



Welcome to the May 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; reproductive rights and the courts; capacity to consent to sexual relations; and one option in practice.

(2) In the Property and Affairs Report: an attorney as witness; barristers as deputies and a range of new guidance from the OPG;

(3) In the Practice and Procedure Report: the need to move with speed in international abduction cases; executive dysfunction and litigation capacity, and a guest article on meeting the judge;

(4) In the Wider Context Report: new capacity guidance; a fresh perspective on scamming the Irish *Cheshire West* and the CRPD and life-sustaining treatment;

(5) In the Scotland Report: two judgments in the same case relating to anonymity and the 'rule of physical presence' in the context of the Mental Health Tribunal.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our [capacity assessment guide](#)), and as promised, an updated version of our [best interests guide](#) is now out.

We trust we are also allowed to with some pride that no fewer than 5 of the editors have recently been appointed or reappointed to the Equality and Human Rights Commission panel of counsel, along with 3 other members of Chambers: see [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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.

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

LPS update

The Mental Capacity (Amendment) Bill passed its final legislative stage in the House of Lords on 24 April and was given Royal Assent on 16 May. The [debate](#) in the House of Lords, although not giving rise to any substantive votes, was noteworthy, amongst other things, for a trenchant speech from Baroness Murphy about the potential implications of the failure to give a statutory definition of deprivation of liberty. Rather astonishingly, we still do not have an up-to-date version of the Bill on the [Parliament website](#), nor do we have any details of the timescales through to implementation, although

we very strongly suspect that it will not now be “spring” 2020 as had been anticipated, but somewhat later in the year. Along with an [overview](#), Alex has created a [LPS resources page](#) on his website, and will fill it as resources become more available – one highlight so far being this [summary](#) by Tim Spencer-Lane, who led the [project](#) at the Law Commission which led to the Bill and was then involved in the passage of the Bill itself.

Much flesh remains to be put on the bones, although it is possible for organisations now to start implementation work, above all by conducting local impact assessments to understand what demands will be placed upon them by the LPS.

As the Code of Practice and regulations are developed, areas of particular concern for us as regards compliance with Articles 5 and 8 ECHR are going to be:

1. how the guidance in the Code of Practice being produced as to the meaning of deprivation of liberty in lieu of a statutory definition seeks to shape the meaning of the term;
2. how the Code seeks to shape the test in paragraph 14(b)(ii) of Schedule AA1 for when a responsible body can properly determine that the authorisation should be determined under the provisions assigning responsibility for coordinating assessments and consulting to a care home manager;
3. what the Code says as to the circumstances under when it could ever be lawful not to provide an advocate where one should be provided, paragraph 39 of Schedule AA1 placing the responsible body only under a

duty to take “all reasonable steps” to appoint an advocate. It is not immediately obvious how Article 5(4) compliance can be secured in such circumstances;

4. what the Code says as to the length of time for which reliance can be placed on the ‘interim’ authority to deprive contained in the new s.4B(7)(b), given that this is not time-limited. Will this differ if (a) the person or the body doing the detaining has in its possession medical evidence that the cared-for person has a mental disorder; and/or (b) the cared-for person is supported by an appropriate person/advocate from the outset of the process (the safeguard provided by the Law Commission in its draft Bill, but which, as set out above, may not now be guaranteed)?
5. whether non-means-tested legal aid will be available to challenge a deprivation of liberty authorised under the ‘interim’ s.4B(7)(b). The Government has confirmed that it will be available to challenge authorisations when granted under the new s.21ZA MCA 2005, but not having so far made any public commitment in relation to the period prior to that point, which is open-ended, and during which time the person is, by definition, deprived of their liberty for purposes of Article 5;
6. what the regulations will say in terms of the requirements that will be required for assessors and independent reviewers, and will (in the context of the medical assessment) will they address the Grand Chamber decision in *Ilmseher v Germany* [2018] ECHR 991 that: “*in certain specific cases, [the Court] has considered it necessary for the medical experts in question to have a specific*

qualification, and has in particular required the assessment to be carried out by a psychiatric expert where the person confined as being 'of unsound mind' had no history of mental disorders" (para 130);

7. what the Code says as to the appropriateness of an appropriate person: will it, for example, include Care Act advocates and will it require face-to-face contact with the cared-for person?;
8. what appropriate action will AMCPs be able to take before determining whether the authorisation conditions are met.

Reproductive rights and when is it 'right' to go to court?

University Hospitals of Derby And Burton NHS Foundation Trust v J (Medical Treatment: Best Interests) [2019] EWCOP 16 (Williams J)

Best interests – medical treatment

Summary

This case concerned the question of whether it was in the best interests of a woman, identified as 'Anne,' to undergo a hysterectomy and bilateral salpingo-oophorectomy and a colonoscopy, including a transfer plan including sedation and a level of deception to ensure her presence at hospital for the procedures to be undertaken.

Anne had a diagnosis of autistic spectrum disorder and a severe learning disability. The evidence before the court was that when she started menstruating as a teenager her monthly cycle had affected her behaviour and mood, which had in turn restricted her lifestyle. She was very upset at the sight of blood, and her distress

manifested itself in various forms which the judge did not set out in the judgment as being highly personal and sensitive. In addition, the hormonal changes (linked to the production of progesterone) prompted an increase in her aggressive and challenging behaviour. Anne lived at home with her mother and father.

Over the years, her treating consultants had tried a range of treatments, including oral contraceptives, and an IUD. These helped stabilise the problem but ultimately failed, and Anne had experienced severe crises in her mental health in 2010 and 2012. She was said to remain fearful about this experience. She had been started in 2012 on 3 monthly injections of Decapeptyl which suppresses normal hormonal activity including menstruation. It is licensed for 6 months' use, but Anne had been on it far longer. As Williams J noted, it is known to cause osteoporosis and the effects of its long-term usage are unknown. Because of that risk Anne was tried on an alternative medication following a minor operation, and this was drastically unsuccessful, with Anne experiencing severe side effects including psychosis and violent aggression, as well as vertigo. She returned to Decapeptyl use. This involves injections being given every 3 months by her GP at home. These had been reasonably successful in preventing menstruation (and so the linked distress that Anne experienced) and have moderated her behavioural difficulties, albeit her parents believed that when the medication was starting to wear off, she became more aggressive. However, Anne was said to find the injections extremely distressing, both in advance and during their administration. In addition to these symptoms, Anne was also found to have endometriosis, and severe abdominal pain

related to going to the toilet. This might be indicative of large bowel upset, although it could be linked to endometriosis. Testing had suggested an inflammation of the bowel which might be caused by a disease such as Crohn's or ulcerative colitis, requiring further investigation.

Since about 2015 Anne had been unwilling or unable to travel out of her home save on very rare occasions, for instance when she was in such pain from a tooth that she willingly travelled to hospital. However, she suffered from vertigo, which appeared to be exacerbated by travel. On one occasion she struck her father and attempted to leave the moving car, and her distaste for travel by vehicle had now become more embedded. She would not willingly go on a journey in a vehicle, whether car or ambulance. Shortly prior to the application, when she was experiencing severe abdominal pain, she did agree to an ambulance being called, and thus it is possible that, if in sufficient pain, she might agree to travel by vehicle, but otherwise it was likely that she would not. On one occasion she insisted on walking 9 miles home from hospital because of her aversion to travel in a vehicle.

An issue of a hysterectomy has been discussed at various times over the years; it had initially been rejected by her parents and her treating doctors for various reasons, including the effect on her fertility. Anne's consultant obstetrician and gynaecologist since 2014 had ultimately concluded that a hysterectomy is the last realistic option given that Decapeptyl injections could not be used long-term.

There was unanimity between all before the court as to the order to be sought, the Official Solicitor noting that:

23 [...] this is significant life changing surgery which will impact profoundly upon Anne's personal autonomy, bodily integrity and reproductive rights. Nevertheless, he supports the gynaecological intervention (and other interventions) as being in her best interests and thus lawful. They are necessary and proportionate interferences with her rights. The medical and other evidence in support of these conclusions on best interests is clear. In relation to Anne's ability to bear children, the Official Solicitor notes that this is a theoretical rather than real loss, because as a result of her lack of capacity to consent to sexual relations she will not bear children and is most unlikely ever to be able to parent a child. The Official Solicitor notes that Anne is herself unable to express a clear view about the operation. She has indicated that she does not want to have menstrual bleeding or a child.

Williams J noted that:

39. Section 4(6) requires that in evaluating 'best interests' I consider past and present wishes, beliefs and values that would be likely to influence Anne's decision if she had capacity and the other factors she would be likely to consider if she were able to do so. The evidence demonstrates that Anne approves of medical treatments which relieve her of pain and distress; her overcoming her dislike of travel to attend to her dental problems and her support for an ambulance being called when recently in severe pain illustrate her approach.

Williams J concluded that:

43. *The overall balance in the evaluation of Anne's best interests is overwhelmingly in favour of the proposed HBSO, the colonoscopy and the care plan which will facilitate those surgical procedures being undertaken. The medical evidence both from the treating clinicians and also, and highly significantly, from one of the country's leading experts in the field is compelling. That it happens to be aligned with the views of Anne's parents is fortunate but no coincidence. The parents' experience - and they know their daughter best of anybody - is of course the human perception or experience of matters which are ultimately rooted in medical science, as confirmed by the treating clinicians and Professor O'Brien.*

In terms of sedation and deception, Williams J had already noted that:

iv) Given Anne's aversion to leaving her home and travelling by vehicle and the distress and behavioural challenge that getting her to hospital would present, it is plainly in her best interests that a plan is implemented which both enables her to undergo the HBSO and the colonoscopy and which minimises the impact on her of so doing. If that requires both a level of deception and the use of sedation, that is clearly in her best interests; the means is completely justified by the end.

Williams J continued:

44. *As Anne's parents noted, it is unfortunate (to say the least) that it has taken so long to reach this point for Anne. The statement prepared by Anne's mother and endorsed by her father provides a vivid picture of the consequences for Anne and those*

around her, most particularly her parents, of the difficulties associated with her menstrual cycle. That Anne and her parents have had to contend with those difficulties for so long and with such consequences for Anne and for those around her is profoundly regrettable. The pressure which the family have been living under is plainly taking its toll on Anne's parents but their devotion to her is self-evident and remarkable. Many might have succumbed but they have put their daughter's interests above any other; particularly their own. Anne and her family live every day with the consequences of her severe learning disability and autism and any step which makes life better for her and thus for her family should be implemented as rapidly as possible. If there is any lesson to be learned for the future from Anne's case, it seems to me it is that the human cost to the individual and their family should never be underestimated, even when dealing with what for the vast majority of the female population is part and parcel of womanhood. For an individual such as Anne, that biological reality has translated into a truly debilitating and distressing condition. The true welfare of the particular individual (which encompasses not just medical welfare) must not be obscured by other considerations, which might be fundamental to the vast majority of women but which are displaced by other considerations for that individual.

In terms of whether the application had to have been brought to court, Williams J noted that:

45. *It is entirely right that cases such as this, where medical decisions and the plan for their implementation impact so profoundly on P's personal autonomy,*

bodily integrity and reproductive rights, should be considered by the Court of Protection at High Court level, and as this case demonstrates, once in the hands of the court and the Official Solicitor they can be dealt with rapidly.

Comment

Decisions concerning reproductive rights are always – rightly – intensely sensitive, and fact-sensitive. In this instance, Williams J had before him a clear body of evidence establishing that, in this case, it was in her best interests to undergo the procedures, including by way of sedation and deception.

It is, perhaps, unfortunate that, whilst Williams J identified that it was “right” that Anne’s case and those such as it should come to court, he did not specify what “right” meant. In *NHS Trust v Y* [2018] UKSC 46, the Supreme Court made clear that obligations to bring cases to court have to be spelled out of either common law, statute or the ECHR; considerations (for instance) of “good practice” cannot suffice. In *Re P* [2018] EWCOP 10 Baker LJ came closer to spelling out an obligation in a closely related area, namely the covert insertion of a contraceptive device, on the basis that:

given the serious infringement of rights involved in the covert insertion of a contraceptive device, it is in my judgement highly probable that, in most, if not all, cases, professionals faced with a decision whether to take that step will conclude that it is appropriate to apply to the court to facilitate a comprehensive analysis of

best interests, with P having the benefit of legal representation and independent expert advice.

However, not least to assist the revision of the Code of Practice to the MCA, it would be of huge assistance were either the Official Solicitor to argue or the Court of Protection of its own motion to address in the next case on what legal basis it is “right” (as it undoubtedly is) to require such a case to come to court. It would undoubtedly be possible to identify such a requirement out of the implied procedural protections contained in Article 8 ECHR, construed (if necessary) by reference to the CRPD;¹ it would undoubtedly be very helpful if this could be made express in domestic case-law.

Short note: sexual relations, rights and capacity

The judgment in *Re NB* [2019] EWCOP 17 has just appeared on Bailli of a hearing on 7 May 2019 at which Hayden J considered the position of a married couple where doubts had been raised as to the wife’s capacity to sexual relations. There had been a previous directions hearing in March 2019 following which there had been extensive press coverage which centred around remarks reported of Hayden J as to a husband’s “right to sex” with his wife. Hayden J observed that it appeared that in consequence of the publicity the husband had become frightened, had gained the impression (apparently in consequence of poor advice given by a local solicitor) that he was likely to be sent

¹ See, by analogy, the discussion in Alex’s article on *“Powers, defences and the ‘need’ for judicial sanction.”*

to prison, had left the flat he shared with his wife, and had disengaged with the proceedings.

The hearing before Hayden J therefore only involved Counsel for the applicant local authority and Counsel for the Official Solicitor as the wife's litigation friend. Hayden J's recitation of the arguments, his concerns, and his proposed course of action was as follows:

12. During the course of today, I have listened to detailed, helpful and very interactive submissions on behalf of the Official Solicitor and the Local Authority, considering the case law and seeking to evaluate the reach and ambit of the relevant test. Mr Bagchi submits that the test articulated by Sir Brian Leveson in Re: M (an Adult) (Capacity: Consent to Sexual Relations) [2014] EWCA Civ 37 should properly be construed as a general test in which the Court of Protection has, prospectively, to assess an individual's capacity to have a sexual relationship with any other individual. In other words, he submits it is a 'general' or 'issue-specific' test rather than a partner-specific one. If Mr Bagchi is correct, the difficulty that presents in this case is that there is only one individual with whom it is really contemplated that NB is likely to have a sexual relationship i.e. her husband of 27 years. It seems entirely artificial therefore to be assessing her capacity in general terms when the reality is entirely specific.

13. On the facts of the case, for example, it may be that her lack of understanding of sexually transmitted disease and pregnancy may not serve to vitiate her consent to sex with her husband. There is no reason to suggest that AU has had sexual relations outside his marriage. There is no history of sexually

transmitted disease. There is one child who, as I have said, is 20 years old.

14. As I said on the last occasion, these issues are integral to the couple's basic human rights. There is a crucial social, ethical and moral principle in focus. It is important that the relevant test is not framed in such a restrictive way that it serves to discriminate against those with disabilities, in particular those with low intelligence or border line capacity. See: Re: E; Sheffield City Council v E and S [2005] 1 FLR 965.

15. Mr Bagchi has accepted that if a person-specific test were applied here then the outcome, in terms of assessment of NB's capacity may be different. However, he says for the law to impose a person-specific test would be to render a state of uncertainty of outcome in every case, which is, he submits, essentially inimical to the effective administration of the Court of Protection in these cases. It seems to me, the consequence of this approach may be to give insufficient priority to the individual in a legislative framework which prioritises the vulnerable.

16. In the context of the criminal law, it is entirely clear that consent is and can only ever be a person or partner-specific test. As Baroness Hale said in R v Cooper [2009] 1 WLR 1786 'it is difficult to think of an activity which is more person and situation specific than sexual relations.' I am bound to say I find this to be a very forceful point. Mr Bagchi submits that the test for consent in the Criminal Law and that which applies in the Court of Protection is different. In this Mr Bagchi is plainly right. However, as I have indicated in exchanges with counsel, I do not necessarily consider

that the applicable test in the Court of Protection necessarily excludes the 'person specific approach'.

17. I am reserving my Judgment in order that I can take the time to look carefully and in some detail at the case law and its applicability to the facts of this case. It would appear, that it requires to be said, in clear and unambiguous terms that I do so in order to explore fully NB's right to a sexual life with her husband and he with her, if that is at all possible. I have delivered this short interim ex-tempore Judgment in order that AU may receive a copy of it and better understand the focus of the Court's enquiry. I also want to afford him the opportunity to make submissions, through counsel, if he wishes to do so.

As Hayden J seeks to navigate the way through, it is of importance to note that the Court of Appeal was considering its judgment in the case of *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3, the hearing having been on 14-15 May and including consideration of the judge's findings in relation to B's capacity in relation to sex, along with residence and access to social media.

Short note: one option in practice

In *Harrow Clinical Commissioning Group v IPJ & Ors* [2018] EWCOP 44, SJ Hilder considered a classic situation of "only one option" in relation to a young man of 24, AJ, who lived in his family home with his parents and sister. AJ had learning disabilities and sometimes challenging behaviour. He had been in receipt of a substantial package of CHC funded care paid directly to his parents (on a long-term interim basis since July 2014). Neither the family nor

the CCG were happy with this interim arrangement. AJ's father pursued various avenues of complaint, including to the Ombudsman. The CCG commenced proceedings, and, after a protracted period of time, they reached a final hearing. The CCG proposed an extensive package of care at the family home, with (most of) the financial arrangements managed by a third-party broker. His parents did not agree the proposals and sought dismissal of the application. As SJ Hilder identified:

48. [a]lthough the CCG has identified alternatives to its proposal for funding care – care at home with no support package, or residential placement - it is manifestly obvious that both of those "options" carry significant risk of failing to meet AJ's extensive needs, and neither scenario has been set out in any detailed form for the court's consideration. No party actively promotes either of them; and the history of his parents' commitment to AJ to date gives grounds for concluding that they would not be likely to conduct themselves so as to bring either of them about.

Directing herself by reference to *N v ACCG* [2017] UKSC 222, SJ Hilder considered that:

49. Continuation of existing arrangements is not an option which the CCG is prepared to fund and is therefore not an option open to the court to consider. If, when he asks the court to "dismiss these proceedings," IPJ is assuming that the absence of proceedings would mean the continuation of existing arrangements, unfortunately he has not taken on board the CCG's position.

50. Where [AJ's parents] have raised objections to the CCG's current proposals, I am satisfied that full and proper consideration has been given to their objections in the sense that the process of "independent investigation...coupled with negotiation ... in which modifications are made to the care plan and areas of dispute are narrowed" has been fully pursued. Within these proceedings, it is apparent that IPJ and IJJ have been offered as much opportunity for discussion and contribution as in reality they were willing to take up. Appropriate efforts to facilitate concord between the parties have been made, including even line by line consideration of the PBSP [Positive Behaviour Support Plan] at the last hearing and today inviting (and being given) from the CCG explicit assurances of their intentions in respect of collaborative working with AJ's family.

SJ Hilder pronounced herself satisfied that:

56. [t]aking all the circumstances of this matter into consideration, I am satisfied that the care arrangements proposed offer extensive support for AJ, calibrated to meet his needs as far as they have been ascertained after multi-disciplinary assessment, and offering scope for further provision as issues arise. Notwithstanding the dissatisfaction of AJ's parents with various aspects of the care package, the CCG's submission that it can operate the package is plausible in the light of arrangements to date. Of the narrow range of options available, it is very clearly the approach which is in the best interests of AJ.

SJ Hilder declared herself satisfied it was in AJ's best interests to continue to live at his family

home with a package of care as set out in the framework, the PBSP and the oral evidence at the hearing, and authorised the deprivation of liberty to which AJ was subject in consequence.

This case therefore gives a good example of how MN works out in practice, as well as a reminder that the court will want to see that there really has been stress-testing before simply accepting that there really is only one option for it to consider.

PROPERTY AND AFFAIRS

Attorney as witness

OPG v PGO, MAB, MJD [2019] EWCOP 13, (SJ Hilder)

Lasting powers of attorney – revocation

Summary

P had executed 2 LPAs, one welfare, one property and affairs, but the signature of P was witnessed by one of the proposed attorneys.

The LPA was registered but the OPG did not notice the defect. By the time a financial institution did, P had lost capacity to make new LPAs.

The OPG, therefore, made an application for a declaration as to whether the requirements for the creation of an LPA had been met and a direction as to whether the registration of the LPAs should be cancelled.

Section 9(2)(b) MCA requires an LPA to have been made in accordance with the requirements of schedule 1 of the Act. Section 9(3) provides that if the LPA is not so made it confers no authority.

Schedule 1 requires regulations concerning execution to be satisfied. Regulation 9(8)(b) of the Lasting Power of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007 provides that a donee may not witness any signature required for the power apart from that of another donee.

It was clear, therefore, that as one of the donees had witnessed P's signatures, the regulations had not been satisfied. SJ Hilder held that the

regulations were mandatory and, as a consequence, she had no choice but to direct the cancellation of the registration of the LPAs (paragraph 17 of the judgment).

SJ Hilder reached her conclusion with regret of the facts of the case before her. She noted that:

19. In the absence of attorneys to manage her property and affairs, the Court may appoint a deputy or deputies. In making such an appointment, the Court will take into account all that is known of BGO's wishes and feelings in respect of who she would like to assist her, as demonstrated by the attempt to grant LPAs and otherwise.

20. In respect of health and welfare, the Court may also appoint a deputy or deputies if considered appropriate, although it does so much more rarely. However, pursuant to section 20(5) of the Mental Capacity Act 2005, a deputy cannot be given powers to refuse consent to the carrying out or continuation of life-sustaining treatment. In her welfare instrument, BGO had ticked the box to confirm that she wanted to give her attorneys this power. On the failure of her LPA, there is no means for the Court to give effect to her wishes in this respect.

SJ Hilder was mindful of authorities (such as *Miles & Beattie v The Public Guardian* [2015] EWHC 2960, *Wye Valley NHS Trust v Mr B* [2015] EWHC 60, *Briggs v Briggs* [2016] EWCOP 53 and *The Public Guardian v DA & Others* [2018] EWCOP 26) which together emphasise the empowering intention of the Mental Capacity Act 2005 and the "underlying principle that respect must be given wherever possible to the donor's autonomy" (Baker LJ in *PG v DA* at paragraph 47), and that the

mandatory nature of Schedule 1 paragraph 18, particularly where it had the consequences it did for P "*may appear to run in the opposite direction.*" However, SJ Hilder concluded (at paragraph 21) that:

it should be borne in mind that Lasting Powers of Attorney are powerful documents and inevitably therefore there will be those who seek to obtain powers wrongfully. There is no suggestion of such wrongful intent in the matter currently before me but, in different circumstances, insistence on an independent witness to the Donor's signature is itself an important safeguard for the expression of genuinely autonomous decisions.

Comment

It is, to put mildly, unfortunate that the OPG did not notice the fundamental defect in the powers of attorney at the point of registration, as the consequences for P were ultimately that she has been deprived the opportunity of empowering an attorney to act on her behalf in relation to decisions in relation to life-sustaining treatment, a matter about which she clearly felt sufficiently strongly to seek to give her attorney that power.

Barristers as deputies

NKR & Usha Sood v The Thomson Snell and Passmore Trust Corporation Limited [2019] EWCOP 15 (SJ Hilder)

Deputies – property and affairs

Summary

In this case P was a child with cerebral palsy with the consequence that he it was unlikely he would have capacity to manage his property and affairs

when he reaches 18. He received a large award of damages arising out of negligence at his birth and a professional deputy was appointed.

There was a breakdown of relations between P's family and the deputy and so P's mother applied for the discharge of the current deputy's appointment and the appointment in its place of a barrister to act as professional deputy.

The court directed inquiries as to professional regulation and insurance. The Bar Council confirmed that the work of a deputy is not the provision of legal services so not directly regulated but that in the context of discharge of the functions of deputyship, regulatory powers extend to "*behaviour which diminishes trust and confidence in you or the profession (CD5) or insufficient cooperation with the BSB (CD9)...*".

The latter satisfied the court that the behaviour of the proposed deputy, Ms Sood, would be the subject of some regulation in that one of the main risks is misappropriation and that would clearly be a breach of the quoted regulations. (Paragraph 24).

As to insurance, Ms Sood had obtained a quote (BMIF not covering these activities) but had not indicated whether she would charge this as an expense to P's estate or treat it as an overhead (as other professional deputies do).

The deputy had identified a suitable panel deputy who was willing to act. The court, partly because of the insurance position and partly because of the panel deputy's greater experience, decided that P's best interest were served by the appointment of the panel deputy. (Paragraphs 28-30).

Comment

SJ Hilder's decision confirms that barristers may in principle act as professional deputies (although it would appear that insurance would have to be treated as an overhead).

Capacity, pre-nuptial agreements and knowledge of your own assets

PBM v TGT & X Local Authority [2019] EWCOP 6 (Francis J)

Mental capacity – assessing capacity – finance – marriage

Summary

This case concerned the questions of capacity to marry, enter into a prenuptial agreement and also disclosure of the extent of assets managed by a property and affairs deputy. It concerned a man, PBM, who had an acquired brain injury as a result of a deliberate injection of insulin by his father when he was 12 months old. He received a significant compensation award from the Criminal Injuries Compensation Authority in respect of these injuries, although he had made a much greater recovery from his injuries than had been anticipated at the time when his award had been assessed. His compensation award was managed for him by his Property and Affairs Deputy. PBM was described as having coexisting mild/moderate learning difficulties; he had an autistic spectrum disorder (Asperger's) and epilepsy. He lived in a bungalow in Wales with the benefit of a care package run by a case manager.

Since about 2016, PBM had been in a relationship with his fiancée MVA. They had originally planned to marry in June 2018.

However, on 24 May 2018, following an application by the Deputy, the court made an interim declaration that PBM lacked capacity to marry and consequent thereto a caveat has been entered by the Deputy under section 29(1) of the Marriage Act 1949. This had the consequence of preventing PBM from marrying, a step which understandably upset PBM, but which on the substantive determination of the Deputy's application Francis J held had been justified at the time.

By the time that the matter came to final determination, there was agreement between all (including the Official Solicitor as PBM's litigation friend) that PBM had capacity to marry and also to enter into a prenuptial agreement, but lacked the capacity to manage his property and affairs (although that steps should be taken by the Deputy to assist him in developing the requisite skills).

Perhaps because of that agreement, Francis J did not spell out in detail the components for capacity to enter into a prenuptial agreement but noted that "*there can be no doubt that PBM understands the purpose of a prenuptial agreement and that, with the benefit of careful legal advice, he has the capacity to enter into such an agreement.*" Francis J accepted the Official Solicitor's submission that "*there is nothing inconsistent in saying that PBM has capacity to make a decision about a prenuptial agreement but yet may lack capacity to manage his property and affairs generally on an ongoing basis. Understanding and negotiating (with advice) and entering in to a prenuptial agreement is a one off event, albeit that the effect of the contract negotiated is always binding. Managing property and affairs is not a single event, but a continuum.*"

Francis J noted (at paragraph 33) that *"it is obviously desirable (from the prenuptial agreement perspective) that [PBM] should know [the extent of his assets]. I make it clear that this is not a reason for him to know or not since the test that I have to apply in relation to that issue is the test of capacity already set out above. However, it is hard to envisage how the disclosure consistent with a successful prenuptial agreement could take place without PBM knowing about the extent of his estate."* Francis J further noted that it was *"axiomatic that it would not be appropriate to tell MVA and not PBM, about the extent of PBM's assets."* Further *"[i]t is, in my judgement, inevitable that when MVA seeks legal advice, as she must, in respect of the prenuptial agreement, those advising her are going to want to know how much PBM is worth. Whilst I am not saying that would be impossible to have an effective prenuptial agreement without disclosure, it is clear, at least on the present state of the law, that full and frank financial disclosure is regarded as one of the key building blocks of a successful prenuptial agreement."*

The motivating factor behind the Deputy's concern (echoed by the case manager) in terms of disclosing to PBM the extent of his assets was his financial vulnerability. However, as Francis J noted, *"Dr Layton was keen to point out, however, the difference between lacking capacity and being vulnerable. Vulnerability is not enough to justify the withholding of the information."*

Francis J was invited not to follow the decision of Foskett J in *EXB v FDZ and others* [2018] EWHC 3456 (QB) (a conclusion that P should not be informed of the amount of a damages award).

43. Mr Rees submits that a decision as to whether a person should be told about

the value of his assets is a wholly artificial one. A capacitous person, he submits, does not ask themselves whether they should be made aware of the extent of their assets. If they do not have the relevant knowledge to hand, they have a right to obtain that information should they wish to obtain it.

44. Mr Rees asks me to go further still: he submits that where a person has capacity to take a decision and wishes to make that decision, that person must be entitled to any information belonging to them which they require to make that decision. I am not prepared to go so far as to say that Foskett J was wrong, nor am I prepared to say that I disagree with him. It is not necessary for me to do so for the purposes of this case. I do not accept that a valid prenuptial agreement cannot be made without knowledge of the value of one's assets. Accordingly, the premise of Mr Rees's submission falls away. I can readily envisage a situation where the judge could decide that somebody has the capacity to enter into a prenuptial agreement but does not have the capacity to know about the extent of their assets. I have already highlighted, above, the obvious disadvantages in this factual state of affairs which is, I suggest, one that we should strive to avoid if at all possible.

Francis J concluded that:

46. In spite of the properly articulated argument on behalf of the Deputy, I have formed the clear conclusion, based on the evidence of Dr Layton as well as everything that I have read, that PBM does have the capacity to be informed about the extent of his assets. It is unnecessary for me to decide whether

the test is whether PBM can decide whether he should ask about the extent of his assets or whether he should be told. To me this is bordering on a semantic absurdity. Plainly, the moment one is entitled to know about the extent of one's assets one is almost bound to make the enquiry. I do not think that the distinction is one which will burden people in the real world.

Even if he were wrong about this “semantic issue,” Francis J considered that it would be in PBM’s best interests to be provided with the information, not least because disclosure would accord with the principles of the MCA and the CRPD. Further, “*PBM is already aware that he is worth a substantial amount. ‘Substantial’ is a word that means different things to different people, but, as I suggested in discussion in court, it is possible that PBM thinks that he is worth more, rather than less, than the sum that he is actually worth.*” As Francis J observed, “[w]hen PBM is informed of the extent of his assets it is important that he is supported emotionally, as well as assisted to build and develop life skills.”

The remainder of the judgment is of specific interest to those considering obligations under the Social Services and Well-Being (Wales) Act 2014, as it consisted of a review of the obligations imposed by that Act. In the instant case, the local authority’s position (with which Francis J agreed) was that it needed to be more robust in ensuring the discharge of its safeguarding obligation under s.126 (akin to s.42 Care Act)), but in relation to discharge of its obligations to assess and meet PBM’s substantive care and support needs:

66 [i] had assessed PBM's needs, as required by s19(1). It has identified the

outcomes that PBM wishes to achieve in day-to-day life, and has concluded that there is nothing additional that could be done to contribute to achieving those outcomes (principally control of his own finances, and the ability to take decisions that flow from that) or otherwise meet his needs. Put simply, the LA asserts that his needs are being met (indeed, possibly exceeded) by his current package.”

Comment

This decision of particular interest for the careful way in which Francis J sought to navigate the line between capacity and vulnerability in the context of “substantial” assets being managed on behalf of a person. It is of further interest for the way in which – no doubt because of what appears to have been a strong expert report – the court was able to reach conclusions as to capacity which undoubtedly upheld the principles of both the MCA and CRPD. However, and whilst it made no difference to the outcome to the case, it is perhaps not an entirely semantic question as to whether the test is that the person has capacity to ask for information about their assets or capacity to be informed about their assets. The latter sits oddly with the MCA. The MCA is not concerned with someone’s capacity to have knowledge about something, but with their capacity to take specific decisions. If it is being framed as a decision, one would not normally think of “being informed of one’s assets” as a decision that the person would take – the decision for the person (and to be taken on their behalf if they lack capacity to take it) is to ask for information about their assets, on the basis that if they have capacity and ask, they will receive it as of right (unless, of course, there is

some other bar that would prevent disclosure of that information).

Capacity – guidance for banks and utilities

The guide, Office of the Public Guardian for England and Wales, in partnership with various regulators, as issued [guidance](#) advising the staff of financial services and utility companies how to deal with customers whose decisions are taken for them under a property and affairs LPA or by a court-appointed deputy. Amongst the other useful practical matters covered (including examples of what forms and relevant watermarks on official documents actually look like) is the reminder that:

there's nothing in law that says you must see the original LPA. Your choice to accept original documents might depend on the level of risk involved in letting an attorney manage someone's account. For utility companies, the risk might be relatively low. For banking services, where an attorney would be able to withdraw someone's life savings, the risk might be higher.

Investment – new OPG guidance

The OPG has published new [guidance](#) for deputies and attorneys covering investment.

The advice is clear and helpful and emphasises the need to seek financial advice in many if not most cases.

Online LPAs

As part of its safeguarding strategy for 2019-2025, the OPG has reaffirmed its belief that the creation and registration of LPAs should go fully

online so that a “wet” signature is no longer required. This is in keeping with its view that everyone should have an LPA. Further discussions will take place against the background of continuing concerns about the potential for fraud.

This [STEP article](#) helpfully sets out the issues.

PRACTICE AND PROCEDURE

Short note: seize the day, or lose the person

In *FT v MM and RM* [2019] EWHC 935 (Fam) Russell J highlighted a real – and problematic – difference between the ability of the English courts to protect adults abroad and children. In 2016 a child with profound learning disabilities, RM (a US citizen), had been removed by his father from this jurisdiction to the United States in face of an order to the contrary from the Family Court. In proceedings started shortly before RM turned 18, his mother sought his return to England & Wales; his father participated sporadically but made clear that he would not bring him back as he believed it to be in RM's best interests to remain living in the USA. Permission had not yet been granted to bring proceedings in the Court of Protection, so matters were considered by the High Court under its inherent jurisdiction.

Russell J accepted that the High Court should take the same approach to the determination of RM's habitual residence as had been taken by Munby J in *Re PO* [2013] EWHC 3932 (COP), i.e. that the doctrine of *perpetuatio fori* does not apply, even in the case of wrongful removal, and that habitual residence fell to be at the point when the matter was before the court, as opposed to how they might have stood at the point of removal. She therefore accepted that RM was, now, habitually resident in the United States. She also noted that, as RM was a US citizen, it was not obvious what jurisdiction the High Court could be said to retain in light of the finding of the change of habitual residence (by contrast with the position in *Al-Jeffery v Al-Jeffery*

(Vulnerable Adult: British Citizen) [2016] EWHC 2151 in which Holman J confirmed for the that the High Court can exercise its inherent protective jurisdiction over a vulnerable British adult on the basis of their nationality, even if they are not habitually resident in England and Wales).

Even were RM to be habitually resident in England and Wales, Russell J found, there was no readily available legal mechanism to seek to compel his return, the US authorities being neither willing nor able to take steps to return a US citizen to the UK in such circumstances. Directing herself by reference to *Re MM (A Patient)* [2017] EWCA Civ 34, she noted that "[f]urther court orders would appear to have little or no prospect of success, and in any case, there are good grounds for finding that a return to this jurisdiction are not in RM's best interests unlike MM in the above case."

The case therefore stands as a fresh reminder that where an adult has been abducted from the jurisdiction – including across the border to the 'foreign' jurisdiction of Scotland – it is vitally important to ensure that the court (the Court of Protection if they lack capacity, the High Court if they have capacity and are vulnerable) is approached as soon as possible so that consideration can be taken as to what steps should be taken without the added complication of a potential loss of jurisdiction through simple loss of time.

Executive dysfunction under the judicial spotlight

TB v KB and LH (Capacity to Conduct Proceedings) [2019] EWCOP 14 (Macdonald J)

Mental capacity – litigation

Summary

In this case Macdonald J had cause to consider the phenomenon of executive dysfunction in the context of the question of capacity to conduct proceedings both before the Court of Protection and the High Court under its inherent jurisdiction.

The issue arose in the context of concerns as to financial abuse by a friend and carer of a 75 year old man with longstanding difficulties with alcohol consumption, which he dated to the breakdown of his marriage but which his family contended subsisted prior to that time and were responsible for the same. The consequences of his alcohol use included public urination, inappropriate and anti-social behaviour and consequential bans from a number of national institutions. P also had a number of medical issues. He suffered from back problems, suffered a minor cardiac event a number of years previously and had been diagnosed with prostate cancer, with secondaries in his lungs and bones. He had a permanent urinary catheter in place. He had limited mobility and used a stick or a wheelchair. During the course of the proceedings, P decided to cease providing instructions to his solicitors and to seek to conduct proceedings as a litigant in person.

Macdonald J reviewed the authorities on capacity to conduct proceedings. In light of P's decision to seek to conduct the proceedings in person, he noted (following *White v Fell* (unreported) 12 November 1987, quoted by Kennedy LJ in *Mastermann-Lister v Brutton & Co* at [18] that "*where a litigant in person does not, in their own right, have capacity to conduct*

proceedings, the question remains whether they have the capacity to instruct others to conduct those proceedings on their behalf. This is consistent with the principle that an individual who, by themselves, lacks capacity on the subject matter in issue should be facilitated to make a capacitous decision on that subject matter by the taking of all practicable steps to help them to do so. Where a litigant in person lacks capacity to conduct proceedings absent advice and assistance and lacks capacity to instruct advisers, he or she will lack capacity to conduct proceedings. A question remains as to the position where a litigant in person lacks capacity to conduct proceedings in his or her own right but has capacity to instruct advisers to conduct those proceedings and chooses not to do so." On the facts of the case, however, it was not necessary ultimately for Macdonald to answer it.

Macdonald J also observed that:

the nature of the dispute is not the only component of the relevant subject matter required to be considered in the context of determining whether a litigant has capacity to conduct proceedings. More fundamentally, the nature of legal proceedings themselves, and in particular the specific demands they make on litigants, also fall to be considered. I accept Dr Barker's characterisation of legal proceedings as not being simply a question of providing instruction to a lawyer and then sitting back and observing the litigation, but rather a dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, potentially on a number of occasions over the span of the proceedings as they develop.

Having set the legal and evidential context, Macdonald J was:

36. [...] satisfied that I must attach significant weight to Dr Barker's view that the defects identified in P's memory and executive function mean that he would not be able to retrieve relevant information and would not be able to use and weigh relevant information in that context. Dr Barker made clear to the court that these are features that are typical of disorders of short-term memory and executive function clearly identified in the neuropsychological testing by Professor Kapur, stating in cross examination that:

"People with executive functioning deficits and deficits in their short-term memory may be okay, but they may have difficulty in electing the right bits of information and using them in the right context. There are glaringly obvious occasions when [P] has not been able to bring to mind information that it is important to know in the moment to make the relevant decision."

37. During the course of his cross-examination of Professor Kapur, Mr Glaser [Counsel for P's, friend, LH] explored with that expert witness the steps that could be taken to assist P to overcome the neuropsychological difficulties identified with a view to helping him make capacitous decisions on the matters in issue. Professor Kapur was clear that whilst a limited number of compensatory strategies could be

deployed to address the deficits in P's memory identified by the neuropsychological testing, in the case of the executive functioning difficulties identified, there was far less by way of compensatory strategies that could be deployed.

38. In the circumstances, and notwithstanding the careful efforts of Mr Glaser, I am satisfied that the expert evidence in this case provides a sound basis for the court to conclude that P is not able to understand, with the assistance of such proper explanation from legal advisors, the issues on which his consent or decision is likely to be necessary in the course of these proceedings, as the result of an inability to retain information, by his short-term memory issues, and an inability to use or weigh that information as part of the process of making the decision, by reason of deficits in his executive function. Further, I am satisfied that the expert evidence in this case provides a sound basis for concluding that that situation results from an impairment of, or a disturbance in the functioning of, P's brain. I am also satisfied that my conclusions in this regard are reinforced by other aspects of the information before the court beyond the expert evidence.

As noted above, P had sought to dispense with his lawyers and conduct proceedings himself:

40. During the course of the hearing P presented as agreeable and charming, at one stage enquiring after the short adjournment whether I "had had a good lunch" (in an ebullient tone that left me with the strong suspicion that P's idea of the judicial luncheon is a long way from

the modern reality) and, as I have noted, at one point telling me that the best way I could make him more comfortable in the courtroom was "to be quick about" delivering my judgment. Beyond this, and whilst in no way determinative, my exchanges in court with P left me with doubts about his understanding of the proceedings. He made no real contribution on the question of an adjournment in light of the absence of certain witnesses. It is, of course, not reasonable to expect a litigant in person to articulate in detail the legal merits of an adjournment such as ensuring an Art 6 compliant hearing, or to deploy exhaustive arguments as to the lack of relevance of particular witnesses to the issue in hand in an effort to avoid one. I also consider that P's case appeared broadly co-terminus with that of LH and that Mr Glaser made extensive submissions. However, I was nonetheless left with the distinct impression that P's lack of contribution was borne out of a paucity of understanding. The same impression was given by his lack of engagement in the process of questioning witnesses who were stating things with which, on the face of it, he plainly disagreed, notwithstanding the offer of having those questions put through me. Again, whilst I take into account that Mr Glaser asked many questions that were also supportive of P's stated position and that the court environment can be an intimidating one, and whilst in no way determinative of my decision, this situation reinforced for me the observations of the experts that I have set out above and had the effect of adding colour to those expert opinions.

P had not been joined previously as a party to the proceedings before the Court of Protection, so Macdonald J had to apply the 'menu' for participation set out in COPR r.1.2. He was clear that the appropriate manner of securing P's participation in these proceedings is to join him as a party to the same. Pursuant to COPR r 1.2(4) P's joinder as a party will only take effect on the appointment of a litigation friend. In the circumstances, he further confessed himself to be somewhat puzzled by the contents of the letter from the Official Solicitor declining a previous invitation to act as litigation friend was it was "not clear what value he can bring to the proceedings (particularly at this late stage)". The letter further observes that, in the assessment of the Official Solicitor, 'The issues are not legally complex'." Macdonald J observed that:

Having regard to the matters set out above, the answer to the question of what value the Official Solicitor can bring to the proceedings as a litigation friend for P might perhaps be thought to be plain on the face of the papers. Namely, to identify and advance, independently and objectively by the fair and competent conduct of proceedings, the best interests of an elderly protected party who is caught up in a contentious dispute between his putative carer and his son as to the proper administration of his financial and personal affairs and, in circumstances where both his putative carer and his son have potentially vested interest in the outcome, where he has no one to identify, articulate and champion his best interests before the court (or to put it in the language of the role of Solicitor to the Suitors, the precursor to the Official Solicitor of the High Court of Chancery, has no 'natural protector'). The Official Solicitor's assessment of the

issues as "not legally complex" is also somewhat difficult to understand in the circumstances that I have articulated during the course of this judgment and in the context of the inherent complexity of retrospective assessments of capacity.

Comment

In addition to containing a useful review of the law and authorities relating to capacity to conduct proceedings, the case is of no little interest for adding to the (so far) very small stock of authorities considering executive dysfunction. This can be difficult to capture with the four walls of the MCA 2005: this case shows how it can be addressed within the context of a series of ongoing decisions, and the care that needs to be taken before reaching a finding that a person is unable to use and weigh relevant information on the basis of executive dysfunction. Importantly, Macdonald J had before him evidence from Dr Barker of "*glaringly obvious occasions when [P] has not been able to bring to mind information that it is important to know in the moment to make the relevant decision.*" In other words – and as we made clear in our [capacity guide](#) – it is crucial before making a determination of incapacity on this basis that there is not mere speculation that P might not be able to bring to mind relevant information at the point that it was necessary, but of repeated occasions when this has been the case. Further, and importantly, Macdonald J had had explored before him support strategies that might enable P to overcome the deficits, but also evidence

these would not be effective in overcoming the problems with P's executive function.

Rules of engagement in the Court of Protection (and the parallel universe of children meeting judges in the Family Court)

[Editorial note: we are very pleased to include here a guest article by Dr Paula Case of the University of Liverpool drawing upon her recent article in [Legal Studies](#). We are always happy to publish such articles to bring to the attention of practitioners research that is otherwise hidden behind paywalls (free research is to be found in our research corner in the Wider Context report).]

The post-*Aintree* emphasis on P's 'point of view' in best interests jurisprudence becomes empty rhetoric, if that point of view is obscured by being theoretically or structurally excluded from engaging directly with the decision maker. Indeed, the importance of the subject of proceedings being able to tell their story *directly* to the decision maker is now reflected in Article 6 jurisprudence, generating what Lucy Series has termed a rule of 'personal presence.'² In *Wye Valley v B* Mr Justice Peter Jackson (as he was then) stressed the merits of Court of Protection (CoP) judges meeting with P:

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

² L. Series, *Briefing Paper: The Participation of the Relevant Person in Court of Protection Proceedings*. (September 2014).

*where the patient would like it to happen.*³

However, despite these words and similar encouragements from other CoP judges⁴, such meetings have been rare and the *direct* voice of P has often been absent from these life changing judgments. The limited evidence available suggests that in published health and welfare judgments from the CoP (in cases where there has been no obvious reason for P not to engage directly with the judge) that engagement has happened in less than twenty per cent of cases.⁵

When CoP judges find themselves with no clear steer on how to deal with a particular issue, they not infrequently reach across to Family Court judgments for guidance.⁶ The parallels of these jurisdictions are clear and the practice of judges meeting children has been the subject of both extensive discussion in the case law and detailed interrogation by researchers. Child and adult jurisdictions have shared concerns that the professional relaying of the subject's wishes and feelings offers a 'filtered' and sometimes 'misinterpreted' account.⁷ The Court of Appeal, for example, in *Re W* referred to the child's

account being 'finessed away' by the CAFCASS officer's 'own analysis.'⁸

In these proximate (adult:child) jurisdictions which share personnel on both sides of the bench, some transplanting of rules is inevitable, but whilst transplanting may be 'socially easy',⁹ it can risk the mirroring of problematic approaches and their mutual reinforcement. For example, the current *Guidance for Judges Meeting Children* follows the 'non-presumptive' model set out in by Baroness Hale in *Re W*.¹⁰ In other words, it leaves the matter of whether the meeting happens in the hands of the judge, and there is no explicit presumption that it should happen in every case where P desires it.¹¹ Amendments to the CoP Rules in 2015 signalled a bold attempt to focus attention on the participation of those at the centre of hearings¹² but, emulating the guidance offered to judges meeting children, the option of a meeting with the judge outside the courtroom was framed as a matter of 'discretion'.¹³

Another distinctive factor of Family Court practice in this area is that it draws an uncompromising distinction between different forms of direct engagement. Where additional

³ [2015] EWCOP 60.

⁴ *Re CD* [2015] EWCOP 74 at [31]; *Re M* [2013] EWCOP 3456, [42].

⁵ For more on this project see P. Case, '[When the judge met P: the rules of engagement in the Court of Protection and the parallel universe of children meeting judges in the Family Court](#)' (2019) *Legal Studies* (First View).

⁶ E.g. *LBX v TT* [2014] EWCOP 24, [39] and *Re AG* [2015] EWCOP 78, [26] adapting guidelines from *Re W* [2008] EWHC 1188 on when to hold finding of fact hearings.

⁷ P. Parkinson and J. Cashmore, 'Judicial Conversations with Children' in *The Voice of a Child in Family Law Disputes* (OUP, 2008) at 162 and see also J. Caldwell,

'Common law judges and judicial interviewing.' (2011) 23 CFLQ 41.

⁸ *Re W* [2008] EWCA Civ 538.

⁹ See P. Legrand's work on legal transplanting in comparative law: 'The impossibility of legal transplants' (1997) 4 MJ 111 referring at 112 to A. Watson, *Legal Transplants* 2nd ed. (University of Georgia Press, 1993).

¹⁰ *Re W* [2010] UKSC 22 [26]-[28]

¹¹ [2010] 2 FLR 1872. A wish to meet the judge should be communicated to the judge, but representations may be made as to whether this is appropriate.

¹² CoP Amendment Rules 2015 (SI 548/2015) inserting a new Rule 3A into the CoP Rules 2007.

¹³ See also A. Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard*. (Brill, 2018), 199.

information emerges from a 'meeting' between the judge and a child (as opposed to the giving of 'evidence'), the information cannot be given any weight. This is because a 'meeting' without the lawyers being present is regarded as putting fundamental adversarial norms at risk, namely that the case should be decided on the 'evidence,' which must be presented in open court, and that the parties should be given the opportunity to test that evidence by way of cross-examination.¹⁴ The author's survey of CoP judgments suggests that the spectre of this 'gathering evidence' rule (as applied to judges meeting children) may well have played a part in deterring such meetings from taking place.

Caldwell observed that the 'culture of the court system will be highly influential' in determining the extent to which judges meet with children.¹⁵ If P wishes to meet the judge, or indeed, give evidence in their own case, the non-presumptive culture from Family Court jurisprudence should be departed from and the starting point should be that it should happen, unless the presumption is rebutted by convincing evidence of potential harm. This may very well emerge from future practice in the CoP, but we are far from a definitive statement on the matter.

¹⁴ E.g. *MB v Surrey CC* [2017] EWCOP B27, [8]: '...the Court is the servant of the evidence that is provided by the parties.'

¹⁵ J. Caldwell, 'Common law judges and judicial interviewing.' (2011) 23 CFLQ 41, 60.

THE WIDER CONTEXT

ENGLAND, WALES AND NORTHERN IRELAND

New capacity guidance

The British Psychological Society has produced two useful guides to assist clinicians. One is a more general capacity guide entitled, 'What makes a good assessment of capacity?' (May 2019). The other is more specific, entitled 'Capacity to consent to sexual relations' (May 2019). Both are recommended reading.

The general guidance covers the relevant provisions of the MCA 2005 and case law. One particular area of interest is the role of psychometric testing in the assessing of capacity. The general guidance provides:

4.22 Psychometric inventories can be a useful part of a psychologist's professional repertoire and many will consider them when conducting MCA assessments. It is important to state there is no psychometric inventory designed to measure capacity within the meaning of the Act and it therefore follows that an individual's capacity cannot be determined based on test results alone.

4.23 However, psychometric inventories can provide useful, informative data which assists the practitioner to come to an opinion regarding one or more elements of an individual's ability to meet the individual requirements of the functional test... Executive functioning is difficult to formally assess. However, tests can indicate ability to plan, organise, follow instructions, adhere to

and switch between rules as well as initiate and inhibit responses.

4.24 Psychometric inventories may also be used as part of the assessment regarding the first arm of the capacity test i.e. the existence of an impairment in the functioning of the mind or brain and to what extent. The clearest example here is a current assessment of intellectual functioning as part of determining the presence (or otherwise) of a globalised learning disability. (emphasis in original)

The appendices are also particularly helpful. Appendix B provides clinicians with guidance on increasing and maximising a person's capacity with useful practicable steps identified for different scenarios. And worked case examples can be found in appendix C.

The guide on assessing capacity as to sexual relations is especially helpful to practitioners working in this area. It covers relevant provisions in both the MCA 2005 and criminal law, including forced marriages, and provides summaries of case law. It goes on to analyse, with examples, the following scenarios:

1. The person has capacity (but there may be a need to manage the risks around unwise decisions).
2. The individual has the capacity to consent to the relationship in question, but may lack capacity to make decisions in other areas that restrict their ability to participate in a sexual relationship.

3. The individual may need support to gain the required knowledge and consider relevant issues.
4. The individual lacks the capacity to consent to sexual relations.

Chapter 4 is particularly useful with guidance on supporting sexual functioning in clinical practice in terms of education, sex aids, dating agencies, social networking, pornography, and commercial sex workers. In a tricky area of law, this professional guidance will be most welcome.

Delays in transforming care

The BBC [reports](#) that the Transforming Care Agenda target has been missed, leaving at least 2260 people with learning disabilities or autism in long-stay hospitals. The NHS England achieved a 19% reduction in patient numbers from 2805 in 2016, missing the 50% target of 1300-1700. The report also notes the increase in children with learning disabilities being sent to assessment and treatment units, from 110 in March 2015 to 240 in March 2019.

New dementia centre

Exciting developments lie ahead with a new £20 million Care Research & Technology [Centre](#) at Imperial College London which will open on 1 June 2019 and aims to provide insights into how dementia develops and to develop technologies to create dementia-friendly 'Healthy Homes'. This will range from artificial intelligence and robotics to sleep monitoring to enable people to live safely and independently in their own homes for longer.

The technology will be assessed and evaluated by people living with dementia, and their carers,

to ensure it is both practical and needed and here are some examples of what the centre will look to develop:

- Sensors to track vital signs such as heart rate, blood pressure and body temperature key information such as gait, brain activity, and sleep that have previously been hard to measure in the home.
- Artificial intelligence that will automatically integrate all this patient information and flag any changes – eg a change in walking pattern that might suggest a patient is at risk of a fall, or an elevated temperature that could suggest an infection.
- Technology that allows researchers and medical teams to that tracks a patient's memory and cognitive function.
- Methods of tracking sleep quality.
- Quick, simple at-home tests for common infections.
- Robotic devices that interact with patients living with dementia.

We presume that all of these developments will take place in the context of an awareness of the legal framework – above all capacity, consent and the potential for (benign) deprivation of liberty.

Prevention, recognition and management of conflict in the medical setting

In an important [article](#) recently published in the Archives of disease in childhood, a distinguished group of doctors and medical mediators set out guidance as to achieving consensus in the context of decisions about paediatric treatment.

Their guidance also contains insights of equal applicability to the context of treatment decisions in relation to adults lacking capacity to consent to or refuse medical treatment. Although the article should be read in its entirety by all those concerned with such decisions, its key points for hospitals are to:

- Avoid giving inappropriate expectations.
- Use palliative care teams early, not just for end of life care, but when treatment options are being discussed.
- Recognise that parents will be under severe stress and offer psychosocial support especially those with children with complex needs or conditions which are life changing or life limiting.
- Equally support practitioners by the bedside who may be caught up in the conflict.
- Assign Lead Clinician role to ensure continuity of information and understanding.
- Develop skills within your service to recognise the development of conflict.
- External expert advice may be helpful, including ethical and legal services and consideration of early involvement of mediation services.

Scamming – a fresh perspective

In an exhibition on between 15 May and 2 June at One Paved Court, a gallery in Richmond, London, the artist Julie Derbyshire presents a new body of photographic work alongside her fabricated objects that inspired it. Informed by personal experience, *Possession* is the

culmination of the artist's research into the social and legal implications of scamming and its impact on elderly victims, bringing a new voice to this increasingly disturbing issue. For more details, see [here](#).

Joint Committee on Human Rights – Youth detention report

On 18 April 2019 the Joint Committee on Human Rights published a report entitled “Youth detention: solitary confinement and restraint”. It considers the c.2,500 children detained by the state in England and Wales for care, treatment or welfare reasons, as well as those in custody because of criminal convictions. The report points out that despite the wide range of reasons for detention, in practice many of the challenges faced apply across the board due the exceptional vulnerability of the children in question.

The report applies international human rights frameworks to youth detention, focusing mostly on the right of children not to be subject to inhuman or degrading treatment (Article 3 ECHR). It also recognises the relevance in this context of the right to life (Article 2), the right to liberty and security (Article 5) and the right to respect for private and family life (Article 8).

The report makes for sobering reading and calls on the Government to take urgent action to prevent breaches of children's rights. It points out that while restraint might seem to solve an immediate problem in custody or hospital, it causes harm in the short term and the longer term: it harms children, it harms staff, it undermines the objectives of detention, and contributes to a vicious circle of problems that

can continue into the future including inhibiting life chances into adulthood.

Relevance of unincorporated international conventions to determining ECHR breach

In *R (SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615 the Court of Appeal had to consider the status of unincorporated international conventions, in a judgment which is of relevance for the operation of the CRPD before UK courts.

In arguing that provisions of the Welfare Reform and Work Act 2016 which imposed a limit of two on the number of children in respect of whom child tax credit could be claimed were incompatible with Article 8 and Article 12 ECHR, as well as Article 14 read with Protocol 1 Article 1 and Article 8, the appellants sought to rely on the UN Convention on the Rights of the Child ('UNCRC'). As part of his analysis Leggatt LJ (with whom Patten LJ and Nicola Davies LJ agreed) set out the circumstances in which unincorporated conventions (which, of course, include the UN Convention on the Rights of Persons with Disabilities) are relevant to determining whether there has been a breach of s.6 of the Human Rights Act 1998 ("the HRA"). In this regard he made four observations (see paragraphs 112-116).

First: it is not permissible for the court to treat a finding that the UK has breached its obligations under an international convention as supporting a conclusion that a difference in treatment created by legislation is not justified and therefore incompatible with Article 14. There is no legal precedent for such an approach. Rather, the ECtHR has regard to international

instruments: (1) to seek to achieve an interpretation of the ECHR which is consistent with rules of international law and, (2) as evidence of internationally accepted common values.

Second: it may be necessary to take account of international instruments in determining how the issue of justification under the ECHR should be approached. In particular, there is precedent which shows that, in assessing whether interference with article 8 rights is justified in a matter concerning a child, regard should be had to the principle embodied in article 3(1) of the UNCRC that the best interests of the child must be a primary consideration.

Third: it may potentially be relevant to take account of international treaties when making a proportionality assessment under Article 14 ECHR. However, whether an international convention is in fact relevant will depend on whether it is sufficiently linked to the prohibited ground of discrimination relied on. One way in which an international convention may be relevant is by demonstrating an international consensus as to the importance of prohibiting discrimination on a particular ground. This matters because it may affect the weight of the reasons required to justify a difference in treatment based on that ground.

Fourth: it was "difficult to see" how rules of procedure outlined by international instruments were of assistance. This is because it is well established that the duty of a public authority under s.6 of the HRA to act compatibly with ECHR rights is one of result, not of process: *R (Begum) v Denbigh High School Governors* [2006] UKHL 15.

All (or at least part go) for the Northern Ireland MCA

Confounding the expectations of those who had thought that the stalemate in Stormont meant there was no possibility that [MCA \(NI\) 2016](#) would ever be brought into force, the Departments of Health there has announced that those parts of the Bill providing for the authorisation of deprivation of liberty will come into force on 1 October 2019. These provisions, placed in their context in this very useful article [here](#), allow for authorisation by a panel of the detention of those aged 16 and above with impaired capacity in circumstances amounting to a deprivation of liberty in a particular place in which appropriate care or treatment is available for them. The Northern Ireland legislation takes the same approach to the definition of liberty as is contained in the MCA 2005, i.e. tying it directly to Article 5 ECHR, so Northern Ireland will be on the same journey (including in relation to those aged 16/17) as England & Wales regarding the scope of the concept. Unlike in England & Wales, but as with the Jersey system described [here](#) (very similar, incidentally, to that in Gibraltar, the right of review is to a reconstituted Mental Health Review Tribunal.

At one level, it is rather depressing that a bold legislative scheme designed to fuse mental capacity and mental health legislation is only being brought into force, so far, to address the *Cheshire West* gap. At another, the fact that any part of the Act is coming into force at all is of real significance, not least, parochially, for purposes of starting to assess whether the confidence tests set out for the future of mental health law in England & Wales in the independent MHA review are met (see [here](#) at 224ff).

INTERNATIONAL DEVELOPMENTS

The Irish *Cheshire West*?

The Supreme Court in Ireland heard last week the case of *AC*, which has the promise of being the Irish answer to *Cheshire West*. It will be of considerable interest to see how that court grapples with the issues, including the applicability of the *Ferreira* judgment which has been prayed in aid before it. From the submissions of the Irish Human Rights and Equality Commission (available [here](#)), it would also appear that the CRPD is going to get a look in, and another domestic court is going to have to decide whether to grapple with the frank clash between Article 5 ECHR and the interpretation of Article 14 CRPD given by the Committee on the Rights of Persons with Disabilities.

The CRPD and life-sustaining treatment

The CRPD Committee has agreed to accept an individual complaint against France involving the case of Vincent Lambert. Readers will recall that the Grand Chamber of the European Court of Human Rights had concluded in 2015 that it was lawful for life-sustaining treatment to be withdrawn from him, and endorsed a decision-making model bearing considerable resemblance to that contained in the MCA 2005. More recently, on 30 April 2019, the ECtHR [refused](#) an application for interim measures brought by members of Mr Lambert's family that it should stay the execution of the authorities' decision to authorise the withdrawal of his treatment and also that it should prohibit his removal from France.

The CRPD Committee has asked French Government to ensure that no steps are taken to

implement withdrawal of CANH pending completion of consideration of the complaint. The French Health Minister Agnes Buzyn is reported to have responded thus:

We are not legally bound by this committee, but of course we will take into account what the UN says, and we will respond [...] All the legal appeals have been exhausted and all judicial bodies, both national and European, confirm that the medical team in charge of his case has the right to halt (Lambert's) care."

Not least as considerable reliance was placed upon the case by the Supreme Court in reaching its conclusion in *NHS Trust v Y* that applications to court were not required where there was agreement as to whether life-sustaining treatment should be maintained, it will be of no little interest to see how the CRPD Committee approaches the matter. It will, in particular, be of interest to see whether it holds true to the model of the 'best interpretation' of will and preferences that it has advocated in relation to hard cases where it is not possible to glean the person's views directly, or whether it takes the course of action being urged upon it by those members of Mr Lambert's family who have brought the complaint, namely to declare that clinically assisted nutrition or hydration can never be lawful. Readers may possibly be interested to note that the Committee appears to have retreated from this latter absolutist position after having advanced it in its draft concluding observations upon the compliance of the United Kingdom with the CRPD: see the discussion here.

RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

Fish, R., & Morgan, H. (2019). "Moving on" through the locked ward system for women with intellectual disabilities. *Journal of Applied Research in Intellectual Disabilities*: an article drawing on accounts from women with intellectual disabilities detained under the Mental Health Act (E&W) 1983 and staff at an National Health Service secure setting in England to explore how "moving on" is defined and perceived.

Dowling, S., Williams, V., Webb, J., Gall, M., & Worrall, D. (2019). Managing relational autonomy in interactions: People with intellectual disabilities. *Journal of Applied Research in Intellectual Disabilities*: an article is about interactions that occur when someone with intellectual disabilities is engaged in everyday activities with a personal assistant or a support worker.

Rashed, M. A. (2018, August). In defense of madness: the problem of disability. In *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* (Vol. 44, No. 2, pp. 150-174): an article developing two bulwarks against the tendency to assume too readily the view that madness is inherently disabling, which also includes a discussion of

the application of the social model of disability to madness.

SCOTLAND

Relocation of Glasgow AWI Court

Glasgow Sheriff Court announced on 7th May 2019 that, with effect from 15th May 2019, the Glasgow Adults with Incapacity Court will be conducted in the Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT. The Sheriff Clerk's Office have intimated that all parties for each application should be advised of the change of venue, but that no formal intimation is required. There must however be fears that confusion will ensue, given the distance from Glasgow Sheriff Court to the Tribunals Centre, and also that even after the date of this intimation, Glasgow Sheriff Court continued to issue warrants for intimation showing the Glasgow Sheriff Court address rather than the Tribunals Centre address.

It would be tempting, but apparently incorrect, to link this move in any way with suggestions that the adult incapacity jurisdiction be transferred from the Sheriff Court to a new Tribunal. It is understood that the move is for practical reasons of accommodation only, and is intended to be temporary.

The move also applies to the Glasgow Family Court.

Adrian D Ward

OPG fees increase

Fees payable to the Office of the Public Guardian have been increased with effect from 1st April 2019. Generally speaking, all of the matters for which the previous fee was £87 (including registration of guardianship and intervention orders, and other registrations under Part 6 of the 2000 Act) have been increased to £89.

Astonishingly and controversially, the fee for registration of powers of attorney has also been increased, from £77 to £79, despite all of the evidence-based research results from the "mypowerofattorney" campaigns that there would be overall savings to public funds if the granting of powers of attorney were to be encouraged by reductions in cost. Put the other way round, if one potential granter were to be deterred by this increase, and in consequence were to require a Part 6 application – with consequent delays – to be moved out of a hospital bed, the cost to the NHS would exceed all the "profits" to public funds generated by this increase for a very substantial period.

Scottish Courts and Tribunals Service are responsible for matters in relation to the Office of the Public Guardian such as fixing fees. The Report has no information as to whether, in deciding to impose this surprising increase, account was taken of information in the public domain such as the article at <http://blogs.bmj.com/bmj/2017/09/12/kate-a-levin-low-uptake-of-advance-directives-and-the-cost-to-public-health/>. I previously criticised as discriminatory the earlier substantial increases in registration fees for powers of attorney: see "Out of the wrong pocket", 2008 JLSS 9.

Adrian D Ward

Fair hearing/access to justice and how 'present' should 'present' be?

Issues relating to access to justice and the actual physical presence of members of the judiciary in hearings concerning the liberty and autonomy of persons with mental disabilities

were considered in the recent Court of Session (Inner House) 3 May 2019 ruling of *MH, Appeal by MH against the Mental Health Tribunal for Scotland (2019) CSIH 28*.

Adrian has also written in this issue¹⁶ about the separate preliminary decision created by this case¹⁷ on whether the names of parties in civil court proceedings arising from the Mental Health (Care and Treatment) (Scotland) Act 2003 should be anonymised.

The Facts

The appellant, MH, suffered from anorexia nervosa and a learning disability and had been subject to a Short Term Detention Certification authorised under the Mental Health (Care and Treatment) (Scotland) Act 2003. Her Mental Health Officer then applied to the Mental Health Tribunal for an interim Compulsory Treatment Order (ICTO).¹⁸

On the date scheduled for the Tribunal hearing of the ICTO application adverse weather conditions prevented the Tribunal convenor from being in the same building as the other Tribunal members. He therefore decided that the hearing could nevertheless proceed with his participation by telephone conference facilities. The appellant's legal representative objected but the convenor decided that the Tribunal would be properly constituted on the basis that he could fulfil all aspects of his role and the appellant would not therefore be prejudiced by his not being physically present.¹⁹ The fact that the

Short Term Detention Certificate was due to expire at midnight on the day of the hearing, no substitute convenor could be found and the convenor had undertaken the necessary preparatory work for the hearing were also all influential here. It also should be noted that another ICTO and then a full Compulsory Treatment Order were subsequently made by the Tribunal where a full panel was in attendance and these were not challenged by the appellant.

The appellant appealed to the sheriff principal against the initial ICTO on the basis that the Tribunal was not properly constituted, Article 5 ECHR (right to liberty) and the need to avoid arbitrary detention²⁰ was unsuccessful. She therefore appealed to the Court of Session (Inner House).

The Court of Session ruling turns on the particular facts of this case and a reading of the full law report is recommended. However, much of the focus of the appeal was on the construction of rule 64 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 and whether this required the physical presence of the convenor at the hearing to see and hear all the evidence and argument and witness the reactions of the appellant to the evidence and legal submissions. The appellant argued that she had been prejudiced by his absence and her common law right for the convenor to be in the same room as the appellant at the hearing as well as her Articles 5, 6 (right to a fair hearing) and 8 (respect for private life) rights had thus been violated.²¹ The

¹⁶ See *No anonymity for patients in mental health cases*.

¹⁷ *MH v Mental Health Tribunal for Scotland (2019) CSIH 14*.

¹⁸ S 65 Mental Health (Care and Treatment) (Scotland) Act 2003.

¹⁹ *R v Soneji* [2006] 1 AC 340.

²⁰ *Winterwerp v Netherlands* (1979) 2 EHRR 387.

²¹ *Shtukaturov v Russia* (2012) 54 EHRR 27 at para 73; *AN v Lithuania* (2017) 65 EHRR 23;

vulnerability of the appellant was also emphasised.

Relevant provisions of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005

2. – Interpretation

(1) ... 'hearing' means a sitting of the Tribunal for the purpose of enabling the Tribunal to take a decision on any matter relating to the case before it;

...

'Tribunal' means the Mental Health Tribunal for Scotland and 'tribunal' means a tribunal constituted ... to discharge the functions of the Tribunal; ...

4. – The overriding objective

The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible.

43. – Interim or preliminary matters

(1) The Tribunal may ... consider and determine any interim or preliminary matter in relation to the case including any matter for which specific provision is made ...

(2) Any matter referred to in paragraph (1) may be considered by the Convenor alone ...

49. – Directions

(1) Except as otherwise provide (sic) for in these Rules, the Tribunal may at any time ... give such directions as the Tribunal considers necessary or desirable to further the overriding objective in the conduct of a case ...

52. – Other case management powers

(1) Subject to the provisions of the Act and these Rules, the Tribunal may regulate its own procedure.

(2) The Tribunal may in any proceedings –

...

(c) hold a hearing and receive evidence by telephone, through video link or by using any other method of communication if the Tribunal is satisfied that this would be fair in all the circumstances.

...

63. – Procedure

...

(2) The Tribunal may, in accordance with the overriding objective, conduct the hearing –

(a) as informally as the circumstances of the case permits; and

(b) in the manner the Tribunal considers –

(i) to be just; and

(ii) most suitable to the clarification and determination of the matters before the Tribunal.

.

64. – Absence of a member of the Tribunal

(1) Except as provided for otherwise in these Rules, a tribunal shall not decide any question unless all members are present and, if any member is absent, the case shall be adjourned or referred to another tribunal.

(2) If a member of a tribunal ceases to be a member of the Tribunal or is otherwise unable to act before that tribunal has commenced hearing the case, the President may allocate the hearing of that case to a differently constituted tribunal.

(3) If, after the commencement of any hearing, a member other than the

Elys v Marks and Spencer [2014] ICR 1091 at paras 16-17.

Convener is absent, the case may, with the consent of the parties, be heard by the other two members and, in that event, the tribunal shall be deemed to be properly constituted."

Court of Session ruling

Whether justice has been seen to be done must be an objective test "judged by the perception of the fictitious yet ubiquitous fair minded and informed observer" who, in this case, would have been aware of things such as:

- The importance in the appellant's own interests that a decision on the ICTO be made on the day of the hearing. If no ICTO was made the appellant would be released from in-patient care and might suffer serious adverse consequences to her health.
- All the Tribunal members had considered the written material (including medical reports) before the hearing so would have been aware of the issues involved at the time of the hearing.
- The convener was participating in the hearing as the convener (albeit by telephone link) and any lack of real engagement in the hearing on his part would have been discernible.
- The other two panel members were present who could observe the appellant.
- Two of the three psychiatrists who had seen the appellant were available for questioning.
- The appellant was legally represented at the hearing.
- There was a right of appeal.

The Court therefore refused the appeal on the basis that there appeared to be no unfairness to the appellant, justice was done and could be seen to be done.

Comment: a note of warning!

As yet there is no clear ruling on the meaning of 'personal presence' (of the judiciary) in proceedings but *MH* does appear to turn on its own particular facts and justice seems to have been done here. The appellant does not seem to have been prejudiced by the convener's decision to proceed with his attendance by telephone. However, given that the determinations to be made in cases involving persons with mental disabilities under mental health and capacity law have significant far-reaching implications for individual liberty and autonomy – engaging Articles 5, 6 and 8 ECHR and Articles 12, 13 and 14 CRPD - it is vital that remote judicial presence is viewed as the exception rather than the norm. Intuition dictates that determining whether or not a deprivation of liberty or autonomy (including restriction of the exercise of legal capacity) is proportionate and non-discriminatory, and therefore lawful, requires full meaningful engagement with a person with psychosocial, intellectual or cognitive disability and this can only normally be achieved through the physical presence of members of the judiciary.

Jill Stavert

Alex adds his own observation – prompted in part by the article by Paula Case in the Practice and Procedure Report that engagement by the judiciary through physical proximity between the person and the judge/tribunal presupposes that we (a) know what the engagement is for; (b)

ensure the judges are properly trained; and (c) recast courts/tribunals around the person.

No anonymity for patients in mental health cases

The case reported by Jill above also gave rise to a separate preliminary decision on whether it was appropriate to anonymise the names of parties in civil court proceedings arising from the Mental Health (Care and Treatment) (Scotland) Act 2003: see *MH v Mental Health Tribunal for Scotland* [2019] CSIH 14, also reported at 2019 SLT 411. The First Division of the Inner House unanimously refused a motion to anonymise the patient's details to initials and to design her care of her solicitors, in order to protect her privacy. The Inner House approached the matter on the basis that there were statutory exceptions to the principle of open justice in relation to proceedings before the Mental Health Tribunal, but these were not extended to appeals to the courts from decisions of mental health tribunals. The Inner House acknowledged that there would be cases where the court should take steps to protect a patient from having privacy unnecessarily disrespected, but that this did not apply where an appeal concerned a point of law in relation to which it was not necessary to divulge details of the patient's illness. An argument that the very fact that the patient had a mental illness should warrant protection was unsuccessful. See the report of this decision for a full and lengthy consideration of the relevant law, including comparative consideration of relevant law applicable in England & Wales.

It is perhaps notable that in his second sentence the Lord President referred to "an important issue of practice in relation to the anonymisation of the names of parties in civil court

proceedings". It is fair to say that the matter was approached broadly in the context of civil court proceedings, rather than treating the mental health jurisdiction as distinct from civil court proceedings generally, and adopting a teleological approach focusing upon the separate mental health jurisdiction alone. That point would perhaps apply even more strongly to any suggestion that this precedent should be transferred to the adults with incapacity jurisdiction, which is very clearly fundamentally different from civil court jurisdiction generally in that the responsibilities of the court are inquisitorial, with a requirement upon the court to comply with the general principles in section 1 of the Adults with Incapacity (Scotland) Act 2000, rather than the traditional adversarial jurisdiction of the civil courts in other matters.

Some might question the consistency between this preliminary decision emphasising the importance of parties to such proceedings being known, and the decision described by Jill above in which the Inner House seemed to be relaxed about the implications of the convener of a tribunal hearing not being personally present to see parties, to observe the demeanour of all concerned, and so forth. An interesting footnote is that in Scots Law Times this decision was immediately followed by the case of *Murray, Petitioner* [2019] CSOH 21; 2019 SLT 424, in which the name of a firm of solicitors interdicted upon application by a wife from acting for her husband in matrimonial proceedings, on grounds of conflict of interest, was anonymised to initials.

The judgments in *MH* make no mention of the "secret court" controversy in England & Wales concerning the Court of Protection. However,

the Lord President did emphasise the fundamental principle that: “ ... public scrutiny of the courts facilitates public confidence in the system. It helps it to ensure that the courts are carrying out their function properly.”

Adrian D Ward

Editors and Contributors



Alex Ruck Keene: alex.ruckkeene@39essex.com

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 QC: 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](#).

Editors and Contributors



Katie Scott: katie.scott@39essex.com

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. To view full CV click [here](#).



Katherine Barnes: katherine.barnes@39essex.com

Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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 recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



Jill Stavert: j.stavert@napier.ac.uk

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. 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

Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see [here](#).

Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information and to book, 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 edition will be out in June. 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.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com



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clerks@39essex.com • **DX: London/Chancery Lane 298** • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

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MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

[For all our mental capacity resources, click here](#)