Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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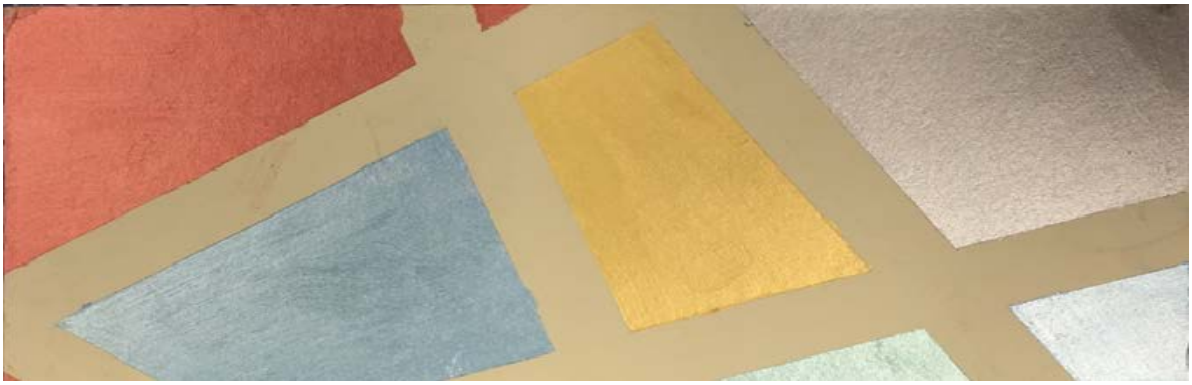

Welcome to the February 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: is depriving a person of their phone depriving them of their liberty, a reminder that the court is the ultimate arbiter of best interests and an Ombudsman comes belatedly to the rescue;

(2) In the Property and Affairs Report: a reminder of the new process for applying for deputyship and how the Powers of Attorney Bill would amend the MCA 2005;

(3) In the Practice and Procedure Report: the Vice-President intervenes on s.49 reports and new contempt rules;

(4) In the Wider Context Report: Parliamentary consideration of the draft Mental Health Bill, a toolkit for supporting decision-making, and confidentiality and common sense;

(5) In the Scotland Report: the Supreme Court dismisses an appeal against assessment for services and an opposed application for guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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

Contents

Section 49 reports – the Vice-President intervenes

The Vice-President of the Court of Protection, Hayden J, has published a letter (dated 16 December 2022) in relation to s.49 reports, following a meeting between him, Senior Judge Hilder and NHS Mental Health Directors. In relevant part, it reads as follows:

> *Concern had been expressed about the scope and ambit of Section 49 reports. There was a strong feeling that some of the Section 49 requests are disproportionate, overly burdensome, and wrongly authorised. There are obvious reasons (i.e., costs) why a Section 49 report might be preferred where what is truly required is an independent expert report.*
>
> *Section 49 reports are, paradigmatically, appropriate where the NHS body (typically a Mental Health Trust) has a patient within their care, who is known to them. This ought to enable the clinician to draw quickly on his knowledge of the patient and respond concisely to the identified questions, which will be directed to the issues clearly set out in the Practice Direction. Importantly, it avoids the patient having to meet with a further professional with whom, he or she, has no existing relationship.*
>
> *Instructions under Section 49 should be clearly focused with tight identification of the issues. It should be expected that the reports will be concise and will not require extensive analysis across a wider range of questions than those contemplated in the Practice Direction. Reports requiring that kind of response should be addressed to an independent expert.*
>
> *I have taken this opportunity to re-circulate the Practice Direction which requires no gloss or embellishment. However, I have highlighted those paragraphs which I consider need to be restated.*

Contempt

Those considering contempt applications in the Court of Protection should be aware that a new part 21 was brought into effect from 1 January 2023 by The Court of Protection (Amendment) Rules 2022. These new provisions were considered by Poole J in the case of *Sunderland City Council v Macpherson* [2023] EWCOP 3. This was an application to commit the defendant Ms Macpherson to prison for contempt of court for

breaches of injunctions preventing her from publishing material about her daughter FP, the subject matter of the COP proceedings. The defendant admitted five breaches of the injunctions, namely having posted audio and video recordings of FP on multiple social media platforms including twitter, as well as posting information about the COP proceedings.

Poole J had at the first hearing of the committal application made an order that the defendant should not be named, as there was a concern that this might lead to the identification of FP. At the sentencing hearing, Poole J re-considered this decision and in so doing, examined the new COPR 21.8 holding:

- COPR 21.8(4) provides that all committal proceedings in the COP must be listed in public unless the provisions of COPR 21.8(4) apply (for example, if the court determined that a private hearing was necessary to protect the interests of P and that it was necessary to sit in private to secure the proper administration of justice.)

- If the court directs that the contempt proceedings be heard in private, COPR r 4.2 applies which allows the Court to make an order imposing restrictions on the publication of the identity of (amongst others), parties, witnesses and P. In such cases the Court held that "*the general power under r4.2 to impose restrictions on the publication of the identity of any party is circumscribed by r 21.8(5) in relation to contempt of court proceedings*."

- The contempt proceedings in this case were held in public (so COPR 4.2 did not apply). Thus the court was concerned with the interpretation of 21.8(5), which restricts the court's ability to withhold the identity of a party or witness' identity to circumstances in which it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interest of that party or witness. Thus Poole J held at paragraph 38 that the new COPR 21.5 "*does not appear to allow the court to restrict the disclosure of the identity of the Defendant if necessary to secure the administration of justice and to protect the interest of P (here FP). I can envisage cases in which it might be considered that the only way effectively to protect the interest of P is to restrict the disclosure of the identity of another party – the defendant to committal proceedings. However, the new rules do not appear to allow the court to act on that basis*."

The defendant was named.

As for the contempt proceedings themselves, Poole J held (at paragraph 49) that:

> *As for the five alleged breaches set out above, I am satisfied that they were deliberate, the Defendant knew she was breaching clear court orders when she committed those breaches, and the breaches were serious. They were serious in that the Defendant's conduct was contumelious and they were serious in relation to the impact and the potential impact on FP. They involved a significant invasion of her privacy and they involved manipulation of a vulnerable person who is the subject of Court of Protection proceedings.*

Poole J found itself on sentencing in an invidious position because the defendant was a carer for her disabled husband and was reliant on benefits (thus not someone for whom it would be appropriate to fine), and she had "*almost dared the court to send her to prison because she believes it will bring attention to her bizarre views.*"

Poole J summed it up in this way at paragraph 59:

> *If she is imprisoned for her deliberate and repeated breaches of court orders designed to protect her daughter, the fact of the imprisonment may well cause distress to the very person the court has sought to protect. A sanction other than imprisonment risks sending a signal to the Defendant and to others that the court will tolerate deliberate breaches of its orders.*

The route through this was to hand down a sentence of imprisonment ('*the only sentence that is appropriate*'), of 28 days for each of the five admitted breaches, to run concurrently, but to suspend them for 12 months, on condition that the Defendant does not during those 12 months, conduct herself in any court proceedings in such a way as to be found in contempt of court.

Joint Practice Note: Cafcass and Official Solicitor – urgent out of hours applications in relation to medical treatment concerning children

Cafcass and the Official Solicitor have published a joint practice note dated January 2023 "*intended to assist the judiciary and legal representatives when dealing with urgent out of hours applications for orders in relation to medical treatment concerning children*." In particular, the Practice Note makes clear that "[i]*n medical treatment cases concerning children* […], *it is Cafcass and not the Official Solicitor who should be approached to provide representation for the child*."

It is important to note that this Practice Note relates to applications under the Children Act 1989 (for a specific issue order) or the inherent jurisdiction of the High Court. If the proceedings were brought under the Mental Capacity Act 2005 (as they could be in relation to a 16/17 year old lacking the relevant decision-making capacity), then it would be the Official Solicitor rather than Cafcass who should be approached.

Court of Protection statistics

The most recent statistics published by the Ministry of Justice covering July to September 2022 show that:

- There has been a 3% increase in applications relating to deprivation of liberty compared to the same quarter in 2021. However, there was a decrease by 36% in the orders made for deprivation of liberty over the same period from 988 to 637.
- There was however a decrease of 8% in applications made compared to the same period the year before. Of these applications, 39% related to applications for appointment of a property and affairs deputy.
- There was also a reduction in the number of orders made during the quarter when compared to the same period the year before. Of those, 41% related to orders by an existing deputy or registered attorney.

OPG simplified process for notification of death

Rather than having to send a death certificate, the OPG has now simplified its process and verifies deaths using the Post Office Life Event Verification system. The guidance states that the OPG needs to be notified following the death of:

- A donor of a registered Enduring or Lasting Power or Attorney
- An attorney acting under a registered Enduring or Lasting Power of Attorney
- A replacement attorney
- A deputy appointed by the Court of Protection
- Someone for whom the Court of Protection has appointed a deputy

- A High Court-appointed guardian or missing person

The process for so doing is kept as simple as possible:

- Notify the OPG of a death by email, telephone or letter
- Return the original LPA or EPA to us so that we can process any updates or cancellations
- The OPG will use the Life Event Verification system to verify the death and then write to the relevant person to acknowledge this
- The OPG will confidentially dispose of any cancelled LPA or EPA
- If a court appointed deputy or guardian passes away, the OPG will advise what action should be taken next. If a new deputy is needed, the OPG will let the relevant local authority know so they take appropriate action.

Be careful of applying criminal concepts in Court of Protection cases

In *A & Anor v B & Ors* [2022] EWHC 3089 (Fam), Knowles J considered how the family court should approach the issue of consent and the complainant's sexual history, and specifically the question of whether criminal conceptions of rape apply in family proceedings. Her analysis is equally applicable in the context of proceedings before the Court of Protection.

The case concerned two appeals each of which involves allegations of domestic abuse, specifically rape and sexual assault by one parent against another. The propositions on which Knowles J sought submissions in the case were as follows:

a. **Proposition 1:** Whether the family court should apply a consistent definition of (i) rape, (ii) sexual assault or (iii) consent, making clear the difference between consent and submission;

b. **Proposition 2:** Whether the failure to have a consistent approach to these issues was in breach of the Article 6, 8 and 14 rights of the appellant mothers;

c. **Proposition 3:** Whether the definitions of rape, sexual assault and consent used in the criminal justice system should be either a starting or finishing point for judges in the family court;

d. **Proposition 4:** What the approach of the family court should be to a complainant's sexual history when determining allegations of rape or sexual assault; and

e. **Proposition 5:** Whether, when determining allegations of rape and/or sexual assault, judges in the family court should give themselves a warning about rape myths. Generally, such myths concern themselves with the behaviour or experiences of a complainant.

Prior to considering each individual proposition, [Knowles J reviewed the role of the appellate court and concluded at paragraph 12 that she was not precluded from providing guidance as to the appropriate approach to be taken in the family court to managing evidential issues in such cases.

Legal Context

The propositions listed above were considered against the well-established rule that it is "*fundamentally wrong*" for the family court to be drawn into an analysis of factual evidence based upon criminal law principles and concepts as per McFarlane LJ (as he then was) in *Re R*

(Children) (Care Proceedings: Fact-finding Hearing) [2018] EWCA Civ 198 ("*Re R*") at paragraph 82.

Knowles J considered Proposition 1 and 3 together and held at paragraph 23 that the correct starting point is that the family court must not import criminal definitions as an aid to fact-finding. Rather, she held, the focus of the family court is to determine how the parents of a child behaved towards each other so as to be able properly to assess risk and determine the welfare issues in each case. For the family courts to characterise or establish behaviour as meeting a particular definition runs the risk of the court becoming "*unnecessarily bogged down in legal technicality*" (see paragraph 29 of the decision of Cobb J in *F v M (Appeal: Finding of Fact)* [2019] EWHC 3177 (Fam)). Knowles J therefore rejected at paragraph 32 "*the need for the family court to apply consistent definitions of rape, sexual assault, and consent. I also hold that the definitions of rape, sexual assault, and consent used in the criminal justice system should have no place in the family court.*"

Proposition 2 considered whether a failure to take a consistent approach was in breach of the Article 6, 8 and 14 rights of the appellant mothers Knowles J found (at paragraphs 33-43) that this proposition was not established.

Proposition 4 considered the approach to be taken to the complainant's sexual history. In considering this question Knowles J identified the family court's discretion to control evidence set out at FPR r.22.1 and the need to be mindful of the overriding objective at r.1.1. Knowles J stated that there are two steps to be taken. First, to consider the admissibility of the evidence in question considering fact, degree and proportionality (paragraph 48). Second, to undertake a balancing exercise in the case that a party objects to the admission of otherwise relevant evidence as held (paragraph 50).

In conclusion at paragraph 58, Knowles J described a procedural framework to be followed in such circumstances:

a. If a party wishes to adduce evidence about a complainant's sexual history with a third party, a written application should be made in advance for permission to do so, supported by a witness statement;

b. It is for the party making such an application to persuade the court of the relevance and necessity of such material to the specific factual issues which the court is required to determine.

c. Any such application will require the court's adjudication preferably at a case management hearing.

d. The court should apply the approach set out above;

e. If a party wishes to rely on evidence about sexual history between partners, they do not need to make a specific application to do so unless reliance is also placed on intimate images. In those circumstances, the party must issue an application in accordance with the guidance at paragraphs 77-78 of *Re M (Intimate Images*);

f. If a party objects to evidence of sexual history between parents/parties being filed, it should make an application to the court in advance, supported by a witness statement explaining why this material is either irrelevant or should not be admitted;

g. Any such application will require the court's adjudication preferably at a case management hearing;

h. The court should apply the approach set out above.

Proposition 5 considered whether family courts warn themselves about rape myths, and commended the *Equal Treatment Bench Book July 2022 revision* and *Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes | The Crown Prosecution Service* as assistive in helping to approach the issues of stereotyping and rape myths.

On the facts, one appeal was dismissed, and the other allowed.

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Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as 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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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.

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

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Adrian is a 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.

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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 March. 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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