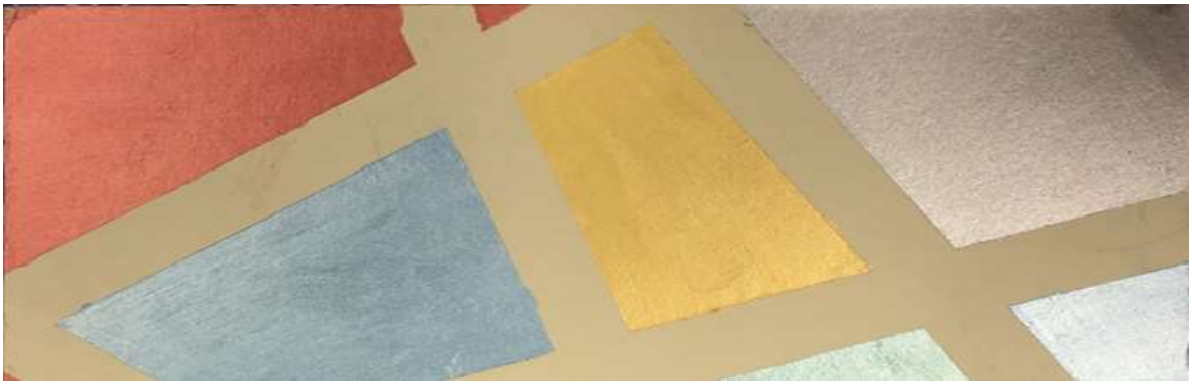

Welcome to the October 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the 14th birthday of the MCA, an important case about the scope and limits of ADRTs, and the impact of coercive control on capacity;

(2) In the Property and Affairs Report: a deputy stand-off and new blogs from the OPG;

(3) In the Practice and Procedure Report: anticipatory declarations and medical treatment – two different scenarios;

(4) In the Wider Context Report: children, competence and capacity in different contexts, the JCHR launches an inquiry into human rights in care settings, and a Jersey perspective on deprivation of liberty;

(5) In the Scotland Report: the Supreme Court, devolution and implications for CRPD incorporation, and resisting guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Happy 14th birthday MCA!

The MCA turned 14 on 1 October 2007. To celebrate, Alex has recorded his personal top ten health

and welfare cases, available here.

Advance decisions, Jehovah's Witnesses and what does "doing something clearly inconsistent" with your ADRT mean?

Re PW (Jehovah's Witness: Validity of Advance Decision) [2021] EWCOP 52 (Poole J)

Medical treatment – advance decisions

Summary[1]

The (surprisingly) small body of case-law relating to advance decisions to refuse treatments has been added to by a judgment delivered by Poole J in difficult and urgent circumstances, which grappled head on with the complexities to which they can give rise. In this case, Poole J was sitting as the Out of Hours Business Judge in the Court of Protection, determining an application made in the evening of 17 September 2021, and conducted by telephone between 11:45 pm that evening and 3:25 am the next morning.

The application concerned Mrs W, an 80 year old in a "perilous" condition in hospital. She had severe anaemia following internal bleeding due to an ulcerated gastric tumour, the medical evidence being that in her current state and whilst the tumour remained, she was at risk at any time of sudden bleeding which if untreated would almost certainly end her life. With a blood transfusion that immediate risk would be significantly reduced so that she would be able to undergo investigations and then surgical or possibly other treatment for her tumour and, given her general condition, she would be likely to survive the treatment and might live for another five to ten years. Mrs W had Alzheimer's dementia. Assessment by a Consultant Geriatrician at the hospital had concluded that she lacked capacity to make decisions about her treatment. She was also a Jehovah's Witness, and it emerged on 17 September 2021 that she had made an advance decision in 2001. This clearly included a decision to refuse blood or blood products even if her life is in danger. All parties accepted that the advance decision was properly made and was applicable to the decision whether to refuse or consent to blood transfusion.

As Poole J identified (at paragraph 3):

> *The question for the court, if Mrs W lacks capacity to make a decision whether to consent to or refuse blood transfusion, is whether the advance decision is valid within the meaning of the MCA 2005. If it is, then her decision must be respected even though she may well die as a consequence. If it is not valid, and she lacks capacity to make the decision, then the court is required to assess what decision should be made on her behalf, in her best interests.*

[1] Note, Nicola having been involved in the case, she has not contributed to this note.

The advance decision included the statement that it "*will remain in force unless and until specifically revoked in writing by me*." It was witnessed by two witnesses. It was three pages long and includes the following (capitalisation as in the original document):

> *I am one of Jehovah's Witnesses. On the basis of my firmly held religious convictions … and on the basis of my desire to avoid the numerous hazards and complications of blood transfusions, I absolutely REFUSE allogeneic blood (another person's blood): the primary blood components red cells, white cells, platelets and/or plasma; and stored (predonated) autologous blood (my own stored blood) under any and all circumstances, no matter what the consequences.*
>
> *MY DECISION to refuse blood and choose non-blood management MUST BE RESPECTED EVEN IF MY LIFE OR HEALTH IS THREATENED by my refusal. Any attempt to administer blood contrary to my instructions will be a violation of my rights of bodily self-determination and personal autonomy, and accordingly will constitute an actional trespass to my person.*

As Poole J noted:

> *24. There are different elements to the advance decision but the refusal of allogeneic blood is very clearly stated to apply "under any and all circumstances". That advance decision is applicable to the administration of allogeneic blood or blood products as life-sustaining treatment but it is not restricted to life-sustaining treatment.*

Importantly, Poole J identified that:

> *25. Although it was made before the MCA 2005 came into force, the advance decision complies with the requirements for making an advance decision to refuse life-sustaining treatment (see s.25 of the MCA 2005). It is in writing, signed in the presence of witnesses, it includes a clear, specific written statement that it is to apply to the specific treatment - the administration of blood - even if life is at risk. There is no evidence that Mrs W took advice from a healthcare professional at the time that she made the advance decision but that was not and is not a requirement for the advance decision to be effective.*

Mrs W had not withdrawn the advance decision but neither had she renewed or updated it since 2001. A further, important, factual matter is that, in August 2020 she made a health and welfare power of attorney in favour of her four children, which was registered with the OPG on 27 November 2020. She did not include any preferences or instructions. Her children's evidence was she told them that she would like to be resuscitated if the need arose but did not tell them of any other preferences or instructions. She did not tell them that she had made an advance decision. The LPA also included a section headed "Life-sustaining treatment;" Mrs W opted not to give her attorneys authority to give or refuse consent to life-sustaining treatment on her behalf.

Two of her daughters gave evidence to the court on their behalf and those of their siblings, recorded as follows (paragraph 30):

> *Mrs W is widowed and there are no other significant family members so far as I am aware. There is no question that the children love their mother dearly but no disguising the hostility they feel towards the Jehovah's Witnesses denomination. They feel that their mother was pressurised into making her advance decision and was indoctrinated. Their father, Mrs W's late husband, was a committed Jehovah's Witness, and Mrs W went along with him because she is a "person who likes to please" and wanted to be a "good wife". They felt that Mrs W was now being treated as "disposable" and that the idea that she should not be given a blood transfusion was akin to euthanasia. They were convinced that she wants to live and would choose to have a blood transfusion if she were able to give a considered and clear view.*

Poole J also noted their evidence to the effect that when earlier in 2021 she had been very ill in hospital, "[a] *'DNR' order had been mistakenly included in her medical notes and she insisted on it being removed. The children told me, through Ms W, that Mrs W had never mentioned the advance decision to them and they had been completely unaware of its existence*."

Poole J identified that it would have been possible for him to avoid making determinations about the key issues in the application, to allow further evidence to be gathered. Despite the shortness of the notice, no party sought an adjournment, and he continued:

> *44.* […] *in any event I was presented with compelling evidence that Mrs W required a blood transition urgently and was at risk of dying due to complications which could occur "at any time" if she were not given a blood transfusion. I was told that clinicians were "standing by" ready to give blood if so authorised. It would, in my judgement, have been an abrogation of responsibility not to make a decision on the evidence before me. With the considerable assistance of counsel, the court did its best to extract and scrutinise the evidence available in order to make the best informed decision that could be made in the circumstances.*

On the evidence, Poole J was satisfied that it was clear that Mrs W lacked capacity to decide whether to accept or refuse a transfusion. The focus was therefore upon what to do in face of the advance decision and, in particular, whether "*in accordance with s.25(2)(c) of the MCA 2005, the advance decision is no longer valid because Mrs W has 'done anything else clearly inconsistent with the advance decision remaining her fixed decision*" (paragraph 47). Poole J's observations about the law in this area merit reproduction in full, given their clarity and lucidity in relation to a point that has not been the subject of detailed consideration since the MCA 2005 came into force:

> *50. Under s.26 of the MCA 2005, an advance decision only has effect when the person who made it has subsequently lost capacity to make the material decision. The advance decision can be withdrawn (s.25(2)(a)) or displaced by an LPA (s.25(2)(b)) but withdrawal can be effected and an LPA can be granted only when the person concerned has capacity to do so. No such restriction applies to s.25(2)(c). I interpret s.25(2)(c) as allowing for the advance decision to be rendered not valid should the person who made the advance decision do "anything else" (other than withdrawal or granting an LPA which displaces the advance decision) which is "clearly inconsistent" with the advance decision remaining their fixed decision, before or after they have lost capacity to make the relevant treatment in question. The question will only arise after they have lost capacity but the court may consider*

things done before or after that time. Munby J refers to a person being locked into their advance decision once they have lost both capacity to decide whether or not to accept medical treatment and any ability to express their wishes and feelings. Similarly, s.25(2)(c) allows for a person who has lost capacity nevertheless to do something or to have done something which renders the advance decision not valid.

51. I also note that s.25(2)(c) will only fall to be considered in the case of a person who has not withdrawn (revoked) their advance decision, and who has not subsequently granted an LPA conferring authority to give or refuse consent to treatment to which the advance decision relates. Something other that express withdrawal of the advance decision may suffice to render it not valid. It follows that, as Munby J emphasised in HE v A Hospital NHS Trust (above), the term within Mrs W's advance decision that "It will remain in force unless and until specifically revoked in writing by me" is unenforceable.

52. Three words within s. 25(2)(c) require particular comment:

a. "done": I read this to include words as well as actions. I am strongly reinforced in this view by what Munby said at paragraph [43] of his judgment in [the pre-MCA case of] *HE v A Hospital NHS Trust (above):*

> *"No doubt there is a practical - what lawyers would call an evidential - burden on those who assert that an undisputed advance directive is for some reason no longer operative, a burden requiring them to point to something indicating that this is or may be so. It may be words said to have been written or spoken by the patient. It may be the patient's actions - for sometimes actions speak louder than words. It may be some change in circumstances. Thus it may be alleged that the patient no longer professes the faith which underlay the advance directive."*

The statutory provision does not refer to words and actions, only what P has "done", but it would be an odd restriction on the interpretation of "done" to exclude written or spoken words when the provision is addressed to previous written or spoken words in the form of an advance decision (an advance decision about treatment which is not life-sustaining treatment may be made verbally).

b. "clearly": the court should not strain to find something done which is inconsistent with the advance decision remaining the individual's fixed decision. Something done or said which could arguably be "inconsistent", or which the court could only find might be inconsistent will not suffice.

c. "fixed": s.25(2)(c) does not merely require something done which is inconsistent with the advance decision, but rather something done which is inconsistent with it remaining the person's fixed decision. Fluctuating adherence to the advance decision may well be inconsistent with it remaining their fixed decision. As with the other elements of the test, whether it is inconsistent will depend on the facts of each case.

The Trust asserted that the advance decision was not now valid because s.25(2)(c) was made out. In this regard, Poole J considered that "*the burden of proof* [was] *on the Trust which must establish that on the balance of probabilities Mrs W has done something inconsistent with the advance decision remaining her fixed decision*" (paragraph 54).

Poole J identified that:

> *57. The determination of whether Mrs W has done something clearly inconsistent with the advance decision remaining her fixed decision has profound consequences and requires the most anxious consideration. I recognise that the evidence before me does not all go one way. However, weighing all the matters discussed, I am satisfied, on the balance of probabilities, that Mrs W has done things clearly inconsistent with the advance decision remaining her fixed decision. She granted to her children, whom she surely knew were hostile the Jehovah's Witnesses denomination, authority to make decisions about all medical treatment, other than life-sustaining treatment, on her behalf should she lose capacity to make such decisions for herself, without mentioning to them or including in the written LPA any preference or requirement not to receive blood transfusion or blood products. The advance decision was widely drawn and did not restrict the refusal of consent to blood transfusion or blood products by way of life-sustaining treatment. Her actions at the time of granting the LPA were in my judgment clearly inconsistent with the advance decision remaining her fixed decision. For the reasons stated earlier, I must presume that she had capacity at that time.*
>
> *58. Likewise, Ms W's actions earlier this year on requesting the removal of the DNR notice, without qualification and without telling her children or, to their knowledge, her clinicians, about the advance decision or that she would refuse a blood transfusion or blood products is, in my judgment inconsistent with the advance decision remaining her fixed decision.*
>
> *59. Mrs W's stated wish at 1500 hours on 17 September 2021 to have transfusion of blood "free from diseases" if she might die without it, was an expression of wishes and feelings which were inconsistent with the advance decision remaining her fixed decision. Whilst she later expressed wishes and feelings which were consistent with her advance decision, the test under s.25(2)(c) requires the court to consider whether Mrs W has done anything clearly inconsistent with the advanced decision remaining her "fixed" decision. I find that when she expressed wishes and feelings inconsistent with the advance decision she was expressing genuine wishes and feelings with more clarity of thought than when she spoke with Dr J half an hour later. It would be open to the court to dismiss both, contradictory expressions of her wishes and feelings as having no weight because of her cognitive impairment. But I am satisfied that some weight should be given to what she said to Dr J, in particular in the first conversation when, in his considered view, she was not resorting to formulaic expressions. Even if equal weight were given to both, contradictory assertions of her wishes and feelings, it could hardly be said that Mrs W was acting consistently with the advanced decision being her "fixed" decision.*

Poole J noted that:

> *61. No submission was made to me that s.25(2)(b) applied because the lasting power of attorney from 2020 conferred authority on the donees to give or refuse consent to the treatment to which the*

> *advance decision relates. Although the LPA expressly did not apply to decisions about life-sustaining treatment, and the treatment under consideration is life-sustaining treatment, the LPA surely conferred authority on the donees to give or refuse consent to the administration of allogeneic blood and blood products by way of non life-sustaining treatment. On the one hand, the advance decision relates to such treatment whether life-sustaining or otherwise but, on the other, the treatment which is now being considered is life-sustaining treatment for which authority was not granted. It might have been argued, but was not, that s.25(2)(b) is satisfied. Since this was not argued at the hearing and did not form the basis of the decision that I communicated at the hearing, I have not asked for further submissions on this issue and I make no determination as to whether s.25(2)(b) applies in this case.*

It therefore fell to Poole J to determine what was in Mrs W's best interests. Having reviewed the evidence and circumstances, he held thus at paragraph 63:

> *In all the circumstances I am satisfied that it is in Mrs W's best interests to have blood transfusion to restore and maintain her haemoglobin at 10 g/dl. I so conclude doing my best to put myself in her shoes and determine her interests taking into account her welfare from the widest perspective. I am satisfied that the decision is in Mrs W's best interests is lawful and in accordance with her human rights under articles 2, 3, 8 and 9 of the ECHR.*

Comment

Views about this decision may vary depending upon one's adherence to the concept of precedent autonomy. Some may feel it useful in working out what they feel about this to consider this article which looks at the situation where (as here) it might be said that a person's past and present wishes collide. Some may also want to mine the judgment for evidence of a discriminatory failure to recognise the beliefs of a Jehovah's Witness. For our part, and given the evidence of the daughters recorded by Poole J, we would suggest that this would be unfair. Rather, it seems to us that Poole J (under clearly sub-optimal circumstances) was striving to identify whether the Trust had upheld their challenge to the ADRT, not to find a way to unpick it on grounds of disagreeing with its religiously-motivated contents. However, this decision serves as a useful opportunity to flag this guidance for anaesthetists (but equally relevant to other medical professionals) about caring for Jehovah's Witnesses who refuse blood.

Poole J's analysis of s.25(2)(c) is crisp and clear, and is entirely consistent with (but much more fully reasoned than) the only previous post-MCA 2005 judicial consideration of what this provision might mean – *Re QQ*, where Keehan J, likewise, considered that the concept of "doing" something inconsistent with the ADRT remaining the person's fixed decision could encompass the "doing" of something on the other side of incapacity. It seems to Alex at least that this must be right, both legally and ethically. But an important corollary of this is that, as set out in more detail here, advance decisions may well be more 'brittle' than some may understand to be the case – and that it is extremely important that any advance decision includes a values statement so as to be able to guide decision-

making in the event that (as here) the decision is ultimately one made by reference to best interests, rather than simply loyally seeking to abide by the ADRT.

Coercive control, capacity and the resolution of an ethical dilemma

Re BU [2021] EWCOP 54 (Roberts J)

Mental capacity – best interests – contact

Summary

How does coercive control impact upon decision-making? And what can – and should – the courts do when the victim of coercive control cannot countenance an existence where the perpetrator is not an integral part of their life? These were the issues at the heart of this decision.

The case concerned BU, a 70 year-old woman with a diagnosis of vascular dementia. She had formed a relationship with a man nearly 20 years her junior, NC, which as described by Roberts J in the introduction to her judgment had "*become, for BU, a central and crucially important part of her life and, as she sees it, pivotal to her emotional wellbeing and happiness*." Her daughter, as a representative of her wider family members, brought proceedings "*because of their increasing concerns about the extent to which she is vulnerable to harm as a consequence of that relationship. Those concerns flow from their observations, confirmed by the expert evidence in this case, that the relationship which BU has with NC is characterised as one of coercive control exerted by him in several aspects of her day-to-day life and in particular in relation to the management of her financial affairs*." NC – who acted as a litigant in person – denied that he had acted in any way to harm BU or expose her to detriment, financial or otherwise: as Roberts J summarised his position "[h]*e believes that this court has no role to play in relation to her decision-making since he maintains that she is capacitous in her own right and able to make choices and decisions for herself*."

As Roberts J reminded herself at the outset of her judgment (in paragraph 2), "[i]*n circumstances where personal autonomy and life choices are a central aspect of the human rights which this court is bound to uphold and respect, it is only in limited circumstances where it can or should intervene*."

By the time the matter came before Roberts J, final declarations had been made that BU lacked capacity to make decisions in relation to her property and financial affairs, and a deputy was appointed to manage her affairs. BU's daughter sought from the Court of Protection a declaration that her mother lacked capacity to make decisions about her contact with others, including NC; an order preventing NC from having further contact with BU (and the continuation of an injunction to this end which had already provided for this for over a year); and an order under the court's inherent jurisdiction which prevented a marriage or civil partnership between NC and BU or, alternatively, an order pursuant to s. 63A of the Family Law Act 1996 (a forced marriage protection order).

The detailed background to the case is set out in the judgment, but for present purposes of particular

importance are: (1) BU's significant financial resources; (2) NC's (extensive) history of criminal convictions (including twelve fraud and related offences and fourteen theft and related offences), leading to a 9-year custodial sentence for an offence of dishonesty and blackmail; (3) (in no small part thanks to the determined efforts of BU's daughter) a police investigation leading to an arrest in relation to his actions in relation to BU, and release on bail that he was to have no contact with BU – a condition that he had breached repeatedly.

Capacity

The position of the parties (bar NC) and the expert evidence was that BU lacked capacity to make decisions regarding contact with NC. Having rehearsed the evidence, Roberts J was clear in her agreement:

> *89. In my judgment the expert and other evidence in this case supports overwhelmingly the conclusion that BU currently lacks capacity to decide whether to maintain contact with NC. There is no evidence at all to suggest that she presently wishes to reduce or eliminate her contact with him (indeed, the evidence points to the contrary). I consider nevertheless that she lacks capacity generally in relation to her contact with NC. The expert evidence, which I accept, is clear. Because of the corrosive and coercive nature of the control which I find NC to have exercised over her, BU has been deprived of autonomous decision-making in this context. Put simply, she no longer has the ability to exercise her individual free will in the context of any ongoing relationship with NC. The degenerative vascular changes in her brain have resulted in a global cognitive impairment which has impacted upon her ability to weigh and use information to the extent that a person with full capacity could. I am not persuaded that she truly understands the nature of their relationship or what a future with NC would hold in terms of an ongoing relationship. I am entirely persuaded that she craves his companionship which she perceives as relieving the intense loneliness and isolation which she has obviously felt outside the loving relationships she previously had with her extended family. She now perceives those family bonds to have been broken as a result of the family's collective hostility towards NC. I am quite sure that the love which BU has for each of her two daughters remains but it has been subsumed for the time being by the intense need which she perceives to preserve what is in essence her complete dependency on NC. I am satisfied that that dependency shapes more or less all aspects of her life at the present time despite the fact that they have been prevented from having contact with one another for a significant period of time. I suspect that these proceedings have themselves been an important means for BU of preserving that nexus with NC. They will inevitably have reinforced what Professor Dubrow-Marshall has described as the "trauma bond" which binds them together even in absentia.*
>
> *90. I have no doubt that there have been aspects of her previous contact with NC which have given BU pleasure and a sense of happiness and wellbeing. That said, it is clear that she has closed her mind to the possibility of his motives in that relationship being anything other than benign. Even when presented with clear and overwhelming evidence of NC's antecedent history and his willingness to coerce, intimidate and blackmail others for his own personal benefit and financial gain, she has been quite unable to weigh and balance those factors in her decision-making. She is blind to future risk as she has been to past risk. She has found herself caught up in the excitement of sharing in NC's own future plans for property investment (for such I find them to be) without any understanding of the*

> *financial risks to which she might be exposed as a result of her financial involvement. She was plainly willing to liquidate a very significant part of her investment portfolio (and thus risk her future financial security) without being afforded an opportunity to evaluate any future risk. I am left in no doubt whatsoever that her decisions in this context were guided and led by NC. He chose to instruct a solicitor to process those financial property transactions who was not previously known to BU. Whilst there is no evidence to suggest that the solicitor fell short of the professional obligations which were owed to BU as a client, it was, in my judgment, a significant example of NC's ongoing attempts to marginalise her from the ongoing influence of her family.*

Roberts J was equally clear that NC had "*engaged on a deliberate and calculated attempt to subvert any independent decision-making on BU's part*" (paragraph 91). She outlined those attempts in detail and found that the test for relying upon similar fact evidence in civil cases was met:

> *96.* […] *no one, including NC, has sought to exclude evidence which may be characterised as evidence which is designed to demonstrate a propensity on NC's part to behave in a certain way. Furthermore, as I have already said, his previous convictions for offences involving dishonesty, fraud and obtaining property by deception are matters of public record and facts upon which this court is entitled to rely. In relation to his relationship with BU, I have the clearest possible evidence from the expert psychologist instructed in this case that NC exercised both coercion and control over BU throughout the entire course of their relationship which spanned a number of years. To the extent that others have provided the court and/or the police with evidence and information that they have been victims of a similar course of conduct, I take the view that this is both relevant and admissible in the context of assisting me to reach my conclusions in the present case. There is a coalescence of factors in this case which persuades me that BU has indeed been manipulated by NC with deliberate intent to secure for himself a financial benefit.*

Best interests

Given Roberts J's conclusions about BU's capacity, it fell to her to make determinations about her best interests. In the circumstances, there was a binary choice for the court: either to sanction ongoing contact between BU and NC or not:

> *98.* […] *Taking into account all the relevant circumstances in section 4(2) and BU's expressed wishes and feelings as I am obliged to do pursuant to section 4(6) of the 2005 Act, I am in no doubt at all that it is not in her best interests to be exposed to further risk of financial abuse and/or the risk of future manipulation by NC through the control he has exerted through his behaviour to date. I regard it as essential that steps are taken at the earliest opportunity to address and reverse the current estrangement between BU and her family and this is unlikely to happen whilst NC's corrosive influence over her persists. The immediate need is for BU to receive therapeutic assistance in coming to terms with the loss of this relationship and the reasons why that step through court intervention has been necessary. If a view is subsequently taken that this position needs to be reviewed at a later stage once BU has had an opportunity to engage in therapy, the court can look again at the matter. It will remain to be seen whether NC remains interested in contact with her at that stage and/or whether he will be prepared at that stage to undertake whatever therapy or other work is required of him in order to address his own behaviour.*

Roberts J noted (with some apparent regret) that she could not make provision in her order for the provision of such therapy since she had no evidence as to what is needed or who might provide it. However, she proposed nevertheless to include in her order a recital by way of declaration that it was in BU's best interests for such therapy to be offered to her with a view to helping her to make informed and capacitous decisions about any future contact with NC.

The orders that she proposed to make were therefore as follows:

> *100.* […] *a final order providing that there will be no contact between NC and BU. The existing injunction will be replaced with a fresh order which will be expressed to continue until further order but subject to any review which may become necessary at a later stage. I propose to attach a penal notice to that order. NC must be quite clear that any breach or attempted breach of that order may expose him to severe consequences if he is found to be in contempt of court and that may include a period of imprisonment. I am concerned about what appears to be his complete contempt for orders made by the court in these proceedings and I propose to reserve to myself any future proceedings involving an allegation that my orders have been breached. BU should be reassured that, whilst expressed as a final order, this is not a 'forever' order. If the position changes in the future, this order can and, if necessary, will be reviewed. What is required at this stage is a period of respite during which she will have the opportunity to engage with those who can help her to understand how NC's influence has impacted on her life and the risks which his behaviour has created. I do not delude myself that my decision will do anything other than cause significant distress to BU. That has never been my intention and I continue to hope that in time, with appropriate help, she will come to understand the reasons why this step was necessary to secure her safety and wellbeing.*

Forced marriage protection order

On the facts of the case, and especially given NC's attitude to court orders, Roberts J considered it was necessary to consider, specifically and separately, a forced marriage protection order (which can also encompass a civil partnership). In doing so, it appears that Roberts J proceeded on the basis that BU both had capacity to marry and to enter into a civil partnership (she declined to resolve an issue about the precise breath of the test to enter into a civil partnership). In relation to civil partnership, she made a separate and specific injunction which prevents NC from entering, or attempting to enter, a civil partnership with BU without first obtaining specific permission from this court. In relation to marriage, she followed the "routemap" set out in *Re K (Secretary of State for Justice and another intervening)* [2020] EWCA Civ 190 as follows:

> *In terms of marriage and the 'routemap to judgment' recommended by the President in Re K, I have already set out my findings in relation to the underlying facts which I have found to be proved on the basis of the civil standard of proof, i.e. the balance of probabilities. With that first stage completed, I turn to stage 2 which is to decide whether or not the purpose identified in section 63A(1) of the FLA 1996 is established. In this case I am entirely persuaded from the foot of those facts that BU requires the protection of the court from any attempt to be forced or coerced into a marriage with NC. As to the balancing exercise required by stage 3, I am acutely conscious that there is a high hurdle to be passed before I should take any steps to override BU's clearly expressed wishes in this context. Here,*

> *I am dealing with the wishes and the future of a woman who has completely lost her personal autonomy as a result of the total subordination of her free will. In these circumstances there are no sufficiently protective factors which could be put in place to reduce or eliminate the potential risks of a forced marriage. BU would have no comprehension that she was not freely consenting to such a marriage and thus the court must take steps to prevent the possibility of that happening. I propose to reflect in that balance a limit on the duration of the order which I propose to make under the 1996 Act and in relation to the prohibition of a civil partnership. Those orders will represent an interim holding position for a period of twelve months whilst further work is undertaken to assist BU in whatever therapy can be arranged. I regard this as an appropriate accommodation between the need to protect BU from the inhuman and degrading treatment which is captured by Article 3 of the Convention and the respect which this court must maintain for any autonomous decision-making of which she becomes capable in the future. In this way I propose to intrude on her right to a private family life to the minimum extent which I regard as necessary to meet the duty under Article 3, but no more. Depending on where we are at that point in time, I would regard it as a sensible precaution to list the matter for review before the expiry of that order.*

Transparency

In an important "footnote," Roberts J made clear that the court cannot and should not make reporting restriction orders which are retrospective in their effect. She also noted that reporting restrictions orders:

> *110* […] *should not be drafted so as to include any prohibition of information which is already properly and lawfully in the public domain. The reasons are so obvious that they probably do not need stating. Accredited journalists and bloggers who attend these hearings as of right cannot be put in a position where they risk being held in contempt of court for publishing information which they hear when that information falls outside any restrictions imposed by the court. In this day and age of mass media communication, information acquires a currency as soon as it is available to a wider audience outside the court room. That is part and parcel of the valuable function which the press and others perform as monitors of the court process. They act as the conduit for public dissemination of the court's working process and procedures and, as such, they fulfil a vital function in any democratic society. There is always a careful balancing act to be performed when the exercise of that function, engaged specifically by Article 10, is examined against the need to preserve the Article 8 and other Convention rights of the subject of court proceedings. In this case the balance has now been struck but, for the avoidance of any doubt, I make it plain that no reporting restriction order should operate so as to have retrospective effect.*

Comment

It is unsurprising that Roberts J described this as a difficult case, nor that she considered that, if (as she did) she acceded to the application, BU would be unlikely to understand why she had been denied the happiness which she sought and which she believed she deserved. It is also unsurprising, in consequence, that she considered that there was "*a heavy responsibility on the court to ensure insofar as it can that the outcome of this application, and the reasons for the decision, are laid out in clear and simple terms*" (paragraph 88).

Questions of coercive control in the context of those with impaired decision-making capacity have been highlighted previously by Hayden J as being particularly insidious: see *Re LW*. This case only reinforces how pernicious they can be, and it is (frankly) terrifying to imagine where BU would have been had her daughter not been willing to risk almost all in respect of her relationship with her mother by taking the steps that she did – including bringing proceedings herself.

What is of wider interest and relevance, perhaps, is the way in which Roberts J was prepared to proceed on the basis that BU lacked capacity to make decisions as to contact with NC. A very narrow view of the MCA would (on one view) prevent relational aspects being taken into account – i.e. in effect to pretend that the person is to be removed from the circumstances and their abilities examined in isolation. In the (common law) context of testamentary capacity, capacity is sometimes viewed in this rather abstract fashion: in *Simons v Byford*, for instance, the Court of Appeal held that "*capacity depends on the potential to understand. It is not to be equated with a test of memory*" (paragraph 40). Translated to the 'real time' analysis required by the MCA, however, such an approach is deeply problematic in any situation where it is not, sensibly, possible to remove the 'disabling' influence from the person's life. BU's case shows just how wrong that would be in circumstances where the disabling influence of NC remained strong despite the fact that she had not had contact with him for a year. The Singaporean case of *Re BKR* (not cited in this case, but decided under legislation almost identical to the MCA 2005 in this regard) provides an important – reasoned – discussion of how to proceed in the context of the interaction of an impairment and the disabling influence of another; for an analysis of the ethical considerations in play, entirely consistent with the approach taken by Roberts J, some may find this book of interest. It is very much to be hoped that the approach adopted in this case – i.e. taking a broad approach to capacity but on the basis of a clear understanding that the corollary is that best interests decision-making should be designed, insofar as possible, to secure the true autonomy of P – is one that other judges feel able to adopt in future cases when these difficult cases come before them. It is certainly a framework which appears to meet the difficult ethical dilemmas in play more satisfactorily than the inherent jurisdiction to which judges other have to have recourse in such cases, bereft as it is of any moral compass to guide them as to the approach to take equivalent to the principles under the MCA 2005.

PROPERTY AND AFFAIRS

Resolving a deputy stand-off

Kambli v The Public Guardian [2021] EWCOP 53 (HHJ Hilder)

Deputies – property and affairs

Summary

In this case, HHJ Hilder considered an application by a panel deputy for discharge. The deputy had been appointed in 2019 in the circumstances set out in this judgment.

The person at the centre of the proceedings was a child, MBR, who had received a significant damages award in 2014. MBR lived with his family in a property owned by him, and in 2012, had Wrigleys Trustees Ltd appointed as a professional deputy.

MBR's mother, NKR, had made an application in 2017 to discharge Wrigleys Trustees and have herself and a barrister, Ms Sood, appointed as deputies instead. Wrigleys Trustees agreed to a discharge, on that basis that "'*such a degree that we no longer believe that we are able to act in [MBR's] best interests' but contended that 'it is in [MBR's] best interest for a suitably qualified and experience professional deputy to be appointed … in our place.*'" [Paragraph 10 of the 2019 judgment]. Wrigleys Trustees had also raised concerns that MBR's funds were being spent too rapidly, in particular for gratuitous care payments made to the family and the cost of the family's proposed adaptations to the property.

The parties had been able to agree in a 2018 Dispute Resolution Hearing that an alternative professional deputy should be appointed, but had been unable to choose that deputy. NKR continued to propose Ms Sood and Wrigleys Trustees proposed a panel deputy. Sunil Kambli, an OPG panel deputy, met NKR and was identified as her second choice if Ms Sood was not appointed. NKR considered that both candidates would offer cultural understanding and appropriate language skills, which she considered important.

In 2019, the court ultimately determined that Mr Kambli should act as deputy, noting both his experience as a panel deputy, and Ms Sood's having failed to provide the court with evidence regarding how she would hold appropriate professional insurance for her work as a deputy. The court also restricted the amount which Mr Kambli was authorised to spend on adaptations to the property to £190,000 in accordance with an agreement reached at the Dispute Resolution Hearing.

In August 2020, Mr Kambli made an application for discharge as deputy and requested another panel deputy be appointed instead, noting similar issues to those raised by Wrigleys Trustees in the previous proceedings. He also applied for an increase of £15,000 in the permitted expenditure on the adaptation works to allow their completion. The application for additional funding to complete the property

adaptations was granted, but his application for discharge was refused in October 2020 on the following grounds (paragraph 5 of the present judgment):

a. *there has been an exceptional turnover of professional deputies in this matter already;*

b. *on every occasion, the appointed deputy either seeks or agrees to the discharge of their appointment on the basis of a breakdown in relations with family members, particularly AR (the father of MBR);*

c. *on every occasion further avoidable costs are incurred, reducing the funds available to meet the needs of MBR;*

d. *the Deputy was appointed following contested proceedings, in which the person nominated for appointment by the family members ultimately failed to comply with court directions, and the deputyship was clearly referred to a member of the Public Guardian's panel as "a particularly challenging case";*

e. *the Deputy's statement confirmed that "it is my belief that AR simply wishes for a deputy to accede to his own wishes and demands rather than act in MBR's best interests, and that he deliberately causes a breakdown in relationship so that a new deputy who may accede to his wishes is appointed."*

The deputy applied for reconsideration of the court's order. The court set out its concerns at paragraph 8 that:

a. *the Deputy's application for discharge is based on grounds/difficulties similar to those experienced by previous deputies;*

b. *two deputyships failing by reason of breakdown of relations with family members may be unfortunate but three indicates that there is a systemic problem which needs to be addressed if MBR's best interest are to be protected;*

c. *consideration should be given to appropriate steps being taken to restrain any inappropriate behaviour towards the Deputy and/or his firm, or any deputy appointed for MBR, by AR and others.*

MBR's father, AR, and the Public Guardian were joined as parties. All parties took the view that it was in MBR's best interests for an alternative deputy to be appointed in place of Mr Kambli, with AR suggesting that either himself or NKR should be appointed as deputy. It was noted by way of background the 2019 decision that AR had previously been convicted of fraud. Mr Kambli also drafted a working agreement for MBR's family, and the Public Guardian was directed to file a statement setting out "*what support he is able to provide to panel deputies who are engaged as deputy in difficult cases involving allegedly hostile and abusive treatment from P's family members*" (paragraph 10).

AR ultimately changed his position and proposed both more distant family members or in the alternative, a solicitor he had chosen to act as deputy; however, where the solicitor failed to file any COP4 declaration, the court could not consider this request.

Mr Kambli argued that "*there has been an irretrievable breakdown in the relationship between his, his team and MBR's family, particularly his father AR. He considers that AR is "intent on breaking down any relationship he has with a Deputy by 'Deputy shopping' until he finds a Deputy that will accede to his demands*" (paragraph 9). He contended that AR was "*often rude, obstructive and undermines my authority as Deputy* […] *he "continuously calls us corrupt, liars, selfish, criminals, robbing [MBR] and evil*" (paragraphs 11 and 15). Mr Kambli gave numerous examples of the difficulties he had experienced with AR, which often involved AR making financial commitments and demanding Mr Kambli pay for them, requesting payments to the family Mr Kambli was not authorised to make, and making demands for purchases which were clearly not in the best interests of MBR. He also reported that AR objected to regular deputyship fees, while demanding a high level of engagement from him. AR would also make recordings of interactions with Mr Kambli.

Mr Kambli noted that previous deputies had been discharged without difficulty, and that he considered he was being "*effectively...enslaved to a job for life*" (paragraph 17). He considered that if a different deputy was able to better establish a working relationship with AR, the overall costs to MBR were likely to reduce, and that if present trends continued, he would "*have no option but to take legal action against AR to protect* [the rights of his firm]*, which is likely to lead to a conflict of interest between Mr. Kambli acting as deputy for MBR and Mr. Kambli acting as partner of Premier Solicitors*" (paragraph 18). He further argued that s.19(3) MCA 2005 envisages consent from the deputy, such that " *in addition to P's best interests considerations – the court should have regard to the views of the deputy, in particular where he asserts that he does not have unlimited resources and is not being proportionately remunerated for the time and expense of this deputyship. It is said that no professional deputy should be required to carry on in the role where it involves being subjected to behaviour that is aggressive, hostile and defamatory*" (paragraph 19).

The Public Guardian acknowledged that the appointment of another professional deputy would not necessarily change anything in the family dynamics or the ability of the family to work with them but nonetheless considered that the Deputy's appointment should be discharged and an alternative panel deputy appointed instead. He observed that "*the replacement deputy would need to be firm with AR and be able to keep a tight control on expenditure*" (paragraph 24). The Public Guardian suggested that a Case Manager might assist in managing potential conflict.

AR argued that the issues which had arisen were the fault of Mr Kambli, whom he considered was "*playing on the fact that he is the third deputy to be appointed and 'taking advantage of the situation'*" (paragraph 28). AR again submitted that either himself, NKR or others chosen by him should be appointed as deputy, and opposed the appointment of another panel deputy. AR was generally opposed to the Public Guardian's proposals for arrangements to improve working relationships, and

did not agree to communicate with the deputy in writing or limit communications to twice weekly. He refused to transfer assets purchased with MBR's money which had been put into his or NKR's name. He refused a proposal not to incur costs without the deputy's authorisation.

HHJ Hilder allowed the application, and looked to the consideration of the application for discharge of a public authority deputy in *Cumbria County Council v A* [2020] EWCOP 38. HHJ Hilder agreed that while a deputy must consent to an initial appointment, "*it was not accepted that consent to continuation of the appointment is similarly required*" (paragraph 38). The decision was a discretionary one for the court, and would be guided by P's best interests.

HHJ Hilder noted that being on the Public Guardian's panel of deputies was "*a recognition of expertise and experience which carried advantages in terms of referrals of cases but also responsibilities in that panel members are expected to accept such referrals (except in limited circumstances) irrespective of the nature of the case*" (paragraph 38). She expressed a reluctance to discharge a panel deputy simply "*on the basis that the matter is challenging*" (paragraph 38).

HHJ Hilder was clear that a change of deputy should not be a 'default response' to difficulties in managing a deputyship, as it incurs costs for *P* "*and risks being perceived as 'rewarding' negative behaviour, which in turn undermines the prospects of future stability. Rather the Court should probe the actual circumstances, with a view to salvaging working relationships if possible*" (paragraph 39). However, she considered that that did not appear possible in the present case, as efforts had been made and had failed.

HHJ Hilder considered that it was "*clearly not in the best interests of MBR for the current deputyship to continue*" (paragraph 42). The stress caused by the breakdown in relations was considered as a primary factor, rather than either Mr Kambli's wish to be discharged or AR's behaviour. The court cautioned that AR should not consider this conclusion vindication of his behaviour, and emphasised the cost to MBR each time a new deputy was appointed.

HHJ Hilder did not consider that there was any reason for optimism that a new panel deputy would have a different experience. The court considered AR was inappropriate to act as deputy due to his conviction for fraud, and noted NKR's "*previous involvement in his unsuccessful business, and her apparent inability to mitigate the difficulties between him and three deputies to date,*" led the court to the conclusion that "*she could not discharge the functions of deputyship with sufficient independence.*"

AR had also proposed two more distant relatives, KS and AQ, who had filed appropriate deputyship declarations and had professional/working experience and obligations which he asserted suggested that they could and would understand the responsibilities of deputyship. HHJ Hilder considered that KS and AQ were more likely to have AR's cooperation, and they would not incur management fees for MBR. She also considered that there were disadvantages insofar as they did not have either deputyship experience or indemnity insurance. The court considered that MBR's finances were likely

to be less complicated as building works had been completed, and risks could be mitigated by a number of steps:

1. They were appointed jointly;
2. The court also proposed to take steps to ensure that the set budget for MBR would be complied with and further funds could not be withdrawn.
3. The court also required KS and AQ to make a further application to the court in respect of any dispute with AR which was not resolved within 3 months.
4. Their appointment was time-limited to allow review after supervision by the Public Guardian of the initial period.
5. They were required to hold a £400,000 security.
6. They did not have authority to sell property or withdraw from investments.

Comment

The case provides an expansion of the discussion in *Cumbria County Council v A* beyond the realm of public sector deputies, and again reiterates that a deputy will not be released simply because the deputy states that he or she is no longer willing to act (with the earlier case suggesting that a deputy would not be prevented from relinquishing a deputyship due to retirement). While HHJ Hilder did not engage in fact-finding, there had been a consistent narrative on the part of the professional deputies that the family had been extraordinarily difficult to work with, and she clearly had a concern that MBR would be repeatedly subject to the costs associated with new deputies being introduced repeatedly. Her decision to appoint familial deputies subject to heavy restrictions and supervision, rather than imposing more draconian restrictions on the family, was an interesting one which the court clearly hoped might break the cycle of MBR being repeatedly subject to the cost of new deputies being brought in.

Two new Blog posts from the OPG about being a deputy

The OPG has issued two new Blog posts about being a deputy. They are mainly aimed at lay people but have useful reminders of the process even for seasoned professionals.

One is about becoming a deputy and the other is about what happens and what you should do after being appointed.

PRACTICE AND PROCEDURE

Short note: anticipatory declarations and medical treatment (1)

In *Re Z (Medical Treatment: Invasive Ventilation)* [2021] EWHC 2613 (Fam), Peel J made observations about the appropriateness of making an anticipatory declaration in a medical treatment case.[2] The case related to a child, as opposed to an adult with impaired decision-making capacity, but we suggest that the observations that he made are equally relevant to cases before the Court of Protection. In reliance upon *An NHS Trust v Mrs H* [2012] EWHC B18 (Fam), Peter Jackson J (as he then was) considered that the approach of the Court of Appeal in *Wyatt v Portsmouth Hospital NHS Trust* [2005] EWCA Civ 1181 made clear that "*declarations should only extend to matters where the factual basis is known. This makes it unwise to endorse aspects of plans that may change in their details, as the plan in this case may. […]. The approach that I take is to identify the treatment issues that need to be determined and that are not likely to change over time*." Peel J noted that he did not join issue any of these dicta, but that:

> *16.* […] *None of them suggest that the court is prohibited from making an anticipatory declaration. Although there may, in some cases, be a disadvantage in attempting to pre-empt a fluctuating situation, there are many cases where the facts establish, to the requisite civil standard of proof, not just what the current circumstances are, but what future circumstances are likely to be. Medical prognosis almost always involves an assessment of the future which by definition cannot be guaranteed, but the court will ordinarily have the benefit of expert evidence to assist in making findings to the requisite civil standard. The court is entitled to weigh up such medical prognosis as part of the totality of the evidence and, if the factual foundation is made out, and the evaluative exercise so justifies, I see no reason why an anticipatory declaration should not be made. Further, there are good reasons for thinking that to clarify the permissible level of medical treatment before the patient reaches a critical condition may avoid urgently instituted proceedings, fraught disputes and rushed decision making while the patient is in intensive care. That is the very situation which M in this case has said that she wishes to avoid. To my mind, it is therefore essentially a question of fact and evaluation. In my judgment, I am entitled to make an anticipatory declaration provided that (i) I have a factual basis on which to do so, (ii) those facts enable me not just to assess the situation as it is now, but also to form with a degree of solidity a prospective view, and (iii) the proposed anticipatory declaration, viewed in the context of best interests, is justified.*

These observations place – we suggest – some very useful flesh upon the bones of Lady Hale's (very short) observation in the adult case of *Aintree v James* at paragraph 47 that:

> *if the clinical team are unable to reach agreement with the family or others about whether particular treatments will be in the best interests of the patient, they may of course bring the question to court*

[2] Tor having been involved in the case, she has not contributed to this note.

in advance of those treatments being needed. But they may find that, as here, the court is unable to say that when they are needed, they will not be in the patient's best interests.

Short note: anticipatory declarations and medical treatment (2)

By way of an example of the courts having to having to grapple with advance planning in a much more fluid context, see *Cambridge University Hospitals NHS Foundation Trust & Anor v GD & Anor* [2021] EWHC 2105 (Fam). This case concerned a 17 year old with chronic depression and MS. She was in a psychiatric hospital at the time of the application and was going to require further admissions every 4-6 weeks for infusions of medication for severe relapsing and remitting MS. She had a history of self-harming, described by the judge as being 'extraordinarily severe in nature' such that hospital admissions and surgical treatment had been required. GW was an informal patient and was not deprived of her liberty, having given consent to being in hospital. The Trust applied for orders under the inherent jurisdiction in respect of treatment for her MS and for the management of wounds caused by self-harm, both requiring physical restraint as a last resort, if GW objected to receiving treatment. There was evidence that GW had refused treatment in the past, for both MS and for her wounds, and could become overwhelmed and unable to think through the risks of such refusals.

GW's mother and the Official Solicitor for GW opposed the use of physical restraint in respect of treatment for MS, but were open to its use in respect of wound management.

Theis J approved the MS treatment plan but without provision for restraint, on the basis that GW had been compliant with treatment for a period of months prior to the hearing, and had written a letter to the court explaining that she understood the need for regular treatment and had reflected on her previous experience after missing a scheduled infusion, when her condition had deteriorated markedly. The risk of GW withdrawing consent was low, and if she did, there would be a 2 week window when the Trust could apply back to the court for further orders.

The wound management plan was approved, including physical restraint, and including aspects of treatment where GW had not previously refused consent. Treatment of self-harm wounds was likely to be needed urgently, and the consequences of not providing treatment were very serious. The court found that GW did not understand the magnitude of the risks posed by her refusal of treatment related to her wounds, and that at times when she self-harmed, her mental state was likely to be such that she could not weigh up risks and benefits. Theis J observed "[i]*t would not be in GW's best interests to leave the Trusts to rely on statutory defences under ss 5 and 6 MCA 2005, or the common law of necessity, which would provide less clarity and more uncertainty than the proposed wound management treatment plan*."

The court ordered that the Official Solicitor should be notified of any occasion on which physical or chemical restraint was provided to GW.

This case required the parties and the court to deal with a complex and dynamic medical situation, and to make advance plans where the precise circumstances that would prevail in the future were not known. That task was made somewhat easier by the fact that GW was 17 as the court could step in under the inherent jurisdiction regardless of whether GW had capacity, and so the fluctuating capacity problems that arise in the Court of Protection could be side-stepped for the time being.

It is of interest that the Official Solicitor sought notification of future use of restraint under the wound management plan authorised by the court, as the Official Solicitor's stance is often to say that once proceedings have concluded, she has no role and should not be used to monitor the implementation of orders.

THE WIDER CONTEXT

Eating and drinking with acknowledged risks

The Royal College of Speech and Language Therapists has published multidisciplinary guidance to help guide healthcare professionals through the complex decision-making process to support adults when eating and drinking with acknowledged risks.

As the guidance identifies, the Royal College of Physicians document 'Supporting people who have eating and drinking difficulties' (2021) is the primary guidance for care and clinical assistance towards the end of life, the RCLST document will serve as an adjunct referring to the nuances within the decision-making process for adults eating and drinking with acknowledged risks irrespective of the stage or progression of their illness.

Full disclosure: Alex was involved in the later stages of both projects.

Gillick competence and capacity: the Court of Appeal pronounces

Bell & Anor v The Tavistock and Portman NHS Foundation Trust [2021] EWCA Civ 1363 (Court of Appeal (Lord Burnett of Maldon, Sir Geoffrey Vos, MR and King LJ))

Other proceedings – family law

Summary[3]

In *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363, the Court of Appeal roundly upheld the appeal of the Tavistock and Portman NHS Foundation Trust against the declaration made by the Divisional Court as to the relevant information that a child under the age of 16 would have to understand, retain and weigh up in order to have competence to consent to the administration of puberty blocking drugs. As is common practice now, the Court of Appeal has provided a short summary of its judgment, but in headline terms, the key points of the judgment are as follows.

By way of important context, the judicial review been brought by two claimants, one of whom (Keira Bell) was a former patient of the Tavistock who was treated with puberty blockers as a 16-year old, progressed to cross-sex hormones and began surgical intervention as an adult to transition from female to male. She terminated her treatment having changed her mind and regretted having embarked upon the treatment pathway. The second claimant (Mrs A) was the mother of a child who suffered from gender dysphoria and had been referred to Tavistock, but had not yet had an appointment. The purpose of the judicial review had been to require, as a matter of law, the involvement of the court before anyone under the age of 18 was prescribed puberty blockers, thus denying the opportunity of consent to such treatment either individually or with the support of their

[3] Nicola having been involved in the case, she has not contributed to the note.

parents or legal guardians. The argument was that those under 18 were not capable in law of giving valid consent to the treatment. The Divisional Court did not accept this proposition, but, rather than dismissing the judicial review, it (1) made the declaration above; (2) gave extensive guidance as to practice and procedure, in particular as to when the involvement of the court would be appropriate.

The question before the court was whether the Divisional Court was right to do both of these things. As the Court of Appeal noted, the arguments that it had heard about the Divisional Court's approach to the evidence provided the background to this question.

The Court of Appeal held that the Divisional Court had erred in its approach to the evidence. Having noted that evidence adduced by the claimants appeared to have informed the Divisional Court's conclusion that the treatment was experimental, and in relation to the conclusion that it was highly unlikely that a child under 14 could give valid consent to puberty blockers and improbable that a child aged 14 or 15 could do so, the Court of Appeal identified that:

> *38. The claimants made no application for permission to rely upon the expert evidence they produced. Although some expert evidence was served with the claim the majority was served shortly before skeleton arguments were due to be lodged. None of it complied with the rules regarding expert evidence and a good deal of it is argumentative and adversarial. Tavistock sought to exclude the expert evidence on the grounds that it was inadmissible because it was not necessary to resolve the legal issue before the court; and also because it comprehensively failed to comply with the rules regarding expert evidence in any event. The issue was not resolved. Much of it was adduced to contradict the evidence given by Tavistock and the Trusts. Such evidence is rarely admitted but a particular difficulty here was that there was no way of resolving evidential disputes. The court supported the guidance it gave "in the light of the evidence as it has emerged": see para [147]. It would have been preferable for the status of the claimants' expert evidence to be resolved. It was controversial and would not, as we have said, ordinarily be preferred over that of a defendant in judicial review proceedings.*

At paragraphs 62ff, the Court of Appeal returned to this theme:

> *62. The correct approach was not in dispute. It was not for the court hearing a judicial review to decide disputed issues of fact or expert evidence (see paras [9], [70] and [74]). That principle is only subject to exceptions that are not relevant to this case. The question is whether, notwithstanding its acceptance of the principle, the Divisional Court placed reliance on the contested and untested expert evidence of the claimants as Tavistock and the Trusts contend. The claimants submit that the salient facts decided by the court were taken from Tavistock's own evidence so that they were effectively common ground.*
>
> *63. This dispute applies most significantly to the two findings to the effect that treatment of gender dysphoria with puberty blockers was "experimental" (see paras [28], [74], [93], and [134]), and that the vast majority of patients taking puberty blockers go on to cross-sex hormones and are on a pathway to much greater medical interventions (see paras [68] and [138]). The Divisional Court recorded at para [70] that Professor Butler had "explained that it is very common for paediatric medicines to be*

used off-label and that this factor does not render the treatment in any sense experimental." It nonetheless concluded at para [134] that the treatment was experimental in the sense it explained in that paragraph (real uncertainty over the short and long-term consequences of the treatment with very limited evidence as to its efficacy). The argument may, in one sense, be semantic, but, respectfully, we think that it would have been better to avoid controversial factual findings.

64. The same points apply to the finding that the vast majority of patients taking puberty blockers go on to cross-sex hormones and are on a pathway to much greater medical interventions. The evidence filed by Tavistock indicated that more than half of those who embark upon a course of puberty blockers go on to cross-sex hormones. For the Divisional Court to have reached with confidence the conclusion set out at [138] that the "vast majority of patients taking [puberty blockers] go on to [cross-sex hormones] and therefore that s/he is on a pathway to much greater medical interventions", it would, we think, have been necessary not only to look at the limited data provided by Dr de Vries and Dr Carmichael, but also to evaluate evidence as to how patients were chosen for puberty blockers, the progression of the treatment, and multiple issues affecting progression between treatment pathways, including the consent processes for subsequent treatment stages. Tavistock and the Trusts argue that the Divisional Court failed to appreciate the difference between a causal connection and an association, whatever the proportion of those who move from one treatment to another. The correlation may be the result of effective selection of those for puberty blockers and information sharing at the consent stage. The point, however, is that these judicial review proceedings did not provide a forum for the resolution of contested issues of fact, causation and clinical judgement.

65. As will appear from what we say in the next section of this judgment, we have concluded that the declaration implied factual findings that the Divisional Court was not equipped to make.

Turning to the question of whether the Divisional Court was right to make the declaration, the Court of Appeal identified that no example of a declaration being granted in judicial review proceeding in which a clear legal challenge had failed was drawn to their attention. It then noted that

70. The declaration is in terms which not only states the law but also identifies an exhaustive list of the factual circumstances that must be evaluated in seeking consent from a child and specifies some matters as conclusive facts. It comes close to providing a checklist or script that clinicians are required to adopt for the indefinite future in language which is not capable of clear and uniform interpretation and in respect of which there were evidential conflicts. Some of the factors identified in the declaration are simple statements of fact. Others beg questions to which different clinicians would give different answers.

The Court of Appeal was particularly struck by the fact that:

75. […] *The declaration would require the clinicians to suspend or at least to temper their clinical judgement and defer to what amounts to the clinical judgement of the court on which key features should inform an assessment of Gillick competence, influenced by the views of other clinicians who take a different view and in circumstances where Mr Hyam accepts that the service specification, which sets out criteria for referring a child for puberty blockers, is not unlawful.*

> *76. The* ratio decidendi *of* Gillick *was that it was for doctors and not judges to decide on the capacity of a person under 16 to consent to medical treatment. Nothing about the nature or implications of the treatment with puberty blockers allows for a real distinction to be made between the consideration of contraception in* Gillick *and of puberty blockers in this case bearing in mind that, when Gillick was decided 35 years ago, the issues it raised in respect of contraception for the under 16s were highly controversial in a way that is now hard to imagine. A similar conclusion was reached by Silber J in connection with abortion in* R (Axon) v. Secretary of State for Health *[2006] QB 539 at para [86].*

The Court of Appeal identified that

> *78. The legal issue before the Divisional Court was not a general inquiry into the content of information and understanding needed to secure the informed consent of a child, although we have great sympathy with the Divisional Court given the large volumes of materials which informed that clinical issue. The declaration which the Divisional Court made does not sit happily with the observations of Lord Phillips* [in *Burke*, as to the dangers of a court being used as a "*general advice centre*," and also declarations which did not resolve issues between the parties but *"appeared intended to lay down propositions of law binding upon the world*"]

It continued:

> *80. A formal declaration states the law. In so far as it specifies facts as part of the law (itself a difficult concept) they remain the law. There is a great deal of difference between the declaration originally sought in these proceedings ("no prescription of puberty blockers without court approval") or in Gillick ("no contraceptives without parental consent") and the declaration made here. It turns expressions of judicial opinion into a statement of law itself. In addition, it states facts as law which are both controversial and capable of change. Both Lords Fraser and Scarman in Gillick expressed views about the matters which a clinician would have to explore with a patient, without being prescriptive and recognising that it was for the clinicians to satisfy themselves, in their own way. No declaration was contemplated to capture the essence of that thinking. It would have been inconsistent with the ratio of the case that clinicians must be trusted to make the decisions for the court effectively to give them a manual about how to do so. It is instructive to consider the language of Lord Scarman on the main issue in Gillick at pages 188H to 189A:*
>
> > *"I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give consent valid in law."*
>
> *81. His conclusion on the law is found in the first sentence but the second recognises that the question whether valid consent is given in any case is a question of fact. That depends upon the individual circumstances of any child and the surrounding circumstances of the clinical issues. Both he and Lord Fraser identified at a high level what they could expect a clinician to take into account in making a clinical decision. Turning their observations into formal declarations (all the more so if they*

> *included immutable facts) would have been inappropriate. It is a matter of clinical judgement, tailored to the patient in question, how to explain matters to ensure that the giving or refusal of consent is properly informed. As Lord Fraser observed at page 174F, medical professionals who do not discharge their responsibilities properly would be liable to disciplinary sanction. The law of informed consent culminating in Montgomery also exposes the vulnerability of clinicians to civil action from someone they have treated who shows that they did so without first obtaining informed consent.*

The Court of Appeal was therefore clear that that the Divisional Court was wrong to make the declaration. It was equally clear that it was wrong to have given guidance, although it recognised that it "*stemmed from the understandable concern of the Divisional Court for the welfare of children suffering from gender dysphoria who, it is common ground, are deeply distressed and highly vulnerable*." Critically, however, the Court of Appeal found that the Divisional Court was "*was not in a position to generalise about the capability of persons of different ages to understand what is necessary for them to be competent to consent to the administration of puberty blockers*" (paragraph 85). The Court of Appeal also noted that:

> *86.* […] *the effect of the guidance was to require applications to the court in circumstances where the Divisional Court itself had recognised that there was no legal obligation to do so. It placed patients, parents and clinicians in a very difficult position. In practice the guidance would have the effect of denying treatment in many circumstances for want of resources to make such an application coupled with inevitable delay through court involvement. Furthermore, the guidance that there should be an application to the court in circumstances where child, parents and clinicians all consider the treatment to be in the best interests of the child would be inconsistent with the conclusion of the Supreme Court in An NHS Trust (discussed at [49] above).*
>
> […]
>
> *89. We conclude that it was inappropriate for the Divisional Court to give the guidance concerning when a court application will be appropriate and to reach general age-related conclusions about the likelihood or probability of different cohorts of children being capable of giving consent. That is not to say that such an application will never be appropriate. There may be circumstances where there are disputes between one or more of clinicians, patients and parents where an application will be necessary, even if they are difficult to envisage under the service specification and SOP with which this case is concerned.*

The conclusions of the Court of Appeal merit reproduction in full:

> *92. We should not finish this judgment without recognising the difficulties and complexities associated with the question of whether children are competent to consent to the prescription of puberty blockers and cross-sex hormones. They raise all the deep issues identified in Gillick, and more. Clinicians will inevitably take great care before recommending treatment to a child and be astute to ensure that the consent obtained from both child and parents is properly informed by the advantages and disadvantages of the proposed course of treatment and in the light of evolving research and understanding of the implications and long-term consequences of such treatment.*

Great care is needed to ensure that the necessary consents are properly obtained. As Gillick itself made clear, clinicians will be alive to the possibility of regulatory or civil action where, in individual cases, the issue can be tested.

93. The service specification and SOP provide much guidance to the multi-disciplinary teams of clinicians. Those clinicians must satisfy themselves that the child and parents appreciate the short and long-term implications of the treatment upon which the child is embarking. So much is uncontroversial. But it is for the clinicians to exercise their judgement knowing how important it is that consent is properly obtained according to the particular individual circumstances, as envisaged by Gillick itself, and by reference to developing understanding in this difficult and controversial area. The clinicians are subject to professional regulation and oversight. The parties showed us an example of a Care Quality Commission report in January 2021 critical of GIDS, including in relation to aspects of obtaining consent before referral by Tavistock, which illustrate that. The fact that the report concluded that Tavistock had, in certain respects, fallen short of the standard expected in its application of the service specification does not affect the lawfulness of that specification; and it would not entitle a court to take on the task of the clinician in determining whether a child is or is not Gillick competent to be referred on to the Trusts or prescribed puberty blockers by the Trusts.

94. Once it was conceded by the claimants that the Divisional Court had made no findings of illegality, the focus of this appeal was squarely on Gillick and whether, by making the declaration accompanied by guidance requiring (probably frequent) court intervention, the Divisional Court had placed an improper restriction on the Gillick test of competence. In our judgment, whilst driven by the very best of intentions, the Divisional Court imposed such a restriction through the terms of the declaration itself, by the utilisation of age criteria and by the requirement to make applications to the court. As we have said, applications to the court may well be appropriate in specific difficult cases, but it was not appropriate to give guidance as to when such circumstances might arise.

Comment

The Court of Appeal were at interesting pains to make clear what they were not considering:

(1) The situation where a court is asked to approve life-sustaining treatment for under-18s to which they or their parents are unable or unwilling to consent (recently considered by Sir James Munby in *Re X (A child)(No 2)* [2021] 4 WLR 11) (paragraph 82).

(2) The situation where a child (by which the Court of Appeal must mean a child of 16 or 17) lacks capacity to make the decision to consent to puberty blockers/cross-sex hormones applying the MCA 2005, although the Court of Appeal observed – somewhat cryptically – that "[w]*e do not think that a comparison between the exercise of assessing Gillick competence and the process envisaged under the Mental Capacity Act 2005* […] *assists in this case*." The Court of Appeal referred to the judgment of Sir James Munby in *Re X (A child)(No 2)* [2021] 4 WLR 11 in relation to this point (the reference to paragraph 72 of that judgment must be a typographical error), in which Sir James observed that he considered that:

> *the tests of capacity and of Gillick competence have nothing very obvious in common, not least because they are rooted in different areas of scientific knowledge and understanding. Capacity, or, more precisely, lack of capacity, derives from what Butler-Sloss LJ referred to in Re MB as "some impairment or disturbance of mental functioning", what in section 2(1) of the 2005 Act is referred to as "impairment of, or a disturbance in the functioning of, the mind or brain." Gillick competence, in contrast, is tied to the normal development over time of the typical child and teenager. In the first, one is therefore in the realm of psychiatry. Indeed, it is notorious that Thorpe J's analysis in In re C, from which everything since has flowed, was modelled on the analysis provided in the expert evidence of a psychiatrist, Dr Eastman. In the other, one is not in the realm of psychiatry, rather that of child and adolescent psychology.*

In this regard, it is of note that the focus of these observations was upon the distinction between the normal maturation process and the potential for a (by definition) abnormal impairment or disturbance in the functioning of the mind or brain. In MCA-speak, in other words, these comments related to the so-called 'diagnostic' element. The Court of Appeal did not address the so-called 'functional' element. Even if not a legal requirement, it is suggested that doctors are likely to find it useful to probe whether a child is *Gillick* competent to be able to make the decision in question by asking whether they can understand, retain, use and weigh the necessary information.

(3) Children covered by s.8 Family Law Reform Act 1969, which provides that the consent of a minor over 16 to 16 "to any surgical [or] medical treatment … shall be as effective as it would be if he were of full age."

As (in a different context) a previous Court of Appeal had been in relation to the case of Leslie Burke, this Court of Appeal was equally robust in identifying that – in essence – the lower court had been lured out of its role in determining a dispute before it into seeking to resolve ethical dilemmas.

The Court of Appeal's identification that the responsibility for determining whether a young person has the *Gillick* competence to consent to treatment (of any kind) lies with the clinician proposing that treatment is robust and clear. However, to the extent that the judgment could be read as saying that the courts simply cannot consider the question at all, it is more problematic. It would certainly come as a surprise to judges of the Family Division who have considered for themselves over the years whether they are satisfied as to the *Gillick* competence of a child to accept or refuse medical treatment (see, for instance, the judgment of Baker J (as he then was) in *An NHS Trust & Anor v A & Ors* [2014] EWHC 1135 (Fam), in which the judge took into account both clinical evidence and "informal oral evidence" on the part of the young man in question when considering his competence). The concept of *Gillick* competence has also escaped the gravitational pull of medical decision-making, and has been considered by judges, for instance, in relation to the ability of a young person to consent to the adoption of her child, and, again, it would likely come as a surprise to such judges that they have no ability to resolve a dispute as to whether valid consent has been given. In the circumstances, therefore, it is suggested that the proper approach (in line with the position in *Re Y*, expressly referred to by the Court of Appeal) is that where there is consensus, there is no need to approach the courts, but, there is

dispute or debate, or the issue of competence is finely balanced that (1) the court can be approached to reach a resolution of the question; and (2) the courts can determine – with the benefit of appropriate evidence – what is (as the House of Lords identified in *Gillick*) ultimately a question of fact.[4]

It should be noted in any event that even if the Court of Appeal did, in fact, intend to say that the court can never take on the role of determining (guided by the relevant clinical evidence) whether a child is or is not *Gillick* competent in respect of the decision in question, this cannot apply to the question of whether a person of 16 or over has or lacks the mental capacity to make a decision. Section 15(1)(a) MCA 2005 expressly empowers the Court of Protection to make exactly such a decision.

Finally, the Court of Appeal in this case was clearly troubled by the fact that the Divisional Court had embarked upon an abstract exercise in relation to the question of identification of what information a young person should be able to process to be able to consent to the administration of puberty blockers. It is in this regard striking that the appellate courts are entirely comfortable with the idea of setting down the types of information that a person should be able to understand, retain, use and weigh to make a decision for purposes of the MCA 2005. Perhaps the difference is that they do not seek to reduce these to declarations; or perhaps the difference is that they do not enter into medical debates. But it is a difference which will no doubt fall for further consideration in due course.

Human rights in care settings

The Joint Committee on Human Rights has launched a new inquiry to investigate whether the human rights of residents and their families are respected in care homes in England.

During the Covid-19 pandemic, the Joint Committee on Human Rights reported on the detention of young people with disabilities or autism and called for further action to end blanket bans on visiting people in residential care homes, including a statutory right to an individualised risk assessment before any restrictions on visiting are imposed.

However, human rights concerns extend beyond those which came to the fore during the pandemic. There are also ongoing concerns about the application of Do Not Attempt Cardiopulmonary Resuscitation notices, poor use of treatment escalation plans, over-medication, and Deprivation of Liberty Safeguards.

The new inquiry will examine how the human rights of those accessing social care are currently undermined or put at risk, and what can be done to enhance legal protections. It will examine how well care providers ensure the human rights of the people under their care and how regulators ensure high

[4] There was, of course, no such debate in this case in relation to whether a specific child patient was actually *Gillick* competent to give consent (and in *AB v CD*, decided subsequently, and endorsed by the Court of Appeal in this case (see paragraph 48) the court did not have to confront the issue head-on: see paragraph 51).

standards in the sector. The inquiry will cover the broad range of social care services including support for older people and people with long-term medical or mental health disabilities.

The Joint Committee invites written submissions on the following questions:

- What human rights issues need to be addressed in care settings in England, beyond the immediate concerns arising from the Covid-19 pandemic?
- How effective are providers at respecting the human rights of people under their care?
- How effective are regulators in protecting residents from human rights breaches and in supporting patients and residents who make complaints about their care provider?
- What lessons need to be learned from the pandemic to prevent breaches of human rights legislation in future?

The deadline for submissions is 1 November 2021.

For further details, see here.

Short note: competence or capacity?

In *An NHS Trust v D (A Minor: Out of Hours Application)* [2021] EWHC 2676 (Fam) MacDonald J heard an application in the very early hours of the morning for an urgent order to carry out blood tests and administer treatment to a 16 year old looked after a child, accommodated in a children's home by the local authority. The local authority had parental responsibility for her and her parents were not involved with her. As the doctor giving evidence on behalf of the applicant Trust identified:

> *She reportedly took 16 tablets of 500mg of paracetamol at her care home at 0400am on the 4th October 2021. There was a long delay in presentation and she arrived in the department at 15:32. She refused investigations and she refused the antidote treatment for paracetamol toxicity. She was seen by the CAMHS team and was deemed to have capacity but they wanted to keep her in overnight to "cool off" and to reassess in the morning. The patient left the department at 20:00 and is back at her children's home with her key worker and is refusing to come back.*

Following the child leaving hospital after refusing treatment, the Trust submitted (paragraph 6):

> *that the local authority were less than helpful when contacted by the Trust, a duty solicitor for that local authority indicating that, notwithstanding the situation I have described above, no further action would be taken by the local authority save for observing D in the placement. I am conscious that the local authority is not represented before the court, but on the face of it this is an extraordinary position for a local authority with parental responsibility for a child to have taken in light of the level of concern expressed by D's treating doctors.*

The optimum window for administering treatment comprising the 24 hour period following ingestion of paracetamol had almost expired, the matter coming before the court some 22½ hours after the child took the overdose. She was at that point refusing to attend hospital for treatment. The police and ambulance service were confirmed they are willing to convey her to the hospital for blood tests and any treatment required once a court order is in place.

In the circumstances, it is perhaps not surprising that MacDonald J had no hesitation in making the order sought. What is perhaps slightly odd, however, is that the clinicians – and the court – proceeded on the basis that the touchstone was the child's *Gillick* competence. As Sir James Munby made clear in *An NHS Trust v X (No 2)* [2021] EWHC 65 (Fam), however, once a young person reaches the age of 16, the issue of *Gillick* competence falls away. The young person is assumed to have the legal capacity to give consent to medical treatment (applying s.8 FLRA 1969) unless they are shown to lack the mental capacity to do so applying the tests in s.2-3 MCA 2005. Applying this approach would have been unlikely to have made a substantive difference on the facts of this case, but the route would have been different.

Deprivation of liberty and children – the limits

Nottinghamshire County Council v LH, PT and LT; Nottinghamshire v LH, PT and LT (No. 2) [2021] EWHC 2584 (Fam) and [2021] EWHC 2593 (Fam) (Poole J)

Article 5 – deprivation of liberty – children and young persons

Summary

In these two judgments, decided five days apart, Poole J considered the authorisation of the deprivation of a deprivation of liberty of a 12-year-old girl, LT, in an acute psychiatric unit. LT did not have a psychiatric condition requiring hospitalisation, and her admission was unplanned and unsupported "*by any clinical evidence that it was either necessary or appropriate from a treatment perspective*" (paragraph 1). LT had diagnoses of Autistic Spectrum Disorder and Attention Deficit Hyperactivity Disorder; she was also described as 'extremely anxious' and suffering from panic attacks. She was also considered likely to have 'attachment issues' and to be showing symptoms of trauma.

LT's history leading to her admission was tragic. Her mother had historically made reports of struggling to care for care for LT and her sister, and had been struggling with her own mental health. LT's mother had reported to the local authority that she was feeling suicidal due to LT's behaviour and violence towards family members. As Poole J observed:

> *6. ...From June 2021 problems within the home, and the challenging nature of LT's behaviour, escalated alarmingly. There were numerous reports of LT being violent in the home, absconding, running out in front of traffic, and requiring restraint by police officers due to her aggression. On 15 August 2021, despite two support workers being present in the family home to assist, LT managed*

to jump from her upstairs bedroom window. LT's mother made repeated requests for LT to be accommodated by the local authority as she was unable to cope with her at home.

7. On 7 September 2021, the mother's partner, H, reportedly strangled LT. K told police that she saw LT's eyes roll backwards and she was frothing at the mouth. He was subsequently arrested and is on police bail with a condition excluding him from the family home. He has a history of alcohol abuse and is currently in a psychiatric unit as a voluntary patient having expressed suicidal thoughts.

On 14 September, LT was alleged to have assaulted her sister, K. When police were called, LT absconded, ran into traffic and attacked the arresting officers. "*It took six police officers to restrain this 12 year old girl over a period of two hours. In the police car LT began trying to ligature herself with the seatbelts. She was taken to a "place of safety" under s. 136 of the Mental Health Act 1983, namely to a suite at A Hospital that is allocated for that purpose"* (paragraph 8). Though LT was not considered detainable under the Mental Health Act, she was admitted to an acute adolescent psychiatric ward.

In hospital, LT was being staffed by three support workers provided by the local authority and was surrounded by adolescents with acute psychiatric conditions. LT's presence was said to be distressing to the other patients on the ward and to be 'triggering' them, and the unit had to operate at less than full capacity due to the resources being diverted to LT's care (resulting in psychiatric inpatient care being unavailable to adolescents who needed and would benefit from such care). Since her admission approximately eight days prior to the first judgment, LT had attempted to ligature at least ten times, with restraint then being used to remove these. LT had been aggressive towards staff, and drugs were being used to sedate her. It was considered that being on the ward was "'*having a detrimental effect on LT's mental health and she is rapidly learning maladaptive coping mechanisms*"(paragraph 1). It was considered that LT's condition would not improve on the ward, and "*result in a long term negative impact on her behaviour. There is a high risk of her becoming not only institutionalised but also becoming one of many sad revolving door cases*" (paragraph 1).

The local authority had applied for authorisation of LT's deprivation of liberty on the ward because it had no alternative option for her residence, alongside an application for an interim care order, which was granted. The court had initially authorised LT's deprivation of liberty from 17 to 23 September and the local authority's application had been supported by both LT's mother and her guardian. LT herself was distressed, and wish to go home. The court accepted the position of the local authority that the risk to her of doing so was grave, as she was both beyond parental control and it appeared her mother was not able to protect her.

By 23 September, there was again no prospect of a community option becoming available in the short-term. Her treating clinicians considered that she needed a safe, therapeutic placement, but had no need for hospital treatment.

The court considered that the case had 'striking similarities' to *Wigan MBC v Y* [2021] EWHC 1982 (Fam), in which the court had declined to authorise a child's deprivation of liberty in hospital. It was agreed by

all parties that, as a matter of fact, LT was deprived of her liberty, there was no consent to it and it was imputable to the state. Poole considered that LT's being on the psychiatric unit had been "*wholly unsuitable from the first day LT was accommodated there, and the urgent need to move her from the unit has been evident now for over a week*" (paragraph 12)

While Poole J accepted that the High Court does exercise the inherent jurisdiction to authorise the deprivation of a child's liberty in unregistered placements, which the courts are ill-suited to monitoring, on the grounds that there is no other available solution, he declined so in this case:

> *14.* […] *the proposed continued accommodation of LT in a psychiatric unit cannot possibly be described as a means of properly safeguarding her. Depriving her liberty in that setting would not provide her with a safety net - it would not keep her safe or protect her. To the contrary every hour she is deprived of her liberty on this unit is harmful to her. Her accommodation on the unit has exposed her to new risks of harm and will continue to do so. I cannot find that it would be in LT's best interests to be deprived of her liberty on the psychiatric unit.*
>
> *15. If the inherent jurisdiction is a means of meeting the need as a matter of public policy for children to be properly safeguarded then, in my judgment, it is also appropriate to take into account the adverse impact of continued authorisation on the other vulnerable children and young people on the unit.*

The local authority had no other plan to propose in the event that the court refused to grant the deprivation of liberty, and Poole J that it was "*deeply uncomfortable to refuse the authorisation and to contemplate future uncertainties*" (paragraph 17. He reiterated that the local authority must comply with its duty to provide accommodation and safeguard her as a looked-after child.

The court published a second judgment in relation to LT five days later. Despite the lack of an authorisation of her deprivation of liberty, LT had remained on the unit, and her presentation had deteriorated. "*Her continued presence is causing escalations in the behaviour of the patients on the unit. She is now being taunted by other patients who are dissatisfied with the amount of support that LT is receiving and the disruption her presence on the unit is causing. LT required restraining on 23 September 2021. This has caused LT to become agitated. She threw a drink-filled cup towards a patient. She has again tried to self-ligature*" (paragraph 3). Her treating clinicians considered that her repeated attempts to self-ligature were a new behaviour caused by her being on the unit, a place described as noisy and over-crowded, where she lived with peers who were hostile to her.

The local authority had considered applying for a Secure Accommodation order, but had located no placement willing to house her, and following inquiries, it appeared unlikely one would become available. It intended instead to place LT as the sole resident of a currently vacant children's home which could accommodate up to four children. Poole J recorded that "[t]*he staff on site are unqualified and have no experience of managing children who self-harm but the local authority plans to rely on agency nurses, using the same agency as currently provides nurses to work alongside the NHS staff to care for LT*

on the psychiatric unit" (paragraph 4) The agency nurses had training in restraint, and other staff were also to be given training. "*In effect, the local authority is creating a bespoke placement for LT as a bridging provision before a more settled solution can be found*" (paragraph 5).

LT was to be subject to significant restrictions, including 3:1 staffing, locked doors and windows, and removal of any items which might cause her harm. It was considered by both the local authority and hospital staff that LT remained at risk in the family home, and appropriate measures for her safety could not be put in place there.

Poole J authorised the deprivation of liberty in this placement under the inherent jurisdiction, but was adamant that the inherent *jurisdiction* "*cannot be treated as a rubber stamp to authorise the deprivation of a child's liberty whenever the court is told that there is no other option available*" (paragraph 11). He continued to decline to authorise her placement in the psychiatric unit, despite the community placement being unavailable for a short period of time.

As had others before it, the court directed that a copy of the judgment be distributed widely to those with a role in commissioning services for children.

Comment

These judgments are more examples of the increasingly common cases relating to applications for the use of the inherent jurisdiction to authorise deprivations of liberty for children, in circumstances in which the arrangements are accepted by all parties to be inappropriate. There have been cases since the judgment in *Wigan* (*W (Young Person: Unavailability of Suitable Placement)* [2021] EWHC 2345 (Fam)) in which courts have authorised short-term detentions in hospital as being in a child's best interests while searches for placements were found. However, we would note that, like the child in *Wigan*, LT was notably quite young, receiving no therapeutic benefit and extraordinarily distressed by her detention in hospital.

We would note that while the proposed placement in this case was a registered children's home, it was effectively replacing its entire management and staffing to care for LT since its last Ofsted inspection. In our experience, the difficulties in placing children can be exacerbated due to concerns of potential providers of bespoke placements that they may be subject to prosecution by Ofsted, a concern which was a particular feature in *Birmingham City Council v R, S & T* [2021] EWHC 2556 (Fam). There, Lieven J noted that the child, T, who was 16, had been placed in what appeared to be a supported living accommodation, which had been able to provide her with reasonably consistent and positive care, and led to her reengagement in education. The placement had initially stated it would seek to apply for registration as a children's home, but had not done so for approximately the first year of T's residence, and ultimately decided against doing so. Ofsted had threatened to prosecute the placement if T were to remain there. The local authority had been unable to find any alternative option for T's care which was Ofsted registered, and it was considered that any move was likely to be highly detrimental to T. Lieven J continued to authorise T's deprivation of liberty and noted:

> *27* […] *a concern about Ofsted's position. I would not be making an order to authorise the deprivation of T's liberty at the placement for 4 weeks if I understood Ofsted's concerns to be around the quality of the care provided and T's safety. However I have very limited information about Ofsted's position and think therefore it is of the greatest importance that Ofsted let the court and BCC know their position as to any prosecution and why it was threatening prosecution against NFL. I hope if Ofsted's concerns were not about the quality of care but were rather about the principle of registration then this judgment will assist in explaining to them why I have continued to authorise the DOL.*

A final – wider – point is that it is not immediately obvious why many of the factors that apply in cases such as *Wigan* and *LT* are not applicable in relation to adults who are deprived of their liberty in placements which are unsuited to their needs. Analytically, there is no difference in ECHR terms for judges considering whether to authorise deprivations of liberty under the MCA – just because no other option available does, or should, not mean that the court's hand can be forced. It could be stayed if – applying the logic of *Re T* from the Supreme Court – the alternative was to put it in breach of the positive obligations it owed the child under Articles 2 and/or 3 ECHR but that should be the limit.

Deprivation of liberty – the Jersey perspective

Minister for Health and Social Services v B and Ors (Capacity) [2021] JCA 011 (T. J. Le Cocq, Bailiff of Jersey, President; James McNeill, QC, and Jeremy Storey, QC)

Article 5 – deprivation of liberty

Summary

A 30-year-old man in Jersey had developed significant developmental regression, was non-verbal and had a spastic tetraparesis. Following various hospital admissions, he required assistance with all activities of daily living which included nutrition and hydration via a percutaneous endoscopic gastrostomy. A best interests dispute resulted in legal proceedings which determined that he should reside at a care establishment rather than to return home. His father was appointed as his delegate (similar to a deputy) for health and welfare, as well and property and affairs. At first instance, the Minister for Health and Social Services sought an order authorising "*the imposition of a significant restriction on P's liberty*" on the basis that he was under constant supervision and control and not free to leave his placement.

In Jersey (which is bound by the ECHR but to which the Mental Capacity Act 2005 does not apply), significant restrictions on a person's liberty must be authorised either by the Minister or by the court. Rather than base a deprivation of liberty on Article 5 ECHR, Article 39 of the Capacity and Self-Determination (Jersey) Law 2016 sets out the circumstances in which an authorisation is required:

> *39. Significant restrictions on liberty*
>
> *(1) A measure listed in paragraph (2) amounts to a significant restriction on P's liberty if it applies to P on a regular basis.*

(2) The measures mentioned in paragraph (1) are that -

(a) P is not allowed, unaccompanied, to leave the relevant place;
(b) is unable to leave the relevant place unassisted, by reason of P's physical impairment or mental disorder, and such assistance as it may be reasonably practicable to provide to P for this purpose is not provided;
(c) P's actions are so controlled in the relevant place as to limit P's access to part only of that place;
(d) P's actions are controlled, whether or not in the relevant place, by the application of physical force or of restraint as defined in Article 9(2);
(e) P is subject, whether or not in the relevant place, to continuous supervision;
(f) P's social contact, whether or not in the relevant place, with persons other than those caring for him or her in the relevant place, is restricted.

(3) A measure applicable to all residents at a relevant place (other than staff employed at the place) which -

(a) is intended to facilitate the proper management of that place; and
(b) does not excessively or unreasonably disadvantage P in particular,
shall not be regarded as a significant restriction on P's liberty.

(4) For the purposes of paragraph (2)(b), and for the avoidance of doubt

(a) P is not to be regarded as subject to a significant restriction on liberty where P is wholly incapable of leaving the relevant place because of physical impairment; and
(b) any limit as to the time or duration of any assistance provided to P, which does not excessively or unreasonably disadvantage P, shall not be taken to mean that assistance is not provided.

(5) The States may by Regulations amend this Article. (emphasis added)

Article 57 provides that the court may make an order authorising the imposition of a significant restriction on a person's liberty if that person "*lacks capacity in relation to giving consent to the arrangements for his or her care or treatment*;" and "*it is both necessary in the interests of P's health or safety, and in P's best interests, to impose significant restrictions on P's liberty*."

At first instance, it was held that such authorisation was not required and one of the issues on appeal was whether this was correct. Interestingly, the Minister did not contend that P was deprived of his liberty for Article 5 ECHR purposes. Indeed, it was accepted that the restrictions arose because of P's personal physical impairment. As the Court of Appeal observed (at paragraph 37): "*it would be wonderful if* [he] *were to wake up one morning and find that he was able to get out of bed and leave the care establishment. If he did then no one could prevent him from doing so*". Instead, it was contended that the continuous supervision amounted to a significant restriction on liberty which did require authorisation.

The appeal court held that Article 57(2) specifically required that there be a necessity to impose significant restrictions which was not the case here. However, here, the "*restriction in fact arises wholly as a result of* [his] *individual physical impairment and not because of the supervision*". The supervision "*is not supervision intended to restrict his liberty, but supervision intended to ensure his wellbeing*". The Court of Appeal considered that the concept of "*continuous supervision*" in Article 39(2)(e) "*is not in our judgement about supervision for safety purposes but is instead about intrusive supervision which would amount to a breach of the patient's right to respect for private and family life*". Accordingly, no authorisation was required.

Comment

English law is not binding in Jersey but Article 5 ECHR is. Thus, whilst the courts took into account the likes of *Aintree* in relation to the approach to best interests, and *Cheshire West* in relation to deprivation of liberty, they were not bound by the English approach. It is therefore interesting to note that neither the Minister nor the appeal court considered the care arrangements to amount to a deprivation of liberty for Article 5 ECHR purposes. The Minister's approach might be explained by the nuances of the legislation, containing as it does from the concept of "significant restriction on liberty" a statutory exclusion (Article 39(4)) for the situation where the person is wholly incapable of leaving the relevant place because of physical impairment, if appropriate assistance is not withheld. Those responsible for enacting the legislation must presumably have been taken to consider that this position did not amount to a deprivation of liberty, as otherwise the legislation would have been enacted with a built-in breach of Article 5 ECHR.

Whatever the Minister's position, however, the Court of Appeal's analysis represents a first principles analysis of Article 5 at significant odds with the currently understood position in England & Wales. That having been said, it is not beyond the bounds of possibility that the Government may seek to rely upon this approach if and when the long-awaited Code of Practice is published to set out how the Government intends the concept of deprivation of liberty to be understood by those applying the LPS.

Book review

Mental Health, Legal Capacity and Human Rights (Michael Ashley Stein, Faraaz Mahomed, Vikram Patel and Charlene Sunkel, eds, Cambridge, 2021, Hardback, £85)

[*A version of this book review will be forthcoming in due course in the International Journal of Mental Health and Capacity Law, so this serves as a sneak preview – the most recent issue of the journal can be found* here]

This is perhaps the most useful book that has been published in recent times in what is now a very crowded area, and (something which is sufficiently rare to merit noting) lives up to the billing on the back that it offers a comprehensive, interdisciplinary analysis of legal capacity in the realm of mental health. Edited by Michael Ashley Stein (Harvard Law School) Faraaz Mahomed (Wits University)

Vikram Patel (Harvard Medical School) and Charlene Sunkel (Global Mental Health Peer Network), this hefty – 412 page – book includes chapters by a very wide range of contributors. This range is particularly important for two reasons.

The first – and very unusually for works in this area – is that the editors have deliberately sought contributions from across the spectrum of perspectives. This means that a chapter from Tina Minkowitz outlining clearly and crisply the argument that the Convention on the Rights of Persons with Disabilities (CRPD) "*strictly prohibits substitute decision-making and any form of involuntary admission or treatment in mental health settings*" (p.44) and advocating reparations for psychiatric violence is followed directly by a chapter from Gerald L Neuman describing (in his words) how "*the Committee* [on the Rights of Persons with Disabilities]'s *absolutism endangers many of the people living with moderate or severe dementia whom it supposedly benefits*" (p.56). The book could therefore serve as a primer for anyone new to the issues raised by the passage of the CRPD in a way that texts that seek to gloss over real differences do not. The opening chapter by the editors itself serves as an elegant and stimulating tour d'horizon of the state of the debate.

The other reason that the range of the book is so important is because it brings in perspectives from outside what is sometimes a hot and airless bubble of debates relating to issues in American and European countries. It is perhaps a shame that there is only one contribution from South America, as reforms there in the field of legal capacity are often lauded as coming closest to achieving CRPD compliance. But the contribution there is, from Alberto Vasquéz Encalada, in relation to the potential for legal capacity law reform in Peru to transform mental health provision is undoubtedly stimulating, even if the chapter leaves this common law-lawyer wanting to understand more about (for instance) precisely how the apparently very broad concept of "medical emergency" is actually interpreted in practice, applying as it does across the board – including psychiatric emergencies – to disapply the need for informed consent in respect of "any sudden or unexpected condition that requires immediate attention as it imminently endangers life, health, or that may leave disabling consequences for the patient." As ever, when analysing reforms, it is important to be able to put them within the wider context of the laws (and practices) that apply in the jurisdiction in question.

Even if South America feels under-represented, and there is no chapter addressing the debates from a Muslim country, there is otherwise an embarrassment of riches to delight: there are contributions from authors discussing Cameroon, Ethiopia, Ghana, India, Japan, Kenya, South Africa and Zambia. Amongst these, I would single out, in particular, the chapter by Ravi et al entitled "Contextualising legal capacity and supported decision-making in the Global South: Experiences of Homeless Women with Mental Health Issues from Chennai, India." This – all-too short – chapter was of particular interest for the way in which the authors both show how an organisation significantly pre-dating the CRPD (The Banyan) was, in effect, supporting decision-making avant la lettre, and, on the basis of their work, advance the challenge that "[f]*or a document that is extremely futuristic and representative of the needs of persons with disabilities, the General Comment on Article 12 is not robust in terms of representation from ultra-vulnerable populations or those from the Global South. This leads to a silencing*

or abstraction of practical issues faced by the aforementioned population and treatment responses of those states that have ratified it" (p.122-3). This challenge may not be popular, but it is one which it is necessary to engage.

A further merit of the broad church approach taken in the book is that it allows the reader to compare for themselves theory and reality, to compare micro-level work and macro-level policy, and to pose for themselves the question of whether evolution is better than revolution. In this regard, of particular interest – to me at least – were the chapters by Piers Gooding on the barriers to researching alternatives to coercion in mental health care, and also the chapter by Laura Davidson seeking what she identifies as a "*practical legal approach towards the global abolition of psychiatric coercion*," a chapter in which she ends up, in essence, making a plea for the CRPD Committee to "*acquiesce in pragmatic progressive realisation*," as the only basis upon which the global elimination of psychiatric coercion can move from pipe dream to reality (p.94).

Whilst the book has a very wide range, it also has an importantly limited scope, the editors making clear at the outset that the focus of the book is on those with psychosocial disabilities. In an important footnote (fn 1, p.2) they note that intellectual disabilities and degenerative conditions such as Alzheimer's "*are likely to be affected by changes in decision-making regimes and should, therefore, be considered in debates relating to legal capacity*," and that whilst in practical terms such was not possible for the book "*it is conceivable that many of the findings and assumptions relating to mental health may apply to intellectual disabilities, dementia and other conditions which affect capacity. However, this is not a universal truth, and conclusions drawn here about the mental health care system should be interrogated further before being applied to social care models for the intellectually disabled or for those whose condition may not improve with time*." In this regard, and whilst – by the editors' criteria – the chapter by Gerard L Neuman should perhaps not have been included, it is of no little importance that it fundamentally challenges the applicability of such "truth." If it does, then on what "truth" about the relationship between mental capacity and legal capacity can legal systems be built other than a recognition that, at least at some points, anyone can lack mental capacity to make a decision, and that legal systems need to be able to respond?

That the book provokes such questions is a measure of its strength, and readers from all backgrounds with an interest in these critically important issues will find themselves informed, stimulated and challenged in equal ways. Especially in the circumstances of the pandemic (which features in the chapter by Barsky et al on redefining international mental health care in its wake) the editors are to be congratulated on bringing together, and home, such an important work.

[Full disclosure, I was provided with an inspection copy of this book by the publishers. I am always happy to review books in the field of mental capacity and mental health law (broadly defined)].

Alex Ruck Keene

SCOTLAND

Human rights and the hierarchy of Parliaments

The Supreme Court has held that the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("the UNCRC Bill"), and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill ("the ECLSG Bill"), passed by the Scottish Parliament on respectively 16th and 23rd March 2021, are both invalid because provisions of both Bills were outside the legislative competence of the Scottish Parliament. This article concentrates on the Supreme Court's reasoning in relation to the UNCRC Bill. Similar considerations apply to the ECLSG Bill.

The matter was referred to the Supreme Court by the Attorney General and the Advocate General for Scotland for determination as to whether the Bills would be within the legislative competence of the Scottish Parliament, under section 33(1) of the Scotland Act 1998 ("the Scotland Act"). The respondents were the Lord Advocate, and also the Counsel General for Wales. The Supreme Court, presided over by Lord Reed (President), heard the parties on 28th and 29th June 2021, and issued its judgment on 6th October 2021.

Two aspects are of interest from the viewpoint of the Mental Capacity Report, and in particular this Scottish section of the Report. The first is that while the process of proposed incorporation culminating in the two Bills considered by the Supreme Court is well ahead of the similar process in relation to the UN Convention on the Rights of Persons with Disabilities ("CRPD"), up until now that process has been following along the same tracks. What are the implications for that process? Secondly, in light of the Supreme Court's decision and reasoning, where do the citizens of Scotland now stand in relation to human rights already assured by previous incorporation? I address that by reference to the incorporation of the European Convention on Human Rights ("ECHR") by the Human Rights Act 1998.

The judgment of the Supreme Court was unanimous. It was delivered by Lord Reed. The judgment may be accessed here. This article does not attempt to do justice to the full reasoning and manner in which it is presented by Lord Reed. The full judgment will certainly warrant reading by any Scots lawyer interested in either the matters addressed in it, or the broader implications which I have suggested. This article picks out a few points relevant to the comments made in it.

The Supreme Court's findings (summarised briefly, and selectively)

The court was asked to determine four questions in relation to the UNCRC Bill. The first three concerned whether three provisions of the UNCRC Bill were outside the legislative competence of the Scottish Parliament. If so, the whole Bill would fall. The fourth question concerned whether one provision of the UNCRC Bill could be interpreted in such a way as to bring it within the competence of the Scottish Parliament.

The first question concerned section 19(2)(a)(ii) of the UNCRC Bill. Section 19 is headed "Interpretation of legislation". It provided that legislation of either the Scottish Parliament or the UK Parliament "must be read and given effect in a way which is compatible with the UNCRC requirements, so far as it is possible to do so". The second question concerned section 20(10)(a)(ii), under the heading "Strike down declarators". It would provide that a court could make a "strike down declarator" if any provision "that … would be within the legislative competence of the Scottish Parliament to make", whether comprising an Act of the Scottish Parliament, or an Act of the UK Parliament, in each case which received Royal Assent before the day that section 20 came into force. The third question concerned section 21(5)(b)(ii) of the UNCRC Bill, under the heading "Incompatibility declarators", which empowers a court to make an "incompatibility declarator" in respect of future subordinate legislation, if such legislation "would be within the legislative competence of the Scottish Parliament to make" and is wholly or partly made by virtue of an Act of either Parliament which receives Royal Assent on or after the day on which section 21 comes into force.

In respect of each of these, for reasons given by Lord Reed, the court held that these provisions were outside the legislative competence of the Parliament, engaging section 29(1) of the Scotland Act, which provides that: "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament". A provision is outside the legislative competence of the Scottish Parliament *inter alia* if it breaches restrictions in Schedule 4 to the Scotland Act, paragraph 2(1) of which provides that: "An Act of the Scottish Parliament cannot modify or confer power by subordinate legislation to modify, the law on reserved matters". The same applies to modification by subordinate legislation. None of the exceptions to this provision includes section 28(7), which provides that: "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland". As Lord Reed put it, that provision makes it clear that the power of the Scottish Parliament to make laws does not affect the power of the UK Parliament also to make laws for Scotland; which reflects the nature of devolution, and the fact that the people of Scotland continue to be democratically represented in both Parliaments. The court held that all three impugned sections were outside the legislative competence of the Scottish Parliament, because they would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

The fourth question concerned section 6 of the UNCRC Bill, which would make it unlawful for any public authority, carrying out any function, to act incompatibly with UNCRC requirements. If it should be believed to have done so, proceedings could be brought against it under section 7, and damages could be awarded under section 8. The only exceptions are the Scottish Parliament and persons carrying out functions in connection with proceedings in the Scottish Parliament. It was common ground that section 6, on its face, was outside the legislative competence of the Scottish Parliament, having regard to sections 28(7), and 29(2)(b) and (c), of the Scotland Act, and Schedules 4 and 5. It was conceded that there would be circumstances in which the compatibility duty created by section 6 of the UNCRC Bill "would be beyond the legislative competence of the Scottish Parliament", but it was asserted that such a question of competence would "fall to be analysed on a case-by-case basis". The interpretation

rule set out in section 101(2) of the Scotland Act could be applied so as to render section 6 within competence. Section 101(2) provides that provisions within the scope of that section which "could be read in such a way as to be outside competence" should be read "as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly".

The court reviewed cases where restrictive interpretations had been applied by a court to give effect to a statutory provision, and noted that in those cases the difficulty appeared to have arisen through inadvertence. By contrast, section 6 had been deliberately drafted in a manner beyond the competence of the Scottish Parliament. Lord Reed opined that: "*The courts are not being asked to read section 6 in a way which is a possible reading of the provision which the Scottish Parliament enacted, but rather to give effect to that provision subject to the various limitations set out in section 29 of the Scotland Act, and Schedules 4 and 5. This is not in reality the interpretation of the provision which the Scottish Parliament enacted, but its modification or amendment by another enactment*." The court also had regard to the principle, that "is fundamental to liberal democracies", that there should be legal certainty, and that "the law must be accessible and so far as possible intelligible, clear and predictable" (Lord Bingham, "The rule of law" (2010), p37). There had been no attempt to draft section 6 of the UNCRC Bill in such a way as to provide a clear and accessible statement of the law. The deliberate intention was "to draft and enact a provision whose plain meaning does not accurately represent the law", and to rely on the courts applying section 101(2) "to impose a variety of qualifications upon the provision, on a case-by-case basis, so as to give it a different effect which is lawful". The court held that section 6 was outside the legislative competence of the Scottish Parliament because it relates to reserved matters, contrary to section 29(2)(b) of the Scotland Act; would modify section 28(7) contrary to section 29(2)(c); and would modify the law on reserved matters, contrary to section 29(2)(c).

Potential relevance to incorporation of CRPD

In pursuit of its programme of work, the Scottish Human Rights Task Force convened a "UNCRPD Reference Group" which met once. I declare an interest as a member of that Reference Group. I do not know whether progress on possible CRPD incorporation has stalled pending the outcome of the present case.

One must start with the proposition that if similar legislation to the UNCRC Bill were enacted in relation to CRPD, it would be at significant risk of being declared invalid for the reasons applied to the UNCRC Bill. Stepping back from the detail of the impugned provisions of the UNCRC Bill, I would suggest that at the heart of the matter is an attempt to "take a shortcut" in the process of translating human rights principles in an international instrument, into domestic law. That has been successfully done only once, in relation to ECHR, in the Human Rights Act 1998. Lord Reed referred to a submission on behalf of the Lord Advocate that section 19 of the UNCRC Bill "did nothing more than reflect the approach which the courts would take in any event to the interpretation of legislation". Section 3 of the Human Rights Act 1998, in relation to ECHR rights, "is much more far-reaching than the ordinary effect of unincorporated international treaties on the interpretation of legislation". It goes much further than the

ordinary approach to statutory interpretation, including the impact of international law on the interpretation of statutes. Hence, Lord Nicholls had described it as imposing an obligation which was "of an unusual and far-reaching character" in *Ghaidan v Godin-Mendoza*, [2004], UK HL 30.

Standing the outcome of the present case, it would appear that the Scottish Parliament could opt to impose upon itself provisions following the same extraordinary approach as is to be found in the Human Rights Act 1998, but would have to ensure that such provisions were so drafted as not to contravene the limitations imposed by the Scotland Act upon the legislative competence of the Scottish Parliament, in ways such as those impugned in the present case. That might or might not be considered workable.

There is another approach. In some ways it would be more modest, it would involve more hard work in preparing legislation, but it might have the advantage of conferring more real benefit to more people, in a manner that would be certain and predictable. It would involve recognising that international instruments such as CRPD are not law, nor intended to be law, nor to be draft legislation. They certainly set standards and outcomes which should be achievable by legislation, but that is a different matter. The approach that I suggest would require the courts to do "business as normal", rather than being pressed into the extraordinary and unaccustomed role, fraught with the potential for uncertainty, narrated by Lord Reed in relation to the Human Rights Act 1998.

This approach would entail avoiding grandiose and essentially declaratory "legislation" and instead would go about the more normal legislative task of taking the purpose and provisions of an international instrument and facing up to the difficulties – which can be overcome – of enacting "good law" to achieve that purpose. Thus, to take one example from Article 12.4 of CRPD, an obligation that measures should "respect the rights, will and preferences" of the person in question would, as regards the elements of will and preferences,, place an attributable duty upon someone to ascertain what they are, with an enforceable right to have that duty performed, and appropriate remedies if that duty is not performed. To that extent, one could view the principles of the Adults with Incapacity (Scotland) Act 2000 as straying into similar generalised declaratory language, rather than creating attributable duties. Thus we have the curiously passive construction of "account shall be taken of –" at the beginning of section 1(4). In section 1(4)(a), subsequently mirrored by Article 12.4 of CRPD, is the obligation to take account of the present and past wishes and feelings of the adult "so far as they can be ascertained by any means of communication …". Who has the obligation to ascertain them? Who has the obligation to show that what is obtained is the best that can be obtained "by any means of communication"? And so on: hence the recommendation in the Essex Autonomy Three Jurisdictions Report (available here) that this passive language be replaced with attributable duties. That is given just as one obvious example of the more general point.

The other problem with statements of principles in documents such as CRPD is that such principles can contradict each other in most circumstances, and therefore require to be balanced in their application to particular situations. To go no further than the definitions in Article 2, discrimination on

the basis of disability "includes all forms of discrimination, including denial of reasonable accommodation". Benignly or otherwise, reasonable accommodations are discriminatory. Otherwise Article 5 would not be required. Article 16 requiring protection from exploitation, violence and abuse of disabled people because they have disabilities again points to special measures which may modify the status in law of the protected individual "on an equal basis with others in all aspects of life" guaranteed by Article 12.4, and so on. These are not criticisms of CRPD. They are important principles, fulfilling its task as an international human rights instrument. But as they stand they are not drafts of potential law, at least of "good law" which is effective and certain. It might be possible to realise the principle that in some situations "less is more", by addressing more specific legislative tasks that can achieve "good law" in ways consistent with CRPD, and ultimately better achieve its purposes in ways likely to achieve real results for people with disabilities.

Another possible approach would be a simple procedural one requiring compliance of all proposed primary and secondary legislation of the Scottish Parliament, or within the legislative competence of the Scottish Parliament, to be subject to a report as to compliance with CRPD. That would not employ the blunderbuss of rendering whole pieces of proposed legislation *ultra vires*. If however the Scottish Parliament were again to act with complete disregard of CRPD requirements, as it did when substantially replicating in Scottish legislation the existing UK provision for appointees to receive and administer someone else's state benefits, the extent of non-compliance would at least be reported upon before relevant legislation was finalised.

"Sauce for the goose is sauce for the gander"?

In its relationship with the Scottish Parliament, the UK Parliament is in effect the master. However, the UK Parliament was itself created by the Acts and Treaties of Union in 1707. The position in Scots law was established unanimously by the First Division of the Court of Session in *MacCormick v the Lord Advocate*, 1953 SC 396 (and 1953 SLT 255). Lord President Cooper, with the full concurrence (on this point) of the other two members of the First Division, observed that the principle of the unlimited sovereignty of Parliament is distinctively English, and has no counterpart in Scottish constitutional law. He did not see "why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament … That is not what was done." He pointed out that the Treaty and associated legislation by which the Parliament of Great Britain was created as the successor of the separate Parliaments of Scotland and England "contain some clauses which expressly reserve to the Parliament of Great Britain the powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provisions shall be fundamental and unalterable in all time coming, or declarations to a like effect. There was nothing in the Union legislation which laid down that the Parliament of Great Britain should be "absolutely sovereign". As regards the justiciability of any breach by the UK Parliament of the fundamental law of the Treaty of Union, there was a distinction between legislation on questions of "public right" and "private right". As to the latter, the Treaty provides that Parliament has only a power to alter the law of Scotland when it is for the "evident

utility of the subjects of Scotland", as to which the Court of Session might well one day have the duty to decide.

However, since *MacCormick* was decided almost 70 years ago, a new method has emerged of making decisions which the UK Parliament has chosen to consider itself bound to implement, and that is decision-making by referendum. In matters specific to Scotland, we have had referendums on whether the Scotland Act should be brought into force, and whether Scotland should be a separate country.

It would be interesting to speculate about the consequences if the UK Parliament were purportedly to legislate to remove from citizens of Scotland who have mental or intellectual disabilities the "private rights" that they enjoy by virtue of the protections provided by Articles 5, 6 and 8 of ECHR, and if in a referendum the Scottish electorate were to decide that this would not be for the "evident utility" of citizens of Scotland. By fundamentally the same tests that have been applied in the present case, would such purported legislation of the UK Parliament in such circumstances be at risk of being held to be *ultra vires*? If not, why not?

Adrian D Ward

Opposed application for renewal of guardianship

A trend appears to be emerging towards strenuous opposition by adults to the prospect of renewal of a welfare guardianship order, often where the chief social work officer of the relevant local authority is guardian. Typically, the adult's capabilities are limited by a learning disability expected to be lifelong; such renewal applications contain extensive averments and evidence of the adult being substantially dependent upon provision of care, support and guidance provided or arranged by the local authority in discharge of its functions under the Social Work (Scotland) Act 1968. Also typically, there is no evidence before the court that during the period of guardianship preceding the renewal application the guardian ever actually required to exercise guardianship powers. In consequence, the need to renew the guardianship order is dependent upon whether the adult only accepts the continuation of the care package, and only accepts the care, support and guidance given in the context of the support package, because the adult is aware of the existence of the guardianship powers and only complies because the adult is aware that non-compliance would result in exercise of those powers to ensure compliance.

It is possible that in some such cases the adult may have been made aware, at least in basic terms, of the view expressed by the United Nations Committee on the Rights of Persons with Disabilities that the existence of a guardianship order is *per se* a breach of the adult's rights assured by that Convention, and amounts to discrimination on grounds of disability. If so, that awareness may be a motivating factor, though I personally am not aware of cases where submissions or evidence pointed towards that factor. Whatever the outcome in each individual case, it is surely to be welcomed that the voice of the adult is being increasingly heard by all engaged in such procedures, reminding them how discriminatory are such limitations to the rights of any individual, and testing out whether this most invasive of measures is in each case justified as unavoidable by reference to the section 1 principles

of the Adults with Incapacity (Scotland) Act 2000, is the minimum necessary intervention, and applies all of the safeguards assured by Article 12 of the UN Convention on the Rights of Persons with Disabilities.

Typical of the general pattern outlined above is the case of *Fife Council v CH*, decided by Sheriff Alison McKay at Kirkcaldy Sheriff Court on 24th August 2021 (Case Reference KKD-AW7-08), which would appear not yet to have been reported on scotcourts website or elsewhere. One would observe in passing that in view of the gravity of imposing any limitation on the rights and freedoms of an adult by way of intervention under part 6 of the 2,000 Act, in the face of clear opposition by the adult, a full judgment in every such case should be made publicly available on the scotcourts website, albeit with the identity of the adult frequently at least partially anonymised (though we have reported previously on determinations under the Mental Health (Care and Treatment) (Scotland) Act 2003 that the broader interests of justice require that an adult's identity should only be anonymised on cause shown). We do not provide a link to the judgment at this point because it is not fully anonymised, but consider that we can relate the appropriate details below.

In the CH case, the sheriff notes a large number of categories of matters in which the adult has received and apparently accepted care, support, guidance and supervision, coupled with a finding that the adult "*is generally accepting of care services*" but that he "*lacks insight into the need for such services*". It is perhaps interesting to note that matters in which he had accepted guidance and supervision included management of his finances, which evidently was achieved without the need of guardianship powers being available "in the background", as the order was for welfare guardianship only. There is narration of the adult being "*reluctant on occasions to accept some aspects of his care and support plan*". In these circumstances it is surprising that the sheriff found, in unqualified terms, that "*the Adult does not have capacity to make decisions about his welfare*". The truth appears to be that provided that he received appropriate support, he did customarily accept guidance and decide to comply with that guidance, indicating that he did have relevant capacity subject to provision of the support that he received by the care team. Provision of such support is of course his right, assured by Article 12.3 of UN CRPD. It remains the case, accordingly, that the key issue is whether the adult only accepted the support that he received, and only acted in accordance with the guidance given, because he was aware of the guardianship order and that compliance could be enforced by the guardian if need be, notwithstanding that there are no findings that the guardian ever in fact required to exercise his guardianship powers. On the question of willingness to comply, the sheriff recorded that:

> *"The Adult has consistently said he does not wish to be subject to the order currently in place. The Adult has stated he would work with staff if there was no guardianship in place. He has indicated a willingness to work with his carers on a voluntary basis."*

There was indeed before the sheriff an affidavit by the adult in which the adult stated inter alia that "he would continue to cooperate with care and support even if he was not subject to a guardianship order".

However, the sheriff then made a finding that contradicted those assertions by the adult:

> *"If the guardianship order was not in place the Adult would reduce the support package currently in place to part-time or possibly stop engaging at all. He would no longer seek support from staff and would not follow guidance offered to him."*

The judgment does not appear to contain an analysis of the basis on which the sheriff found against the adult on this crucial point. In a number of matters, the sheriff narrates that the adult "benefits from the Minuter having" powers the continuation of which was sought, but not that the adult has ever benefited from any actual exercise of any of those powers.

On one aspect of the submissions that the sheriff narrates, the judgment is tantalisingly silent. The sheriff recorded a proposal by the adult's solicitor as follows:

> *"In the event I found that the legal test for granting the renewal craved was met then she suggested a compromise was available to me short of granting the order in the terms sought. She proposed I could grant the order as craved but thereafter suspend operation of the powers granted, on the basis that if the local authority later considered the exercise of any of the powers requested had become necessary then a motion could be made in the process to vary that direction."*

The nearest that the sheriff came to responding to that was a non-response, in the following paragraph:

> *"In light of these factors I am satisfied on the balance of probabilities that no other means (except the renewal of the guardianship order with continuing powers as detailed above) would be sufficient to enable his interests in his personal welfare to be safeguarded or promoted. There is no other means provided by or under the 2000 Act which would be sufficient to enable that to happen. Renewal of the order is therefore the least restrictive option in relation to the freedom of the adult which is consistent with the purpose of keeping him safe and promoting and safeguarding his personal affairs."*

There appears to be a *non sequitur* in that reasoning. The sheriff had earlier narrated the provision of section 58(1)(b) that he might grant such an application if satisfied that no other means provided by or under the Act would be sufficient. But that is not enough. That provision has to be read subject to the non-discretionary requirement of section 1(2) that there must be no intervention unless it would benefit the adult and (crucially) that such benefit cannot reasonably be achieved without the intervention. That is reinforced by the requirement of section 1(3) that the intervention must be "the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention". For the purpose of complying with those requirements of sections 1(2) and (3), all options require to be considered, not just alternatives provided by the Act.

If the "compromise" proposed by the adult's solicitor had been accepted and implemented, one does not know whether the adult would continue to accept the support provided. To put the matter to the test in that way would however have been a less restrictive option than continuing operability of the guardianship order in full force. It would have enabled the guardianship order to be brought back into

force and operation by motion or minute in the existing process, which could have been done expeditiously if there was clearly demonstrated need for exercise of guardianship powers.

It would be helpful if decisions, particularly in such contested cases, were to narrate compliance with all of the steps required by the Act before a court can make or authorise an intervention, including with reference to sections 1(2) and (3) what alternatives were considered and why they were rejected.

Adrian D Ward

Compromise Agreement vitiated?

D v D [2021] CSOH 66, decided by Lord Arthurson on 23rd June 2021, related to a purported Compromise Agreement in proceedings under the Family Law (Scotland) Act 1985. The court was required to determine whether a purported compromise in a wife's action for financial provision on divorce constituted a valid and binding Agreement and, if so, whether it should nevertheless be set aside on the basis of unfairness or unreasonableness in terms of section 16 of the 1985 Act. The impugned Compromise Agreement was entered on the morning of a proof diet fixed to address the matters that were subject to the Compromise Agreement which, she accepted, she had instructed her legal representatives to accept. The pursuer stated that two days later she had consulted her doctor, telling him that she had suffered a panic attack on the morning prior to the proof and felt unable to speak to her solicitors. She was worried that she could not cope with what was happening. When it became clear that the pursuer was contending that the purported Agreement was neither binding nor valid, and in any event was not fair and reasonable, the court assigned a proof diet to determine those issues. The pursuer's position was that she had been placed under duress by the very combatative approach taken on behalf of her opponent; that in the lead-up to the proof she had been bombarded with late documents; and that by the day of the proof her state of mind had been overwhelmed and her cognitive ability compromised. Evidence was led on behalf of the opponent from her own legal advisers, who stated that the pursuer had given no impression that she was not thinking clearly or rationally when accepting the proposed compromise.

The judge accepted that it was very stressful for any party to negotiate and navigate significant decisions in their lives at the final stage of a financial provision on divorce action. There was however nothing exceptional in this case such as to warrant exercise of the exceptional jurisdiction in section 16. Both her assertions that the Compromise Agreement was neither binding nor valid, nor her position that if it was binding and valid it should nevertheless be set aside, were "entirely misconceived and ill-founded".

Such a situation does of course raise a question about "exceptional for whom". The stresses of being "put on the spot" to accept or reject a proposed compromise in the short time available on the morning of a proof is likely to be a quite exceptional situation in the life of the individual involved. However, to say that practitioners with any significant degree of experience of contested litigation of any kind are well aware of the exceptional stresses likely to be put upon a litigant in that situation, is also to say that

viewed in the context of contested litigation generally that is not an exceptional situation, and is indeed one in which a competent and experienced litigator can be expected to provide all necessary support to the individual so placed.

That is not to say that there could not be situations in which the stress of such a situation might be proved to have generated or exacerbated a cognitive impairment to the extent of potentially vitiating a Compromise Agreement. The onus would however be upon the party asserting that to demonstrate it to the satisfaction of a court, by virtue of the usual test of balance of probabilities. One also has to conclude that where a situation such as arose in this case was exceptional in the experience of the individual, but unexceptional in the context of the process in which it arose, the court is unlikely to be persuaded to exercise exceptional powers such as those contained in section 16 of the 1985 Act.

Adrian D Ward

JK case reported, leave to appeal refused

In the Scotland section of the June Mental Capacity Report, we reported the case of *JK (Respondent and Appellant) v Argyll and Bute Council (Applicant and Respondent)*. Readers might care to note that this decision of the Sheriff Appeal Court has now been reported at 2021 SLT (Sh Ct) 293, and that that report concludes with a note that a motion by the appellant for leave to appeal to the Court of Session was refused on 24th June 2021 – see [2021] SAC (Civ) 25.

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

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

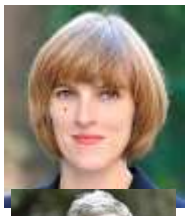
Neil Allen: **neil.allen@39essex.com**

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. 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. 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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

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.

Rachel Sullivan: **rachel.sullivan@39essex.com**

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: **stephanie.david@39essex.com**

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

Arianna Kelly: **arianna.kelly@39essex.com**

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a 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.

Scotland editors

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; honorary membership of the Law Society of 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 here.

Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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

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