been asked to consider the question before HHJ Marston QC, as it would have been useful to have an appellate level decision on the information relevant to the marriage test (a previous opportunity in *A, B and C v X & Z*, also on the relevance of financial consequences. not having come to pass on the death of P).

However, it is perhaps not surprising that the case did not progress further. Although it is a little odd that P was not joined to the determination of such important a preliminary issue (and could, in principle, have argued that HHJ Marston QC was wrong even when he was joined), the conclusion reached on the legal issue would seem to be unimpeachable because of the inexorable consequences of marriage upon a will. Further, HHJ Marston QC was astute to formulate the necessary information at as low a level as sensibly possible to outline those consequences. Although the report of the evidence of Dr Series was of short compass, it would appear clear that it would have been all but unassailable on appeal.

OPG Guidance on Gifting

On 10th January 2018, the OPG updated its legal guidance for professional deputies and attorneys on the rules about giving gifts. The Practice Note can be found here.

The note deals with the principles of gifting (that is to say what powers attorneys and deputies have to make gifts), the meaning of a gift, capacity to make a gift, involving the person in the decision, the attorney or deputy accepting a gift, general rules about gifts, what is reasonable as a gift, gifts of property, who gifts are for, the relevance of any will, applying to the Court of Protection, providing for others' needs, unauthorised gifts, deprivation of assets, bonds and the criminal law.

Of particular interest is a section entitled "*Providing for Others' Needs*", which mentions the decisions of District Judge Elldergill in *The Public Guardian's Severance Applications* [2017] EWCOP 10, where the judge highlighted the difference between a gift and a payment to meet a person's needs. In that case, the court held that an attorney could make payments from the LPA donor's estate to meet the donor's

disabled daughter's needs without seeking authority from the court, as this was meeting a need rather than making a gift.

The guidance, however, cautions seeking authority from the court where there is doubt, that it would be prudent to include in any LPA specific provision for these payments and that such payments should ordinarily only be made where in the past the donor had provided for the needs and it was reasonable to conclude that that would have continued into the future.

OPG's business plan for 2017-2018

On 7th December 2017, the OPG published its Business Plan for 2017 to 2018. Notwithstanding the debate provoked by former Senior Judge Lush as to the relative merits of LPAs and deputyship, there are clear aims to increase the number of people making LPAs, aiming to reduce the average donor age from 73 to 65 and to ensure that usage represents a more diverse spectrum of society. There is, further, an aim to increase online usage so that the percentage of LPAs made using the online tool should increase with a target of 30% of new LPAs being created using that tool, and 80% of deputies submitting their reports online.

Finally, there is an aim to have a published strategy for safeguarding as well as proposals for a new life-long LPA, creating a new area of OPG business to meet the needs of missing persons and improve digital tools and online access to make it easier for users to access services and provide information..

PRACTICE AND PROCEDURE

Fluctuating capacity in the face of the court

Re MB [2017] EWCOP B27 (HHJ Parry)

Mental capacity – residence

Summary

This case was concerned with the capacity of MB to make decisions about his residence, care and contact arrangements. It is the culmination of a series of judgments, the first being reported in 2007.

MB had since 2007 been treated by the local authority providing care to MB, all the Court instructed experts, MB's litigation friend and ultimately the Court as someone who lacked capacity to make decisions as to his residence, care assessment and treatment for his learning difficulties, epilepsy, autistic spectrum disorder behavioural problems and as to the nature and extent of his contact with his mother.

In 2017, in the course of yet further litigation, the court received a report from Dr Leighton, an independently instructed Consultant Psychiatrist. Dr Leighton was of the view that MB had capacity to make the relevant decisions, but "*would, from time to time, in circumstances that could not be accurately predicted, lose capacity to make decisions about his immediate wellbeing*." Dr Leighton was unable to predict the duration of that loss of capacity: "[i]*t could be 'for a matter of hours or even for a matter of days.'*"

The judge was clearly troubled at to what could have caused what she described as a radical change in MB's capacity to make decisions. A second consultant psychiatrist was therefore instructed to report – Dr Lisa Rippon. Her report concurred with Dr Leighton's. The two experts produced a joint statement. This paragraph is set out in the judgment:

> *Both Dr Rippon and Dr Leighton agreed that MB's capacity could fluctuate during times of seizure activity but also when his level of anxiety rises and he becomes distressed because of environmental triggers. It was Dr Leighton's view that these periods could last for several days and he gave the example of the time that MB had become angry with his RPR and had refused to see her for a week. However, what is less clear is whether his capacity was affected over the whole of this period. Therefore, although both doctors agreed that MB's capacity had fluctuated, what is less certain is how long these periods could last.*

The parties did not wish to challenge the expert evidence, and submitted a consent order bringing the proceedings to an end on the basis that the Court lacked jurisdiction over MB. Her Honour Judge Parry held that she was:

> *satisfied on the basis of the evidence that is placed before the Court that I should approve the consented disposal of these proceedings. I do so on this basis, all Courts make decisions on the evidence that his presented to that, to that extent, the Court is the servant of the evidence that is provided by the parties. Whilst the Court has an overall directing role in identifying the type and nature of evidence that it requires to make decisions, ultimately those decisions must be faithful to the evidence that is capable of being accepted.*
>
> […]
>
> *It would therefore be illogical for the Court to arrive at a different position from that which is jointly argued for on the basis of evidence which is jointly accepted as valid.*

The difficulties this would pose those providing services to MB on the ground was not lost on HHJ Parry QC, who noted that:

> *It is a clear undercurrent in these proceedings that those who know MB particularly well, including those who have been providing care to him over a number of years and his social worker, have worries about MB's future and how he will adapt to the changes that may become open to him. There are also understandably legitimate concerns and worries as to the impact upon him of making changes to a routine that he has become very used to over the last nine years or so. Those are legitimate concerns for professionals to have both at a personal and professional level for MB.'*

Lastly, HHJ Parry noted that the "*proceedings conclude without any clarity as to what alternative care arrangements could be made available for MB*" but unsatisfactory as this was, she correctly identified that this was no longer the concern of the Court.

Comment

This case is an interesting example of what the court should do in the face of joint expert evidence as to capacity that it does not find convincing. Reading between the lines, it appears as if the judge felt that her hands were tied by the parties' willingness to accept that evidence.

While it is difficult for a court to take a different approach to that of the parties, the court's jurisdiction is ultimately an inquisitorial one. It would have been interesting to see what the court had done had (as is not uncommon) all the evidence been to the effect that MB lacked capacity but the court was not satisfied as to its quality. There is, of course, the asymmetry introduced by the presumption of capacity, but HHJ Parry did not make express reference to this. Further, what is not clear from the judgment is whether was an exploration of (1) the extent to which the current care package was maximising MB's capacity (by reducing his anxiety and minimising the environmental triggers that may cause him to slide into incapacity); and (2) the likelihood of him losing the capacity to make decisions in the absence of the care package.

We suggest that this could have been a legitimate avenue of exploration in this case. There are cases in which it is only after a period of time in which a care package has been imposed on P via the MCA

(in respect of a non-compliant diabetic for example), that P is able to make capacitous decisions. Once P has regained capacity to make decisions about care (and makes the unwise decision to refuse all care), P's health declines and P again loses the capacity to make decisions about care. We suggest that the court must have power in a case of that nature to put in place a regime that kicks in once P loses capacity, and we have had – unreported – experience of the court making 'contingent' declarations/decisions to cater for sufficiently foreseeable circumstances.

Court of Protection statistics

The MOJ published the 'Family Court Statistics Quarterly, England Wales, July to September 2017' on 17 December 2017. The salient points in so far as the Court of Protection is concerned are as follows:

- There were 8,049 applications made under the Mental Capacity Act 2005 (MCA) in the period, up 4% on the equivalent quarter in 2016 (7,762 applications). Just under half (49%) related to applications for appointment of a property and affairs deputy and 1,077 applications related to deprivation of liberty, up 38% on the equivalent quarter in 2016. 630 applications were made for *Re X* orders. Deprivation of liberty orders were up 57% over the same period, from 362 to 569.

- There were 10,023 orders made, 50% more than the same quarter in 2016, driven by a clearance of outstanding cases and an increase in the number of cases being dealt with by regional courts. A third (33%) of the orders related to the appointment of a deputy for property and affairs.

- There were 193,285 Lasting Powers of Attorney (LPAs) received in July to September 2017, up 32% on the same quarter for 2016 thus maintaining the strong upward trend. There were 2,774 Enduring Powers of Attorney (EPAs) in July to September 2017, down 11% on the equivalent quarter in 2016.

Short Note: continuing violations and HRA claims

The case of *O'Connor v Bar Standards Board* [2017] UKSC 78 is of interest to COP practitioners in considering the limitation period for bringing a claim under the Human Rights Act 1998. Section 7(5) HRA 1983 states that proceedings have to be brought before the end of the period of one year beginning with the date on which the act complained of took place. In the context of disciplinary proceedings brought by the Bar Standards Board (BSB), the Supreme Court held that "the date on which the act complained of" did not have to be interpreted as meaning an instantaneous act. A barrister's claim that the BSB had indirectly discriminated against her by bringing and pursuing disciplinary proceedings therefore amounted to a single continuous course of conduct which continued until the conclusion of the barrister's appeal. Time ran from the date when the continuing act ceased, not when it began. The decision is therefore useful for confirming, by analogy, that lengthy periods of unlawful detention could amount to a single continuous course of conduct in respect of which a claim could be brought under the Human Rights Act 1998.

Cross-border cases involving Scotland

For anyone involved in an 'outgoing' Court of Protection case involving Scotland, we strongly suggest that you read the discussion of the *Darlington* decision from Glasgow Sheriff Court in the Scotland Report, as it comprehensively puts to bed a somewhat odd interpretation of the Adults with Incapacity Act 2000 by Scottish Government, and makes clear that orders of the Court of Protection can be recognised and enforced in Scotland under the provisions of the AWI.

THE WIDER CONTEXT

Mental Health Act review update

The independent Mental Health Act Review continues apace, with, in particular, a call for evidence from service users and carers (by way of an online or paper survey) with a deadline of 28 February.

CANH withdrawal: interim clinical guidance

Given recent legal developments (both in case law and the withdrawal of Practice Direction 9E) the BMA, RCP and GMC published joint interim guidance entitled '*Decisions to withdraw clinically-assisted nutrition and hydration (CANH) from patients in permanent vegetative state (PVS) or minimally conscious state (MCS) following sudden-onset profound brain injury'* (the Interim Guidance) on 11 December 2017.

The guidance provides an update on the law (in particular following *Briggs* [2017] EWCA Civ 1169, *M* [2017] EWCOP 19 and *Re Y* [2017] EWHC 2866 (QB)) to set out what constitutes good practice in making decisions to withdraw CANH from patients in PVS or MCS following sudden-onset brain injury. This is the first time that these three organisations have put their name to the same guidance. It is essential reading for anyone practicing in this area.

The guidance recommends practitioners take the following steps:

1. Ensuring that the RCP guidelines "*Prolonged Disorders of consciousness*" have been followed to establish the patient's level of responsiveness and awareness;
2. Assessing the patient's best interests by consulting all relevant people and holding a formal documented best interest meeting to consider clinical information and the patient's wishes and feelings, values and beliefs;
3. Seeking a second clinical opinion from a consultant with experience in PDOC who has not been involved in the patient's care, preferably from a different organisation to that treating the patient. This is consistent with the GMC's 2010 guidance "*Treatment and care towards the end of life: good practice in decision making*;"
4. Keeping detailed records of discussions and detailed clinical records;
5. If it is agreed that CANH should be continued, keeping this decision under regular review;
6. If it is agreed that CANH should be withdrawn, ensuring that this takes place as soon as possible after a withdrawal and end of life plan has been drawn up.

The guidance makes clear that, if these steps have been followed, and in line with the cases set out above, the view of the GMC/BMA and RCP is that good clinical practice does not mandate an application to court where clinicians and families are in agreement.

The guidance is expressed as being interim pending the promulgation of updated and in-depth guidance on good clinical and professional practice for making decisions about CANH in a much wider range of categories, with an intended publication date of May 2018.

NICE Guidelines on decision-making and mental capacity: consultation

NICE has published for consultation draft guidelines on decision-making and mental capacity, with a deadline of 5 February (consultation responses have to be given by registered, institutional, stakeholders). The guidelines cover supported decision-making, advance care planning, assessment of mental capacity and determination of best interests. We would urge responses from those who are concerned to ensure that the guidelines (1) reflect the law accurately; and (2) add value to what is already out there in a multiplicity of sources.

Advance decisions: paying the price

Widely reported in the news was the substantial settlement made in respect of a woman whose advance decision to refuse medical treatment had not been honoured (because it had been lost) for 22 months. Two points are worth particular note here: (1) the claim was, in fact, not a human rights claim, but a claim for negligence and assault; and (2) it was the woman's GP who alerted the woman's family and argued alongside them that it should be honoured.

'Everyday Decisions'

The Everyday Decisions project led by Professor Rosie Harding at Birmingham University has published its report (and an easy read version). The project explored how people with intellectual disabilities make everyday decisions about a wide range of life choices and issues, and how care professionals support them to make their own decisions. This research explored how mental capacity law works in practice to support decision-making through qualitative interviews with intellectually disabled people, and care professionals.

The report contains a number of important findings, not least that there is – often unrecognised – considerable facilitation of individuals with learning disabilities to make a wide range of both everyday and life choices, although the same strategies are deployed more rarely in respect of more difficult decisions. Echoing findings from other research, the report found that there was a tension between supported decision-making and mental capacity assessment. Sometimes people are found to lack capacity when they might have been able to make their own decision with the right amount of support. Sometimes people are considered to have capacity when they were actually unable to make particular decisions.

The report contains a series of recommendations which we reproduce in full given their significance:

1. Whilst there is general awareness of the basics of the Mental Capacity Act, there is scope for ongoing, and potentially more detailed, training for frontline care staff about the importance of supporting decision-making under the MCA as a way of supporting legal capacity.
2. A public awareness raising campaign on the UN Convention on the Rights of Persons with Disabilities might help to increase general understandings of the CRPD within the care sector.
3. Care professionals would both be interested in, and benefit from specific training and continuing professional development on the UN CRPD and generic Human Rights issues.
4. Implementation of the changes to the best interests in the MCA proposed by the Law Commission in 2017 may help to embed supported decision-making more fully in practice, and bring the MCA closer to full CRPD compliance.
5. Intellectually disabled people and care professionals with experience of best practice in supporting legal capacity should be involved in any review and revision of the MCA Code of Practice.
6. Appropriately resourced support services, including self-advocacy groups run by and with disabled people are vital mechanisms for fostering a CRPD compliant culture of supported decision-making for people with intellectual disabilities.
7. Nuanced support and communication approaches, building on strategies developed for everyday and life choices, should be utilised for more complex life choices and legal decisions.
8. More research is needed into how banks and financial institutions engage with customers with intellectual disabilities, effective support frameworks for everyday financial management, and managing bills and payments.
9. More research is needed into how the MCA is used in medical consent processes for people with intellectual disabilities.
10. Given the importance of future planning, further research is required into how best to support people with intellectual disabilities in making wills, advance decisions and granting Power of Attorney.
11. A shift in social attitudes about intellectually disabled people, relationships and friendships is required to better support the relational lives of people with intellectual disabilities, particularly those living in care homes and supported living environments.
12. Policy makers should give serious thought to simplifying the benefits and sanctions regime in order to better support people with intellectual disabilities to enjoy an adequate standard of living and to access their communities.

13. Disabled people's self-advocacy organisations should be funded and supported to provide additional sources of advocacy, support and empowerment for intellectually disabled people that reaches beyond the statutory minimum requirements under the MCA and Care Act 2014.

14. Frontline care professionals must be given time to complete paperwork that does not detract from their practical care giving. Local and central government investment in care services should recognise the need for both high quality care-giving and care planning.

15. The Code of Practice on the Mental Capacity Act 2005 should be revised to take account of developments in practical approaches to supported decision-making and capacity assessment.

Short note: restitution and s.117 MHA 1983

The case of *Richards v Worcestershire CC* [2017] EWCA Civ 1998 concerned a claim brought by a deputy on behalf of Mr Richards who had suffered a head injury in a road traffic accident and had obtained approximately £2 million in damages. Mr Richards had been detained under s.3 Mental Health Act 1983 and was therefore entitled to aftercare under s.117 MHA 1983. His deputy sought to recover the costs which had been paid for his care which, the deputy argued, ought to have been paid by the local authority and CCG under s.117 in restitution. The public bodies argued that the claim should be struck out as it ought to have been brought by way of judicial review rather than restitution. The Court of Appeal held that the deputy could, in principle, claim against the public authorities but there were hotly contested facts which could not be resolved on a strike out application such the local authority's argument that the services arranged by the deputy were extravagant and more extensive than Mr Richards needed. The court having decided, the legal point of principle, we would be interested to learn the outcome in this case and to see whether other deputies follow suit in attempting to recover costs from public authorities for care which has been privately funded in circumstances where there is a statutory duty on the authorities to provide services.

Safeguarding in (variable) practice

Action on Elder Abuse published a report entitled 'A Patchwork of Practice: What adult protection statistics for England tell us about implementation of the Care Act 2014' in December 2017. The report is based on an analysis of the Safeguarding Adults Collection (SAC) Annual Report for England 2016-17, published by NHS Digital on 15 November 2017. The report notes the huge differences in how abuse is reported and investigated in different local authorities. Of particular interest to mental capacity practitioners is the fact that for 19% of those subject to a safeguarding enquiry there was a failure to take account of their mental capacity (it being noted down as either "don't know" or "didn't record"). This affects a staggering 22,050 people. Fifteen local authorities had a failure rate in this regard of 50% or more, with two having a rate greater than 90% (Calderdale 94% and Bournemouth 97%). This is despite the issue of capacity being critical to understanding how best to support and respond to victims of abuse.

Capacity and mental health in the criminal court room

Justice published its report *Mental Health and Fair Trial* on 27 November 2017. It makes 52 recommendations on aspects of the criminal justice process including the investigative stage, decisions as to charge or prosecution, pre-trial and trial hearings and disposal and sentencing. Of particular interest to mental capacity lawyers and the part of the report we explore below is that concerned with legal capacity tests and the recommendations made on that issue.

The report makes recommendations to ensure that "*vulnerability is properly identified, and where identified, properly approached so that the person either receives reasonable adjustments to give them the capacity to effectively participate in their defence, or if appropriate, is not prosecuted*."

The legal capacity tests the report considers are those for fitness to plead, insanity and diminished responsibility. The report makes a number of specific recommendations in respect of these legal capacity tests. These are:

(1) that there should be a capacity based test of fitness to plead and fitness to stand trial, placed on a statutory footing and applied in magistrates' courts and the Crown Court;

(2) Where the psychiatric assessment indicates that a defendant is fit to plead, this opportunity should be offered, subject to legal advice, in order to avoid an unnecessary trial.

(3) Evidential and procedural changes are needed to ensure that this process and the fact-finding procedure that may follow are fair.

(4) The insanity defence should be amended to a defence of "not criminally responsible by reason of a recognised medical condition" available in magistrates' courts and the Crown Court.

(5) In a clear case, for example when the prosecution and defence are agreed that the facts are completely made out and that the expert evidence demonstrates the defendant lacked capacity at the time of the offence, the case should not proceed to trial, and a judge should be able to pronounce a special verdict.

(6) A further review should take place of what defences should be available in cases where mental capacity will be in issue, taking into account the range in degree of diminished capacity that might exist for defendants with vulnerabilities. The amended test of diminished responsibility is very similar to the proposed test for not criminally responsible – the difference being either a substantial or complete lack of capacity. It is difficult to identify which ingredients would satisfy one test and not the other.

(7) Consideration must also be given to whether the defence of diminished responsibility by substantial lack of capacity should be available for all specific intent crimes and not just murder.

(8) Primary legislation and amendment to the Criminal Procedure Rules will be necessary to give effect to these amended tests and their procedures. (ix). Better instructions must be provided to clinicians assessing capacity under these tests, who would benefit from a standard template to follow on preparing their reports.

It should, finally, be noted that the Justice working group examined, with some care, the implications of the CRPD for criminal justice, and noted there were some situations where the "*current approach of the CRPD Committee would create results that are perverse to what we consider to be the CRPD's intention, i.e. where we believe that the person would in fact be indirectly criminalised and discriminated against for having a disability*" (1.19). The working group therefore departed from its guidance in such cases, believing that the approach used in the report "*meets the overarching aims of the CRPD*."

International developments of interest

In international developments of interest:

1. The Republic of Ireland is consulting upon a deprivation of liberty regime to be inserted into their (yet to be commenced) Assisted Decision-Making (Capacity) Act 2015, with a deadline of 9 March. We are sure that they would welcome any assistance with (1) squaring the ECHR/CRPD circle in this context; and (2) avoiding the DOLS elephant traps;

2. Gibraltar has introduced a Lasting Powers of Attorney and Capacity Bill.

Book corner

We include here three book reviews by Alex, who acknowledges with gratitude that copies were provided to him – he is always happy to review works in or related to the field of mental capacity (broadly defined).

The first is the most recent (8th) edition of *Cretney and Lush on Lasting and Enduring Powers of Attorney* (LexisNexis, £85). Caroline Bielanska has now taken over this work from former Senior Judge Lush, and has done an excellent job of updating this authoritative work to ensure that it covers all the bases concerning these powerful instruments. It, rightly, remains the standard work in its field. Perhaps unusually for a new edition of a legal textbook, it received considerable media coverage upon publication in November, thanks to the foreword contributed by his former Senior Judge Lush, which was widely reported. Former Senior Judge Lush explained why he had never made an EPA or LPA himself, as:

> *In a nutshell, I have seen so much of the pathology associated with powers of attorney and the causes and effects when things go pear-shaped, that I find it difficult to recall cases where powers have operated smoothly and to the credit of everyone involved.*

Former Senior Judge Lush made clear that he had greater confidence in deputyship as a means of managing someone's property and financial affairs, and that LPAs could have a "*devastating effect*" it can have on family relationships: "[t]*he lack of transparency and accountability causes suspicions and concerns, which tend to rise in a crescendo and eventually explode*." Finally, he explained that he had not made an LPA for health and welfare "*because, in most cases, I don't think they're necessary*:"

> *The people, who, according to LPA9, don't know you" and "could end up making crucial decisions for you, such as whether to accept medical treatment to keep you alive" are usually qualified health-care professionals, who will make these decisions in your best interests after consulting you and your nearest and dearest.*

Finally, former Senior Judge Lush expressed his concerns that what safeguards there are in respect of LPAs have been consistently eroded in recent years because of the Public Guardian's drive towards creating and registering LPAs online. Caroline Bielanska raises similar concerns in her preface to the work (and has, usefully, also created a safeguarding guide for legal professionals which is available from her web site to download. It includes precedents, and template documents aimed at reducing the risks potentially posed by LPAs).

We discussed some of the issues raised by both Lush and Bielanska in our September 2017 Property and Affairs report. It was particularly striking re-reading this foreword alongside Rosie Harding's new book *Duties to Care: Dementia, Relationality and the Law* (Cambridge University Press, £75), a socio-legal work of the highest calibre examining the regulatory and legal dimensions of caring for a person with dementia. *Duties to Care* is grounded in a detailed empirical study of the experiences of carers looking after individuals at different stages of dementia, and the world she describes is an almost entirely different one to that depicted by Lush and Bielanska. Put very shortly, the world that they describe is one in which the family is, in essence, the problem; the world is described by Harding is one where embattled families are doing their best to navigate an extraordinarily complex landscape when seeking to care for a loved one with advancing dementia. Powers of attorney only play a small part in her study, and the experiences she relays do indicate some of the same tensions identified by Lush and Bielanska; however, more often, the tension is between the donor and the attorney in circumstances where the donor is uneasy and uncomfortable about having handed over power.

The more that we distrust families to 'do the right thing' (whether in the context of potential abuse of powers of attorney, or by extending the tentacles of Article 5 ECHR into private family settings to secure against the risk of potentially arbitrary deprivation of liberty), the more there will be a drive to regulate and inspect. *Duties to Care* is a hugely important book for identifying so clearly, and with the benefit of data drawn from both surveys and interviews, both how heavily society relies upon informal carers, and how the effect of those burdens (which are both social and, increasingly, legal) weighs upon the carers themselves. It therefore serves not just as a valuable and thoroughly researched contribution to the academic literature, but a vital contribution to a debate about the extent to which we do or should

trust families and informal carers – and, in consequence, to whether we should shape the law to seek to support or constrain them.

The third book makes a contribution to a very different debate, namely why we have a mental health law which allows medical treatment under coercion. George Szmukler's *Men in White Coats: Treatment under Coercion* (Oxford University Press, £29.99) provides an elegant, and extremely readable, overview of the core issues concerning involuntary admission and treatment, grounded in his own clinical practice and the experience of service users. It then provides an equally elegant overview of the 'fusion' solution that he proposes, to create a law that does not discriminate against people with mental illness, and reduces, insofar as possible, the shadow of coercion which hangs over the practice of psychiatry. Whilst he has written about this before, this represents an extremely helpful, and updated, version of the proposal, at a time when the Independent Mental Health Act Review is grappling with the two major currents in mental health policy that he – rightly – identifies as conflicting: namely (1) the move to empower patients as collaborators, not subjects, in research and policy developments; and (2) the risk agenda portraying all individuals with mental health issues as, per se, dangerous. Whether or not one agrees with the proposed solution, the book admirably serves its purpose by sharpening the issues in so clear and cogent a fashion and should be widely read by all those remotely concerned with these pressing issues.

World Guardianship Congress

A reminder that the 5th World Congress on Adult Guardianship to be held in Seoul, Korea, on 23rd – 25th October 2018 (with an additional day of workshops, principally for Asian countries, on 26th October 2018). The website for the 2018 Congress is here, and we would encourage anyone interested in sharing experiences in the mental capacity field to consider both travelling to and potentially presenting at the conference.

SCOTLAND

Application by Darlington Borough Council in respect of the adult: AB: Note by Sheriff A M Mackie, Glasgow Sheriff Court, 19th January 2018

It is commonplace for adults with cognitive impairments to be transferred across borders within the UK, often for reasons or combinations of reasons including availability of specialist treatment or specialist residential facilities; return following such placements, which may have been of long duration; following or re-joining family; and so forth. Where such adults are incapable of making valid decisions about such moves, one would expect – given their frequency – that procedures would be clear and that, in absence of significant dispute, they would operate smoothly. In practice, various unhelpful difficulties have arisen. This important decision by Sheriff Andrew Mackie, issued on 19th January 2018, has authoritatively resolved one of those difficulties. It also helpfully explains the relevant procedural steps and issues to be considered where such an adult is transferred to Scotland. Indeed, it is a decision which may usefully be referred to by any Scottish practitioners consulted or instructed regarding such a transfer.

AB resided in a care home in Darlington (referred to in the decision as "the English Care Home"). During 2017 the Court of Protection decided that it would be in her best interests to move to a care home within the sheriffdom of Glasgow & Strathkelvin ("the Scottish Care Home") for a trial period, in accordance with arrangements made by Darlington Borough Council ("Darlington"). The Court of Protection held that *AB* was lawfully deprived of her liberty in the English Care Home; that she might be deprived of her liberty in consequence of the restrictions set out in Darlington's transition plan, but that those restrictions were necessary, proportionate and in her best interests, and lawful; as would be the arrangements to transfer her back to the English Care Home if the trial placement in the Scottish Care Home were to be unsuccessful. *AB* would be deprived of her liberty during the trial placement pursuant to the arrangements set out in Darlington's Care and Support Needs Plan, which however were also necessary, proportionate and in her best interests, and lawful. The Court of Protection also ordered, under section 16(2)(A) of the Mental Capacity Act 2005, that *AB* should travel to the Scottish Care Home, and reside and receive care there, for a trial period of approximately six weeks pursuant to Darlington's arrangements; that Darlington might extend the trial period if it considered that there were good reasons to do so; and that *AB* should return to the English Care Home pursuant to Darlington's arrangements if it were to be agreed that the placement was unsuccessful (such return not requiring a further order of that court).

The order of the Court of Protection was made on 27th April 2017, and *AB* was moved to the Scottish Care Home on 22nd May 2017. Darlington then applied to Glasgow Sheriff Court for (a) an order for recognition of the Court of Protection order of 27th April 2017 and (b) a direction to the Office of the Public Guardian in Scotland to register the Court of Protection order in the Register of International Measures maintained by the Public Guardian. The relevant provisions of the Adults with Incapacity (Scotland) Act 2000 are set out respectively in paragraph 7(1) and paragraph 8(1) of Schedule 3 to that

2000 Act. The procedure is described in an Appendix at paragraph 12.106 of "The International Protection of Adults" (Frimston et al, Oxford University Press, 2015) contributed by Alison Hempsey of TC Young LLP, Solicitors, who acted for Darlington in Darlington's application.

For all of the statutory provisions quoted and considered by Sheriff Mackie, see his Note. This report concentrates on one element which has caused considerable difficulties in such situations in the past, and which had been raised as a potential difficulty in relation to *AB*'s transfer to Scotland. Paragraph 7(3) of Schedule 3 to the 2000 Act lists circumstances in which recognition of "*[a]ny measure taken under the law of a country other than Scotland for the personal welfare or the protection of property of an adult with incapacity*" may be refused. If, as in the present case, the measure would have the effect of placing the adult in an establishment in Scotland, under paragraph 7(3)(e) recognition may be refused if "*(i) the Scottish Central Authority has not previously been provided with a report on the adult and a statement of the reasons for the proposed placement and has not been consulted on the proposed placement; or (ii) where the Authority has been provided with such a report and statement and so consulted, it has, within a reasonable time thereafter, declared that it disapproves of the proposed placement*". Darlington had faxed and sent the required report and statement of reasons to the Scottish Central Authority on 18th January 2017. The Authority did not declare that it disapproved of the proposed placement, but declined to approve or disapprove it. As in other such cases, it pointed out that Hague 35 (the Hague Convention on the International Protection of Adults) has not been ratified in respect of England, and expressed the view that the relevant provisions of Schedule 3 of the 2000 Act relate only to transfers between countries in respect of which Hague 35 has been ratified.

Sheriff Mackie disagreed. He determined that those provisions did apply to the present case. He pointed out that, in accordance with paragraph 7(1) of Schedule 3, recognition by the law of Scotland is dependent upon two conditions set out in paragraph 7(2). The first is that jurisdiction for the measure taken by the other country was based on the adult's habitual residence there. The second is that the UK and the other country were both parties to Hague 35, and the jurisdiction in the other country was based on one of the grounds provided for in Hague 35. However, and crucially, paragraph 7(1) is explicit that these conditions are alternatives. Paragraph 7(1) provides that the non-Scottish measure "*shall, if one of the conditions specified in sub-paragraph (2) is met, be recognised by the law of Scotland*".

As is narrated in Sheriff Mackie's decision, Darlington explicitly sought warrant to intimate their application to the Authority. That warrant was granted and duly implemented. The Scottish Central Authroity thus had the opportunity to enter the process and seek to justify its view, but did not do so. I am bound to comment that I am not aware that anyone has identified any potential reason which might support the Authority's previous view, nor to obtain any such potential justification from the Authority, in the face of what appears to be the entirely clear wording of paragraph 7(1). Indeed, such an interpretation would place an entirely unhelpful – and unnecessary – hurdle in the way of cross-border cases as between England and Scotland. Sheriff Mackie has now authoritatively dealt with the matter, and one trusts that it will not raise its head again. *Adrian D Ward*

Adults with Incapacity: Scottish Government Consultation

An augmented Scottish Government team is nearing completion of its current stage of work on review and amendment of the Adults with Incapacity (Scotland) Act 2000 and associated legislation. The review process was initiated following issue by Scottish Law Commission of its report and recommendations limited to addressing the issue of compliance with the deprivation of liberty requirements of Article 5 of the European Convention on Human Rights. The team was responsive to suggestions that a full review of relevant legislation would be appropriate, including (but not limited to) ensuring compliance with the UN Convention on the Rights of Persons with Disabilities.

It is expected that the consultation document will be issued by the end of January, which will permit us to include at least preliminary coverage in the February Report.

Adrian D Ward

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

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.

Neil Allen: neil.allen@39essex.com

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.

Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click here.

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Adrian Ward: adw@tcyoung.co.uk

Adrian is a non-practising Scottish solicitor 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.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, 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 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

5th UCLH Mental Capacity Conference

Alex is speaking at the 5th University College London Hospital mental capacity conference on 20 February, alongside Sir James Munby P and Baroness Ilora Finlay. For more details, see here.

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see here.

Other conferences of interest

SALLY seminar

The next seminar in the ESRC-funded seminar series on Safeguarding Adults and Legal Literacy will be held on 16 February at the University of Bedfordshire's Luton campus, the topic being "Safeguarding Adults Boards and Reviews." See here for more details.

COPPA seminars

The Court of Protection Practitioners Association have a packed programme of seminars coming up, including (in the North West) a seminar on differing perspectives on proceedings on 31 January and (in London) a seminar on financial abuse on 7 February. For more details, and to book, see here.

Finder's Deputy day

The Third Finder's International Deputyship Development Day is taking place on 1 March in York. It is a free event open to all local authorities carrying out deputyship and appointeeship work, and includes a specific focus on hoarding. For more details, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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