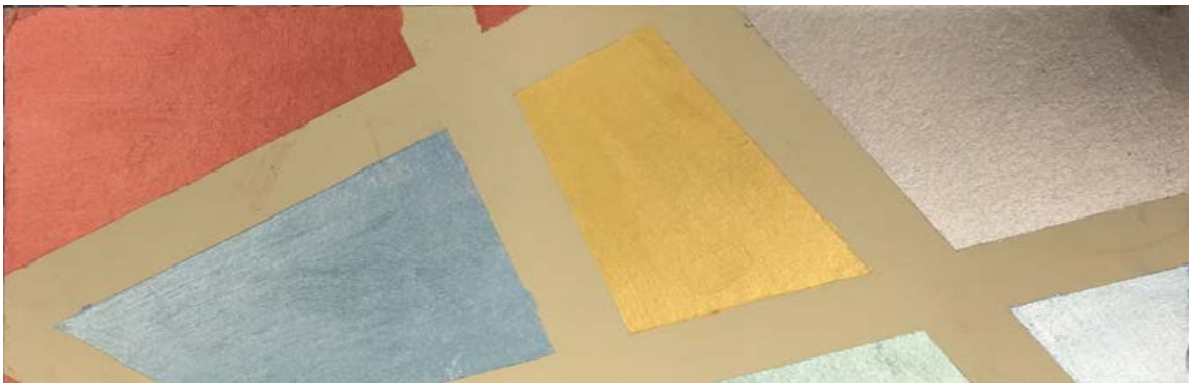

Welcome to the March 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity and emotional dysregulation;

(2) In the Property and Affairs Report: the Court of Protection divorce, refreshed deputy standards and relevant legislative developments;

(3) In the Practice and Procedure Report: 'closed hearings' guidance and Forced Marriage Protection Orders;

(4) In the Wider Context Report: covert medication guidance, an updated litigation capacity certificate, the malign influence of Andrew Wakefield, and changes afoot in Ireland;

(5) In the Scotland Report: a Scottish perspective on the Powers of Attorney Bill and implementation of the Scott Report.

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.

This report also marks an important transition, Hayden J having served his term as Vice-President of the Court of Protection and being replaced by Theis J. We hope that our readers will join us in thanking Hayden J for his tireless service during undoubtedly the most tumultuous and difficult years of the Court's life; Alex will certainly never forget some of the meetings of the HIVE group that Hayden J convened in the early months of the pandemic, nor the speed with which Hayden J (together, we know he would want it to be emphasised, with the other members of the judiciary and the court staff), managed to recast the court and its practices to keep it going against all the odds.

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

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Fluctuating capacity, emotional dysregulation and public protection: a swansong for Hayden J

A Local Authority v H [2023] EWCOP 4 (Hayden J)

Mental capacity – assessing capacity

Summary

The case of *A Local Authority v H* [2023] EWCOP 4 concerned a young adult, H, described by Hayden J as a "natal male who now identifies as female" (and hence female pronouns are used here). H had experienced profound trauma and abuse in childhood and adolescence, giving rise, the judgment states, to global developmental delay; attention deficit hyperactivity disorder; executive dysfunction; developmental trauma disorder; possibly emotionally unstable personality disorder. H also had traits of autism spectrum condition, extremely disordered attachment and highly disrupted emotional regulation. Critically, at times when 'dysregulated', H's behaviour was described as being "extreme and present[ing] harm, both to herself and others." H also presented what was described as a real risk of sexual harm to children, both in contact with them and online.

In consequence, H had been subject to substantial restrictions upon her liberty in what appears to have been a supported living placement for some 3 years prior to the date of the judgment.[1] She was described as having progressed strikingly well, with a very significant reduction in the incidents of violent behaviour. As Hayden J noted (at paragraph 5):

> *H has become remarkably compliant with a level of restriction that would be intolerable to most people. The psychiatrist was plainly concerned, as am I, that H has become so used to these arrangements that far from feeling them to be invasive of her privacy, she has come to regard them as integral to her safety and security. When the psychiatrist prepared her first report, H's circumstances were very different. There had been incidents of her string out at others, destroying property, self-harming, threats of suicide. Physical restraint had been used where necessary.*

The issue before the court was as to H's capacity to make decisions as to residence, care/support, contact with others (both adults and children), as well as use of the internet and social media. Hayden J took the opportunity to set out a helpful review of the case-law relating to capacity. He then turned to its application on the specific facts of H's case, noting (at paragraph 26) that:

> *It is very clear from the evidence, that when she is dysregulated, H is unable to take capacitous decisions. As I understand it, there is no dispute about this nor, to my mind, could there be. Inevitably, this has led to consideration of "fluctuating capacity", which always presents a challenge to general assessment of capacity. In Re JB, Lord Stephens said at [64]:*
>
> > *"Capacity may fluctuate over time, so that a person may have capacity at one time but not at another. The "material time" within section 2(1) is decision-specific (see para 67 below). The question is whether P has capacity to make a specific decision at the time when it needs to be made. Ordinarily, as in this case, this will involve a general forward looking assessment made*

[1] It is not clear from the judgment whether this had been authorised at any point prior to the hearing.

> *at the date of the hearing. However, if there is evidence of fluctuating capacity then that will be an appropriate qualification to the assessment."*

With specific reference to residence, Hayden J (at paragraph 29) endorsed the approach of the expert, Dr S, who emphasised that:

> *In respect of H's capacity to take decisions about her residence, Dr S emphasised that such decisions are best categorised as longitudinal rather than single issue. It is not just a question of whether H wants to be at the home or not, it requires a balance of the options. H can do this in a capacitous fashion when calm and engaged but is unable to achieve this at times of emotional dysregulation. This is as Lord Stephens indicated in Re JB (supra), "an important qualification to capacity".*

On the evidence, Hayden J was satisfied (at paragraph 30) that:

> *In each of the spheres of capacity that have been analysed i.e., residence, care/support, contact with others (both adults and children), use of the internet and social media, I agree with the psychiatrist that the presumption of H's capacity is rebutted by cogent evidence. I also agree that H plainly has some insights into her behaviour but that it remains incomplete. Her co-operation with the plans for her care is one of a number of factors, which I have referred to above, which gives rise for optimism for the future. It is important that H hears me say this and that she recognises the tribute to her resolve and hard work. The philosophy of the care plan, which is being amended in light of the evidence, is to focus upon developing H's sense of agency, to use the psychiatrist's words. In other words, the plan is geared to enabling H to develop her own autonomy.*

Entirely separately, an issue arose as to attendance at the hearing, which had been conducted as a hybrid hearing. As Hayden J identified at (paragraph 31):

> *Understandably, and rightly, the public have come to expect that they will be admitted. It is important that the difficult decisions this court is required to take are subject to public scrutiny. Occasionally, however, the compelling arguments for transparency are required to yield to the equally compelling need to protect the most vulnerable.*

The particular factors in H's case gave rise, Hayden J considered, to a situation which required a modification to the usually applied transparency provisions, and (in a situation more familiar to those before the family courts), he permitted only accredited journalists and legal bloggers to attend the hearing. He also prevented any reporting until the end of the case and:

> *36.* […] *delivered this judgment in order that the parties can understand my reasoning and to establish an identified baseline to the future progress of the case. I recognise the legitimate public interest in these highly sensitive issues and have endeavoured to put them into the public domain in a way which is carefully designed to protect H's identity becoming known. It is for this reason, by way of example, that I have referred to the expert instructed as 'Dr S' and pared away any detail of H's life that might reveal who she is. In this way, I have sought to achieve proportionality in "the ultimate balancing test".*

Comment

It is a fitting irony that the last reported decision of the Vice-President in his current role is one that captures many of the trickiest issues that have arisen during his tenure, including the complexities of fluctuating capacity, the concept of executive dysfunction, the balance between protection of the person and protection of others in the concept of best interests, and navigation of the demands of transparency in a partly online world. His successor, no doubt, will have to grapple with cases in which capacity and gender are squarely in issue (which have already started to emerge, but so far only in unreported cases).

Welfare in the balance

A Local Authority v MF & Ors [2022] EWCOP 54 (Sir Jonathan Cohen)

Best interests – residence

Summary

MF was 40 years old and had diagnoses of a moderate learning disability and schizoaffective disorder. He lived with his mother, GF. MF's sister, VM, and her partner, Dr A, were also involved in proceedings. The local authority made an application to remove MF from the family home, which was strongly opposed by his family. The judgment records that there had been a long history of non-engagement with services by MF's family, dating back to his time in school. MF left school in 1997, and his family repeatedly declined involvement from mental health services in subsequent years despite numerous concerns about MF's welfare. Neighbours repeatedly made reports about MF being tied to radiators by his family, and their landlord raised concerns that there had been 14 incidents of radiators being broken in the home. Sporadic contact between MF and authorities continued to raise concerns, such as an incident in 2009 when MF was found in the community barefoot, unkempt and thought disordered.

In 2016, MF's father died suddenly. MF was found in the home "*naked from the waist down, covered in faeces, with buckets of urine and a dirty mattress in the room. The room was in darkness as there were no light fittings*" (paragraph 23). He was taken to hospital, where he was found to be thought disordered, minimally verbal and unable to use a toilet. He had scratches on his arms and chest and an older wound which had been sutured (it appears outside of hospital).

After leaving hospital, MF was taken to a residential care home, PH, where he stayed from 2016-2020. His mother and sister did not support his move there, but professionals considered that MF made good progress at PH, learning to feed himself, converse with others and attend to self-care. However, the court noted that "[b]*y around 2019/2020, it appeared that M found the regime of PH oppressive. My impression was he had 'outgrown' the need for it, in that his development made the restrictions in place at PH unnecessary*" (paragraph 28).

In March 2020, MF went for a home visit and never returned to PH, staying at his mother's home. The local authority agreed a protection plan with MF's family, which included daily visits by carers to administer medication (including for MF's schizoaffective disorder) and support MF with activities, regular visits by social workers and bereavement therapy for MF. The family stopped visits from carers

and bereavement therapy five months later, with carer visits eventually resuming on a reducing schedule of four visits per week. However, engagement was sporadic, and by the time of the judgment in December 2022, carers had not been able to take MF out of the house for five months. Social workers reported that they had to wait for up to thirty minutes before the door was opened during their visits. When in the house, they considered that MF's mother sought to obstruct their access by insisting that he eat during for the duration of their visits even though he was not hungry.

At the hearing, MF's mother and sister followed the lead of VM's partner, 'Dr A', who acted as a family spokesman. The court was plainly concerned about Dr A's influence on MF's welfare. Dr A did not accept any of MF's mental health diagnoses, and was preoccupied with MF's finances. Dr A also attempted to produce evidence which he claimed had been written by MF, though MF contradicted this. Dr A also repeatedly attempted to remove the Official Solicitor as MF's representative and block access to MF. Dr A's conduct towards an independent advocate was similar, insisting that the family must be present when MF was speaking to her. The judgment records that Dr A had cancelled many carers' appointments, particularly those of significance for the administration of MF's medication. On a review by MF's psychiatrist, concerns were raised that Dr A's actions towards MF "*were controlling, hostile and coercive and it felt like M was reprimanded for voicing wishes and feelings*" (paragraph 68).

The court considered both capacity and best interests. The findings in respect of capacity did not appear to be contested, and the court found (after reviewing the report of independent expert Dr Claudia Camden-Smith) that MF lacked capacity to conduct proceedings, and make decisions as to his residence, care, contact with other and property and affairs.

In respect of best interests, the local authority argued that MF should move to a supported living accommodation, EL, which was in close walking distance to his family home. The placement was described as being 'less regimented' than PH. The local authority considered that MF had 'unrealised potential,' noting his interests and skills as a musician and artist, his developing positive relationships with peers after leaving home in 2016, and his having left school at a young age. The local authority considered that with appropriate assistance, MF could progress to independent living in a warden-assisted property. MF's wishes were to continue to live with his family, but also "to do more and not be at home so much. He told me that he would be keen to go on courses to help with art and with music" (paragraph 82).

After an extended period of seeking to support MF to expand his life while living at home, professionals took the view that this would not be possible due to the conduct of his family and Dr A. It was accepted that MF would be upset to be moved out of the family home (and it was not anticipated that his family would support him in this process). However, the court accepted the views of the professional witness that such a move would be in his best interests:

> *91. M has an opportunity to develop and achieve needed skills for the future. He should be able to learn in a way that he could not at home, because his family have shown themselves unwilling to accept outside help. M can do so much more than he is now doing.*
>
> *92. I have tried very hard to see if there is a way to avoid having M moved. Unfortunately, his family are not open to him having the opportunities that living elsewhere would provide to him.*

> *93. M knows nothing other than his home and PH and he is quite right in not wanting to go back to PH. However, he saw a different supported living home, similar to EL, in 2021. He liked it but was worried that his mother and the family would be upset that he was taken to visit the home. I believe they were told about it in advance but perhaps did not realise the visit was to happen on that day.*
>
> *94. During the course of their evidence, the family were asked if they would visit EL, to look at it but they refused. That was not helpful.*

The court considered the possibility of having MF remain at home with injunctive orders that he attend college and that professionals have unfettered access to him. The local authority submitted that the court should not adopt this approach for the following reasons:

> *96…*
> *i) The family have shown that they will not comply with court orders;*
> *ii) The family are convinced they know best;*
> *iii) The family repeatedly turn away carers and have put obstacles in the way of social workers having uninterrupted meetings with M;*
> *iv) M feels disempowered, his views are dictated by his family;*
> *v) The family are stuck in their views, with no insight into M's condition;*
> *vi) This is the only chance for M to reach his potential and he should not be denied it.*

The court accepted these arguments, and ordered that MF should move after spending the Christmas holidays with his family. The court made further orders that MF's family must permit him to go to EL, and that Dr A and VM not be present on the day of MF's move.

Comment

This judgment does not raise any novel issues of law, but it is a good example of a careful and balanced consideration of person's welfare in a difficult situation. Akin to *ZK (Landau-Kleffner Syndrome: Best Interests)* [2021] EWCOP 12, the person at the centre of the case had had limited opportunities for much of his life, and had rapidly grown and progressed in his horizons after leaving the family home. However, and notably, MF was clear that he did wish to remain in the family home to which he had returned, but to have greater freedom to pursue his own interests and assert his independence. From the judgment, it is clear that the court considered Dr A's influence in particular had been an oppressive one, and there was no realistic prospect of MF being able to freely engage with people outside of his family while the situation continued. While the judgment did not give effect to MF's stated wish to remain in the family home, it appears that the plan approved was designed to give effect to MF's wish 'to do more' with his life than he had been able to previously.

PROPERTY AND AFFAIRS

Short note: the Court of Protection and divorce

In *D v S* [2023] EWCOP 8,[2] Hayden J confirmed (albeit in perhaps rather compressed form) that the Court of Protection has jurisdiction to determine whether it is in a person's best interests to continue (and hence, logically) to bring proceedings for divorce. Sitting as a judge of the Family Court, he then proceeded to grant a decree nisi on the basis of that application. The confirmation of the Court of Protection's jurisdiction here is important, as it has not previously been the subject of any reported modern decision. Both because of the timing of the judgment appearing, as this Report went to press, and because of its quite compressed nature, we will have further coverage of this next month unpacking the background and consequences.

Refreshed deputy standards published

The Office of the Public Guardian published refreshed deputy standards on 13 February 2023. As the accompanying blog post makes clear:

> […] *the guiding principles of the refreshed standards remain the same and continue to be aligned with the Mental Capacity Act.*
>
> *The standards are now more focused, built around eight core areas which reflect the duties and responsibilities of all deputies. Much of the material in the original standards has now been re-shaped and included within the supporting guidance.*
>
> *What does this mean?*
>
> *All deputies, including lay deputies, will now be supervised against these refreshed standards. The standards can be used as a checklist to help deputies make sure they are thinking about all the relevant areas of their role."*

To this end, there are now four sets of standards (and accompanying guidance): (1) for all deputies; (2) for lay deputies; (3) for public authority deputies; and (4) for professional deputies.

Powers of Attorney Bill update

Continuing its rapid progress through Parliament (see our February report), Stephen Metcalfe's Bill passed Committee stage in a single day on 1 March. No amendments were proposed. Adrian Ward addresses a number of Scotland-specific points that arise in the Scotland section of the Report. It is perhaps worth flagging here that, despite the impression that Mike Freer MP (the Parliamentary Under-Secretary of State for Justice) seems to have had, it appears from the Hansard report that the real thrust of the point being made Patrick Grady (SNP) was not so much about the impact of the Bill in Scotland, but about whether it would be possible to use this Bill as a vehicle to enable easier mutual recognition of powers of attorney throughout the United Kingdom (as to which, see also Alex's

[2] Neil having acted in the Court of Protection proceedings, he has not contributed to this note.

walkthrough of the Bill here).

Small payments scheme consultation: response now published

The Ministry of Justice consulted in 2021-22 on a potential mechanism to enable families seeking access to small funds belonging to loved ones who lack mental capacity. A new streamlined process would allow withdrawals and payments from cash-based accounts – up to a total value of £2,500 – without the need to get permission from the Court of Protection.

The impetus for this consultation came about in large part because of issues relating to accessing Child Trust Funds held by banks in the name of individuals who have now turned 18 and lack the capacity to make decisions about managing their property and affairs. Alex discusses this issue – and the legal complexities to which it gives rise – here.

The consultation response has now been published. In headline terms, the proposal for a new statutory scheme is not being taken forward, but (a) the reasons why this is the case; and (b) what Government intends to instead are both important. Both are set out in the Executive Summary, which in material part reads as follows:

> *8. While respondents felt there was a need to make improvements to the current CoP application process, there was little consensus on proposals for the design of the small payments scheme, the safeguards required, and withdrawal limits. Some respondents suggested adding features into the scheme that would have led to a very similar process to the existing CoP one.*
>
> *[…]*
>
> *MCA principles*
>
> *10. Through the consultation responses, it became clear that the lack of access to small payments has arisen due to issues with operational requirements in the current CoP application process and a lack of awareness of the MCA, rather than objections to the principles of the MCA. Respondents were concerned about the length, number and complexity of CoP application forms, the perceived costs of making the application, and the time taken to receive the court order. Adding to this, the worry and misapprehension that they will have to physically attend court and the feeling of being 'judged' may lead to people deciding not to apply for the legal authority they need. There was also a lack of awareness of fee remissions and exemptions that applicants could be eligible for.*
>
> *Awareness of the MCA*
>
> *11. Some respondents pointed out that a lack of awareness of the MCA has made it difficult for people to understand the need to have legal authority to access funds for the people they care for. For example, carers of children or young adults who lack capacity will need to have authority to make decisions on their behalf once they turn 18. But it's become apparent that some parents and caregivers may not be adequately informed about the steps they must take to make decisions on their child's behalf when they reach adulthood. Government recognises that this may be an issue particularly for families who are used to making decisions on behalf of their child who, by the nature of their vulnerability, may not encounter the usual milestones of the transition to adulthood, such as starting work or leaving home for university. This has left many parents feeling shocked and frustrated that they cannot access their children's accounts once they reach 18.*

12. Government considers that this lack of awareness – firstly of the need to obtain legal authority to access the funds of another adult, and secondly of the MCA more generally – is the root cause preventing people from accessing funds on behalf of another individual.

Operational barriers

13. Responses revealed that the causes of people not being able to access small-value assets are operational barriers in the current court application process. As explained, respondents commonly cited concerns about the length, number and complexity of CoP application forms, the perceived costs of making the application, and the time taken to receive the court order. Government considers that the best way to address these is to work with the CoP to improve the process in property and affairs applications.

The way forward

14. Court forms and processes are the responsibility of the judiciary, and improving service delivery and addressing concerns about the accessibility of the forms is a priority. This is exemplified by the steps that the CoP has taken with the changes in the application process for property and affairs deputyship orders. Over the past year, the CoP has been piloting the use of a new digital process and revised their notification requirements which has significantly reduced processing times (from 24 to 8 weeks). The digital process was rolled out to professional court users in January 2023 and the general public in February 2023. Part of this change involves allowing users to complete some of their court forms electronically and digitally submit remaining paperwork. To facilitate the changes, both digital and paper versions of the court forms are being reviewed to streamline and simplify content and remove duplication wherever possible. This is an iterative process, and forms will be tested and continuously reviewed to make improvements based on feedback received.

15. These changes should make the forms more accessible and easier to complete, while also reducing application processing times. Government will obtain regular reports from the chief executive of HM Courts and Tribunals Service to keep the progress of these improvements under review.

16. To address the lack of awareness of the MCA, the Ministry of Justice will embark on a programme of awareness raising. We will engage with other government departments, financial service providers and charities so that the general public is aware of the need to obtain legal authority for adults lacking capacity, and in the case of 16/ 17 year olds who lack capacity, to do so in good time before they reach 18. Parents and carers of individuals who lack capacity interact with many different services and agencies, such as the Department for Work and Pensions, special educational needs and disabilities schools, banks and social workers. Engagement and joint working with these groups will be important to ensure that parents and carers have access to the support and information they need to assist the person lacking capacity.

Conclusion

17. The Ministry of Justice believes that the CoP digital application process and raising awareness of the MCA will address the root cause of the problem (operational barriers and lack of awareness) and resolve many of the challenges raised by respondents to the consultation. As a result, the Ministry of Justice will focus on addressing the key barriers to accessing payments, and not seek

> *to develop a small payments scheme. Taking these measures will ensure that we protect the legal principle that an adult must have proper legal authority to access or deal with property belonging to another adult, while ensuring that those who need to obtain that legal authority can do so in a straightforward and timely way.*

Comment

As discussed here, Alex (and before him the Law Commission back in the 1990s) had significant reservations about the small payments scheme being proposed, and it is not surprising that the outcome of the consultation produced a choice: (1) recreate (in effect) a mini-Court of Protection; or (2) dispense with the core principles of the MCA 2005. In the face of this choice, to recommit to the principles of the MCA 2005 – and, also to commit to (much needed) public education appears to us to be by far the best course of action, so long as it is also combined with giving the resources to the Court of Protection that it requires in order to discharge its vital functions in a timely fashion.

In the interim, the following may be of assistance:

1. The myth-buster produced by the National Mental Capacity Forum entitled "My child has reached 18 and can't make their own decision: What should I do?"
2. A sample COP1A which illustrates the sort of supporting information required to make an application for deputyship in the case of person with the benefit of a Child Trust Fund.

Separately, and noted almost in passing in the consultation response, it is clear that some banks / financial institutions have operated 'informal' or 'exceptional' policies to release CTF monies held on behalf of (now) adults to family members. Given the ringing (and accurate) endorsement in the consultation response of the "*well-established legal principle that an adult must obtain proper legal authority to access or deal with the property belonging to another adult*," we hope and anticipate that those institutions will consider carefully the basis upon which they are releasing such monies, and the advice that they are giving to the family members to whom they releasing it.

Capacity – the need to engage one's professional brain

Two recent cases have emphasised the need for professional curiosity.

In *Boult v Rees (Re Estate of Tilly Clarke)* [2023] EWHC 147 (Ch), and in the context of a doubts about the testamentary capacity of a testatrix identified in the judgment as "Tilly," Zacaroli J held as follows:

> *72. The evidence of an independent lawyer, who is aware of the relevant surrounding circumstances, has taken instructions for the will, produced a draft, and met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity: Hughes v Pritchard [2022] EWCA Civ 386, at 79.*
>
> *73. That is not the case here. Mr Greenway's evidence, given some nine years after the event, that he had "no doubt" as to Tilly's capacity, is given in circumstances where, contrary to the "golden rule" (see Re Simpson (1977) 121 Sol Jo 224, per Templeman J) he took no steps to satisfy himself as to Tilly's mental capacity at all. There is no evidence that he was aware of any of the surrounding*

circumstances, including Tilly's diagnosis of cognitive impairment.

74. In the absence of any attendance note, or any other aid to memory other than the 2013 Will itself, and in circumstances where he met Tilly only once and her will was one of many thousands he drafted over his career, he says that he nevertheless recalls the meeting with Tilly because she was adamant that in the event of Roger's death her estate should go to both Danny and Monica. I accept that this was evidence honestly given, but this appears to be the only thing he remembers about the meeting. He did not give any details as to Tilly's demeanour, or any aspect of her behaviour that might bear on her ability to understand what she was doing, the extent of her assets or the extent of claims upon her.

75. The most that can be said is that nothing alerted Mr Greenway to the need to take steps to satisfy himself of Tilly's mental capacity. That is at least some evidence in support of the conclusion that Tilly had testamentary capacity, but in the absence of any evidence as to his observations of Tilly on the day, it provides only limited support.

On the facts of the case, and perhaps somewhat unusually, Zacaroli J found that, whilst there were doubts as to whether Tilly had had capacity to a make a will at the relevant time, they were not, in fact, sufficient to shift the evidential burden on the propounder of the will to establish that it was valid.

In SRA v Hunjan (5 December 2022), the Solicitors Disciplinary Tribunal ("SDT") took steps to discipline a solicitor who acted in a number of problematic property transactions, including one in which she failed to take reasonable steps to ascertain the mental capacity of the vendor. This action, in addition to the sale of a property in circumstances which intentionally thwarted a former co-owner's will amounting to "*manifest incompetence",* and the sale of a third property in circumstances where Ms Hunan acted for both a client and a lender – i.e. both sides of the transaction – led to a finding of professional misconduct resulting in a fine of £15,000 plus costs of £23,650.

In an agreed outcome – i.e. a judgment agreed by the parties, rather than following a contested tribunal hearing – the SDT recorded that in the summer of 2017, solicitor Ms Sonia Hunjan acted for an elderly client, Client A in the sale of her property.

Client A having attended Ms Hunjan's offices in the company of her two sons in June 2017, Ms Hunjan recorded her as stating that she shared a bank account with one of her sons and wished the proceeds of the sale of her property to paid into their joint account. Client A signed a form of authority to that effect.

Three weeks later on 4 July 2017, Slough Borough Council wrote to Ms Hunjan, advising her that Client A was considered as *"lacking capacity to enter into a formal agreement"* regarding care home charges; that these were outstanding and were subject to *"Court of Protection involvement".* Ms Hunan was also notified by Slough Borough Council that *"the Council is putting an application in to the Court of Protection possibility* (sic) *this week if not already presented by our legal team"* (paragraph 11(c)).

These facts and clear indications notwithstanding, two days later on 6 July 2017 Ms Hunjan facilitated the simultaneous exchange and completion on the property which finally completed on 12 July 2017.

The following month, Slough Borough Council wrote again to Ms Hunjan asking whether or not she had had cause at the time of sale to believe that Client A may not have had mental capacity to make a decision in relation to the sale of her property and asking what steps she had taken to ensure that she *"understood the significance of the decision made"* (paragraph 16). The council noted that Client A had been upset on learning

her property had been sold and could not recall having advised Ms Hunjan to sell it.

In response to the questions asked, Ms Hunjan advised (as recorded at paragraph 17):

> *"[Client A] came to us with her two sons and said that her property was being repossessed and that she needed to sell it.*
> ***3. We did not believe that there was any issue with her mental capacity.***
> ***4. We were not aware that she was in long term care. She did not inform us that she was in care and we found out when you wrote to use.***
> *5. We do not understand how [Client A] can say this as she did not inform us that she had any mental problems and we were not aware of any…"*

The SDT noted that the emails sent to Ms Hunjan by the council put her "*on notice of the possibility that Client A lacked the capacity to make decisions about her property and affairs, including decisions about the sale of her home"* (paragraph 12) and that *"if the Respondent lacked such capacity then (i) decisions about whether to sell her home could only be taken in her best interests and by an appropriately authorised decision-maker: s.4 Mental Capacity Act 2005; and (ii) there may have been consequential impacts upon the validity of the sale."* The SDT observed that *"before proceeding further with the sale, the Respondent ought to have made enquiries regarding Client A's mental capacity, which she could have done (for example) by contacting Client A, Client A's sons, SBC, or the care home"* (paragraph 12).

The case is an interesting illustration of the perils of relying on the presumption of capacity to the detriment of a vulnerable client. Solicitors acting for clients who they suspect may lack capacity must be aware of their obligations to act appropriately and the need to satisfy themselves that potential clients retain the requisite capacity to instruct them. They should be aware of both the Law Society and SRA guidance to this effect. The presumption of capacity is not an assumption to be followed blindly: it cannot be hidden behind in order to avoid carrying out necessary and important assessments and safeguards that apply to vulnerable clients.

Court of Protection Court Users Group (Property and Affairs)

The minutes from the Court of Protection Court User Group (Property and Affairs) meeting of 18 January 2023 are now available, and can be found here.

Short note – clearing up a 'common confusion' about the Trustee Act

By publishing an order with a substantial number of recitals, Senior Judge Hilder in *Re SG* [2022] EWCOP 55 (an order made on 23 December 2022 which has only recently appeared on Bailii) sought to resolve a common confusion as to the meaning and effect of a court-approved trust deed relating to land administered by a deputy.

The key recital (10) reads as follows:

> *Both HM Land Registry and the Public Guardian agree that:*
>
> *a. the Trustee Act gives trustees authority to sell property which is distinct from any authority given in a deputyship appointment;*

b. the process of considering a Trustee Act application to the Court of Protection is sufficient to ensure scrutiny by the Court of arrangements which may lead to sale of property in which a protected person has a beneficial interest;

c. an order made pursuant to the Trustee Act is sufficiently clear "further authority" for trustees to sell property even when the deputy is prohibited from selling the property;

d. in circumstances where there is error or lack of clarity in a trust deed, HMLR may seek further clarification.

PRACTICE AND PROCEDURE

Closed hearing guidance

In one of his last acts as Vice-President of the Court of Protection, Hayden J issued on 8 February 2032 guidance about closed hearings and closed materials. As it says in its opening paragraphs, it applies to 'closed hearings' and 'closed materials,' defined as follows:

> *1. "Closed hearings" are hearings from which (1) a party; and (2) (where the party is represented) the party's representative is excluded by order of the court. For the avoidance of doubt, this is different to a "private hearing," which is a hearing at which all the parties are present (or represented), but from which members of the public and the press are excluded;*
>
> *2. "Closed material" is material which the court has determined should not be seen by the party (and/or their representative).*
>
> *The practice guidance also applies to situations where an order may be made that a party (and/or their representative) is not to be told of the fact or outcome of a without notice application.*

As the guidance emphasises:

> *In situations which are rare, but which do occur from time to time, it is necessary for the court to consider whether a hearing should be closed and/or for material be closed. Nothing in this guidance is intended to increase the number of closed hearings or applications for material to be closed. Rather, its purpose is to provide clarity as to the principles to be applied and considerations to be taken into account in the very limited circumstances under which such steps may be appropriate.*

"Intellectual impairment of parties and witnesses in COP proceedings – the need to be alert"[3]

In a recent speech, Sir Andrew McFarlane, President of the Family Division, provided a crucial reminder for professionals, lawyers and judges of the need to be aware of intellectual impairment in public law family proceedings, which applies equally to Court of Protection proceedings.

The focus, as it should be, in Court of Protection proceedings is on the person ("P") to whom the proceedings relate; but what about those closest and dearest to P who may have invaluable information about P's wishes, feelings and values or may wish to support P at home?

First, it is necessary to identify whether an individual may have an intellectual disability (or low cognitive functioning). In this regard, Sir Andrew pointed to guidance from the British Psychological Society. He observed that some individuals with a form of intellectual deficit (not necessarily fulfilling the conditions of an intellectual disability) may develop strategies for masking their difficulties, such as being very talkative. He therefore emphasised the importance of professional psychological assessments to understand the true underlying situation.

[3] Sir Andrew McFarlane's keynote address to the Aspire Conference in Exeter was entitled, "Parents with intellectual impairment in public law proceedings – the need to be alert"

Second, once such individuals are identified, it is critical that these individuals should understand the proceedings and be able to participate fully (particularly in circumstances where they do not lack litigation capacity and therefore do not have a litigation friend). Articles 12 and 13 of the United Nations Convention on the Rights of Persons with Disabilities require equality before the law and effective access to justice; by Article 6 of the European Convention on Human Rights, the obligation falls on both local authorities and courts as public bodies.

Specific guidance on the participation of vulnerable witnesses is now set out in Practice Direction 1A to the Civil Procedure Rules and Practice Direction 3AA of the Family Procedure Rules ("FPR"), which the Court of Protection can apply (see Court of Protection Rules 2017, r. 2.5(1)). By r 3A.7(b)(i) of the FPR, the court must have regard to whether the party or witness suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning (see also CPR r.1.6).

Courts, with the assistance of parties, should identify vulnerable witnesses or parties at the earliest stage or proceedings and identify whether any directions are necessary, for example, in relation to the nature and extent of their evidence, the conduct of the advocates and/or other parties, and whether special measures should be put in place.

Sir Andrew also emphasised the utility of The Advocates Gateway which provides free access to practical, evidence-based guidance on communicating with vulnerable witnesses and defendants through a series of useful toolkits.

Whilst ground rules have been laid down, a failure to comply with them can give rise to a successful appeal in circumstances where (i) there has been a serious procedural or other irregularity and (ii) as a result, the decision was unjust (see *Re S (vulnerable party: fairness of proceedings)* [2022] EWCA Civ 8). In *A Local Authority v A Mother* [2022] EWHC 2793 (Fam), the parents with low cognitive functioning had not been provided with regular breaks or intermediaries in a fact-finding hearing on non-accidental injuries. Williams J considered the failure to comply with the ground rules was unfair and he ordered a re-hearing.

In terms of support during a hearing, Sir Andrew noted that that intermediaries have a critical role to play because they facilitate communication between all the parties and ensure that the vulnerable person's understanding and participation in the proceedings. That includes undertaking an assessment of the person and reporting to the court on the communication needs of the individual. The witness must, however, provide their informed consent to the appointment of an intermediary: *Z LBC v Mother* [2022] EWFC 63.

Further, and importantly, the guidance that Sir Andrew provides can also usefully be applied to facilitate P's participation in the proceedings. In *ZK (Landau-Kleffner Syndrome: Best Interests)* [2021] EWCOP 12, for example, ZK communicated through British Sign Language, writing messages, and showing images on his mobile phone; his communication was then relayed to the judge by his intermediary and a signer.

Sir Andrew identified that thought must also be given as to ensuring that judgments are clear so that vulnerable witnesses and parties can understand what has been decided. For example, it may be appropriate to write a short, clear accessibility summary (which does not form part of the judgment) or the court may communicate directly to the witness in another way.

Sir Andrew emphasised that some professionals may be over "polite" to raise the issue of intellectual deficit. In his view, professionals must be alert to "*the potential for learning disability to be a factor requires that these issues should be approached professionally and with clarity*." He noted that the Down Syndrome Act 2022 and Health and Social Care Act 2022 aim to aid a wider understanding of the needs to individuals with Down Syndrome, learning disabilities and autism. He also emphasised the importance for professionals of the guidance promulgated by "Working Together with Parents Network" ("WTPN"). Whilst it applies to public law children proceedings, it emphasises: (i) the importance of clarity about rights, roles and responsibilities, including the legal basis for any action; (ii) in-depth assessments; (iii) timely and effective information-sharing between relevant professionals and bodies; and (iv) timely and effective involvement of family, and the provision of independent advocacy. This guidance, in our view, applies equally to vulnerable individuals in Court of Protection proceedings.

Forced Marriage Protection Orders

Two recent cases have identified different practice aspects relating to FMPOs.

Coventry City Council v MK & Ors [2023] EWHC 249 (Fam) concerned applications in linked proceedings in the Court of Protection and the Family Court. The case arose within the context of a FMPO made on 28 September 2021 without notice by Coventry City Council. The Council was the applicant in both proceedings.

The subject of the proceedings, MK, was 21, had a mild learning disability and ADHD. On 2 May 2019 he moved from his parents' house to supported accommodation. The application for a FMPO arose from the discovery that there had been an arranged putative wedding in Pakistan which took place over WhatsApp. MK attended the ceremony from the UK while the bride and MK's grandfather, who acted as his purported proxy, attended from Pakistan. The hearing considered the status of that marriage, and on that basis the remedy to be granted to the parties.

The parties agreed that the fundamental requirements for marriage were not complied with, either those of Pakistan or England and Wales and that MK lacked capacity to marry at the relevant time. The issues in the case, contained at paragraphs 9(i)-(iii), therefore focused on the questions of whether MK's marriage to A was valid, and if not, what the appropriate remedy would be to recognise the invalidity, including the terms of any FMPOs. Other issues such as best interests decisions in relation to MK's placement were also considered, but are not addressed in this note.

The first question that was considered was the question of where the marriage took place given that capacity to marry is governed by the 'dual domicile' test (see paragraph 16) which depends on the law and state in which a party is domiciled. The parties agreed that if the court were to conclude that the marriage took place in Pakistan and the marriage is a void marriage that a degree of nullity would become available under s.14 MCA 2005 which provides:

> *(1) Subject to subsection (3) where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11, 12 or 13(1) above shall—*
> *(a) preclude the determination of that matter as aforesaid; or*

(b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules.
(3) No marriage is to be treated as valid by virtue of subsection (1) if, at the time when it purports to have been celebrated, either party was already a civil partner.

At paragraph 22, Morgan J cited *Asaad v Kurter* [2013] EWHC 3852 (Fam) where Moylan J (as he then was) had concluded that it was for the English court to determine what remedy, if any, was available under English law to a petitioner who had failed to establish the existence of a valid marriage governed by foreign law. As paragraph 97 of *Asaad*: *"(a) whether the defect makes the marriage valid or invalid is a matter to be determined by the applicable law, being in the case of the formalities of marriage the law of the place where the marriage was celebrated"*

A single joint expert, Professor Rahman, was called with expertise in Islamic Law International Human Rights Law and Pakistani Family Laws. He gave evidence as to requirements for a valid marriage. He identified an absence of evidence that MK's grandfather had the legal authority to sign the Nikah Nama as his vakil, and that as the marriage took place in Pakistan, this was a crucial defect in the document. Professor Rahman's evidence concluded with his unequivocal view summarised at paragraph 36: "*failings of formalities were fundamental to the validity of the marriage."*

Morgan J concluded at paragraph 37 that the *Lex Loci* was Pakistan on the basis that this was the location for the ceremony, bridge, and MK's grandfather, along with the fact that the ceremony attempted to comply with the Islamic Law in its formalities. She then went on to conclude, at paragraph 39, that the marriage was to be treated as invalid as it did not comply with the formalities of Pakistani law.

The parties proposed that the remedy should be that the court should record that there had been a 'non-qualifying ceremony.' The parties proposed that the remedy should be that the court should record that there had been a 'non-qualifying ceremony.' Morgan J concluded (at paragraph 46) that, on public policy grounds, it was appropriate to make "*such a declaration to ensure certainty and to protect MK from the implications of a forced marriage."* She concluded (at paragraph 46) that, on public policy grounds, it was appropriate to make "*such a declaration to ensure certainty and to protect MK from the implications of a forced marriage."* She emphasied, however, that "*that I make such a declaration on public policy grounds does not detract from the fact that the decision is one that I make on the fact specific circumstances here and is not intended as being of any wider application for other cases which are very likely to depend on their own factual circumstances*."

In *Re P* [2023] EWHC 195 (Fam), Knowles J considered an appeal from the decision of a District Judge dismissing an application for an FMPO pursuant to Part 4A of the Family Law Act 1996 ("1996 Act"). The District Judge had dismissed the appeal because the applicant was not physically present within the jurisdiction nor was she a British citizen.

Knowles J, however, took matters back to first principles and analysed them by reference to the statutory provisions in play.

By s 63A of the 1996 Act, the court has the power to make a FMPO for the purpose of protecting – (a) a person from being forced into a marriage or from any attempt to be forced into a marriage. Section

63A(2) requires the court to have regard "*to all the circumstances including the need to secure the health, safety and well-being of the person to be protected*." Section 63CA creates an offence of breaching a FMPO.

Section 63B of the 1996 Act addresses the contents of orders; and specifically states that the orders may relate to conduct outside England and Wales.

Section 120 of the Anti-Social Behaviour, Crime and Policing Act 2014 created a criminal offence of forced marriage. A person commits an offence under that provision "*if, at the time of the conduct or deception (a) the person or the victim or both of them are in England or Wales, b) neither the person nor the victim is in England or Wales but at least one of them is habitually resident in England and Wales, or c) neither the person nor the victim is in the United Kingdom but at least one of them is a UK national*."

Knowles J allowed the appeal and made the FMPO. She determined that the 1996 Act was drafted in the widest and most flexible terms. She held that there was nothing in the 1996 Act that requires the court to apply any criteria beyond that set out in s 63A(2); and that, had Parliament wanted to limit the court's jurisdiction by reference to physical presence, habitual residence and/or citizenship, it would and could have done so. She was therefore clear that the Act had extraterritorial application, given the wording of s 63B(2). As she observed, forced marriage is a very serious form of domestic abuse and a fundamental abuse of a victim's human rights – the 1996 Act would fail to meet its objectives if an application had to be physically present in the jurisdiction or a British national to obtain protection against a respondent; and that interpretation would not be compatible with the UK's international treaty obligations. As she concluded at paragraph 43:

> *I observe that this interpretation of the Act's wide and protective jurisdiction sends two clear messages which are of real importance. First, victims abroad who are forced into marriage with a British national or someone habitually resident here may be able to avail themselves of protective orders in this jurisdiction to counter such abusive behaviour and mitigate its harms. Second, British nationals or those who are resident here should be aware that they cannot force a person into marriage and escape legal sanction for their behaviour in the family court merely because their victim is neither habitually resident nor a British national. Forced marriage is a global phenomenon with many forced marriages in the UK having an international dimension. In a world of global social media, it is possible for perpetrators to continue their abuse online with easy access to their victim, wherever their victim is based and whatever the nationality of their victim. This purposeful interpretation of the Act's jurisdiction permits the courts to exercise their protective jurisdiction to safeguard victims, wherever they are based and whatever their nationality.*

THE WIDER CONTEXT

CQC 'Covert administration of medicines' guidance

The CQC has produced guidance for adult social care services for situations when medicines are administered in a disguised format. It can be seen as building upon the case law relating to covert medication, most notably *AG v BMBC* [2016] EWCOP 37, *A Local Authority v P* [2018] EWCOP 10, and *Re A* [2022] EWCOP 44. Those cases recognise that deliberately disguising the administration of medicine where a person refuses it requires a legally thoughtful approach to ensure Article 8 and MCA 2005 compliance.

The CQC's guidance emphasises the right to refuse medicines [4] and suggests that covert administration is "*only likely to be necessary or appropriate where:*

- *a person actively refuses their medicine and*
- *that person is assessed not to have the capacity to understand the consequences of their refusal. Such capacity is determined by the Mental Capacity Act 2005 and*
- *the medicine is deemed essential to the person's health and wellbeing."*

In terms of the best interests process, the guidance states it "*must be a multi-disciplinary team decision:*

- *you can hold a 'best interest' meeting remotely but you should keep clear records of who was involved and what was agreed*
- *involve care staff, the health professional prescribing the medicines, and a family member or advocate, to agree whether administering medicines covertly is in the person's best interests*
- *the decision must not be taken alone.*

The decision is medicine-specific, so the necessity for covert administration must be identified for each medicine prescribed. Moreover, "[e]*ach time new medicines are added or the dose changes of an existing medicine, you must:*

- *identify the need again*
- *make and record further 'best interest' decisions."*

It goes on to caution:

> *Some medicines can become ineffective when mixed with certain foods or drink. Crushing a tablet or opening a capsule before administration may make its use 'off-licence'. You must tell the prescriber if medicines are being administered in this way. Altering the characteristics may change a person's response to the medicine.*

[4] Self-evidently, outside the context of the Mental Health Act 1983.

> *For example, crushing a tablet designed to release slowly over 24 hours might result in overdose. Or it could increase any adverse effects due to the whole dose being released too quickly.*
>
> *Always take pharmaceutical advice from an appropriate healthcare professional. You must make sure medicines remain safe and effective when prescribed for administration covertly.*

With regards to the difficult situation where a person's decision-making ability fluctuates, the guidance suggests "*the service should have a covert plan in place. You must only use the plan when the person lacks capacity*".

The following should be included in any covert medicine care plan:

- *actions taken to give medicines in the normal manner*
- *how medicines will be administered covertly*
- *specialist input to show suitability of the method chosen, for example crushed or mixed with certain food or drinks*
- *whether the medicine is unpalatable*
- *adverse effects (actual or perceived)*
- *swallowing difficulties*
- *lack of understanding about what the medicine is for*
- *lack of understanding of the consequences of refusing to take a medicine*
- *ethical, religious or personal beliefs about treatment*
- *what to do if the person refuses food or drinks.*

Moreover, "[m]*edicines administration records should clearly record which medicines you administer covertly and when. This is particularly important for people with fluctuating capacity*."

Revised certificate as to capacity to conduct proceedings published

A revised version of the form used to address (and where the person lacks the capacity, to explain in detail why that is the case) capacity to conduct proceedings has now been published. Although it says on gov.uk that it is dated 1 September 2007, it is in fact current as to the law in 2023 (including, importantly, the proper ordering of the capacity test: starting with the functional limb). It is relevant where there is a concern in relation to the capacity to conduct proceedings in relation to an adult who is a party or intended party to proceedings in the Family Court, the High Court, a county court, the Court of Protection or the Court of Appeal. Note, however, that it does not apply in relation to 'P,' i.e. the subject of proceedings before the Court of Protection: analysis of their capacity to conduct proceedings (and make relevant decisions) is to be carried out on the COP3 form (itself being revised at the moment).

The National DoL Court in action

The Nuffield Family Justice Observatory have published their report "An analysis of the first two months of applications at the national deprivation of liberty court." This is an analysis of first two month of applications listed in the national deprivation of liberty (DoL) court at the Royal Courts of Justice, which is running for a pilot period of 12 months. The DOL court deals with all applications issued in England and Wales for authorisation to deprive children of their liberty under the inherent jurisdiction of the High Court.

The report[5] makes for sobering reading. It found that:

> *children who are subject to DoL applications are extremely vulnerable. They typically have multiple and complex needs that are evident in behaviours that can make them a risk to themselves or others. Some have severe physical or learning disabilities, some have been subject to criminal or sexual exploitation. Most have experienced significant adversities such as rejection, bereavement, abuse and neglect during their childhoods.*

The report goes on to note that

> *Although their needs may have recently escalated, the vast majority of children who are subject to DoL applications are well known to statutory services. For many children, their emotional and behavioural difficulties are evident from late childhood. It is clear that they need far better support at an earlier stage.*

For those of us who practice in this area, the finding that "[t]*oo few placements were available that could meet the complex needs of children*" is sadly unsurprising. The report goes on to note that in just under half of applications, children were going to be placed in unregistered settings (45.6%) – this included the use of semi-independent (unregulated) placements, hospitals, residential homes that were Care Quality Commission (CQC) but not Ofsted-registered, and rented flats or holiday lets staffed with agency workers. The report found that

> *children with learning and physical disabilities were less likely to be placed in an unregistered setting. In contrast, where the DoL application was primarily related to concerns around self-harm, risk to others and/or criminal exploitation, children were more likely to be placed in an unregistered setting. This may indicate a particular lack of sufficient and suitable placements for children with these needs.*

The report concludes by underlining:

> *the urgent need to develop new provision, at a local level, with joint input from children's social care, mental health services and schools. It is not something that can be left to chance. It will require a nationwide strategy, with significant commitment at local and national level, including national government.*

Safety and wellbeing reviews: lessons learned

NHS England has published the results of their review of the safety and wellbeing of every person with a learning disability and all autistic people who are being cared for in an inpatient setting in England as at 31 October 2021. The findings included that 3% of people required a safeguarding referral to address significant concerns that were identified, and that only 59% of them had care and treatment needs that could only reasonably be delivered in hospital. 57% were placed out of area. The report noted that '*there were examples of individuals being placed in psychiatric intensive care units on a long-term basis because 'there was nowhere else to go'*" and suggested that the current approach to commissioner oversight of

[5] Which only looks at the applications themselves, rather than the outcomes, which will be the subject of a further report.

care might not be working. Yet again, people were experiencing high levels of restraint, seclusion and segregation, and the MCA was not being consistently applied. People were being harmed by admission as a result of inactivity and weight gain, which increased the likelihood of health problems and premature mortality. The review notes that these findings are neither unexpected nor new.

EHRC inquiry into challenging adult social care decisions

The Equality and Human Rights Commission has published the result of its inquiry into Challenging Adult Social Care Decisions in England and Wales. The EHRC found that the system was failing those who need it, and made a number of recommendations including that local authorities need to review whether they are providing properly accessible information, and whether their advocacy services are effective.

Mediation of Medical Treatment Disputes: A Therapeutic Justice Model – help wanted

Dr Jaime Lindsey, of the University of Essex, would like your help if either:

1. You have been involved in a medical treatment mediation in England & Wales over the past 10 years (involving either an adult or a child), and want to take part in an interview about it; or
2. You are a mediator who might be involved in a medical treatment mediation over the next 13 months, and might be able to assist in enabling observation of the mediation.

Please all rush at once to help Jaime, as this is very important work (to learn more about it, see here).

Suffer not the (soon to be born) little child

Kettering General Hospital NHS Foundation Trust v C and North Northamptonshire Council [2023] EWHC 239 (Fam) (Hayden J)

Other proceedings – family (public law)

Summary

This application was made by Kettering General Hospital NHS Foundation Trust for anticipatory declarations relating to the unborn child of 'C.' C was 37 weeks pregnant, and was HIV-positive. It appears that she contracted HIV in the course of receiving childhood vaccinations in Romania. C had taken one dose of anti-retroviral treatment in 1999, but had since declined it. She felt that she would avoid the ill effects of AIDS by diet and vitamins, despite apparently many efforts by doctors to persuade her to take the treatment over the years in both Romania and the UK.

C had continued to decline anti-retroviral treatment during pregnancy and objected to her baby being given the treatment after birth. C's objection to the medication was that it made her feel unwell, with vomiting and dizziness. It is noted in the judgment that she had agreed to take the medication on several occasions and attend the hospital to do so, but on arriving at the hospital had declined (it also appears that she was given drugs to take at home, but it is not clear whether she had taken those).

C was due to give birth by elective caesarean section the day after the case was heard. The Trust sought

an order to commence the administration of anti-retroviral treatment for the baby immediately after birth, for a period of four weeks; Hayden J noted that "[c]*ritical to the prospects of success for this treatment is that it should commence within 4 hours of the birth*" (paragraph 2).

The medical evidence in support of this treatment for the infant was overwhelming. Because C appeared not to have taken retroviral therapy in pregnancy, the baby would need a course of three separate drugs for four weeks after birth to offer the best chance of preventing HIV positive status. It was also recommended that C take certain drugs immediately before and during delivery, which she said she would take, but previous agreements to take medication had not been seen through. The Trust considered that even if C stated that she would consent to the baby's treatment after birth, she was likely to rescind this consent. It was also noted that C and her partner had gone to a number of different hospitals, it appeared to avoid pressure to take retroviral medication.

Hayden J considered the scope of his powers under the inherent jurisdiction as it applied to a child who had not yet been born. He noted that he was not exercising the powers of the Court of Protection in respect of C, and made no findings that she lacked capacity:

> *16* […] *It is also important to state that no jurisdiction arises under the Mental Capacity Act 2005, in the Court of Protection. The fact that C's views in relation to the proposed treatment may be entirely out of step with received medical opinion, does not challenge and certainly does not rebut, the presumption that she is capacitious to take the decision herself. Very recently in NHS Surrey Heartlands Integrated Care Board v JH [2023] EWCOP 2, I made the following observation which strikes me as having resonance here:*
>
> > *"[22] JH has long been of the belief that his stomach pains are in some way related to his Asperger's Syndrome. He has held this view for most of his adult life. It is misconceived. But many people hold irrational, inaccurate or even superstitious views in relation to their own health. In the context of Covid-19 vaccinations, a significant cohort of people do not accept or trust the accuracy of orthodox, peer-reviewed medical opinion and guidance. None of this is to be equated with lack of capacity. It is simply a facet of human nature."*

At the time the application was heard, C was in hospital, preparing for the caesarean section. It appears that the application was made without notice to C, though for reasons that are not clear, C was also listed as a party to the proceedings. Hayden J considered that:

> *17.* […] *the Court is required to consider an application made in the absence of C. It is elementary that C has rights, pursuant to Articles 6 and 8 of the European Convention of Human Rights (ECHR), to be fully involved in the planning both for the birth of her baby and the baby's postnatal care. These principles are reflected in the ECHR case law e.g., W v United Kingdom (1988) 10 EHRR 29 at paras [63]–[64], McMichael v United Kingdom (1995) 20 EHRR 205 at para [87] and Re G (Care: Challenge to Local Authority's Decision) [2003] EWHC 551 (Fam), [2003] 2 FLR 42, at paras [30]-[31], [35]-[36]. However, the Article 8 and 6 rights engaged are not absolute rights and require to be balanced against other competing rights and interests. The ECHR has recognised that there will be, circumstances where parental involvement must yield to alternative rights, particularly where the interests of children are engaged. Without notice applications, in this sphere, have been endorsed as compatible with the Convention in a number of cases, see: Haase v Germany [2004] 2 FLR 39; Venema v The Netherlands [2003] 1 FLR 552. Many of the cases arise in the context of*

> *emergency protection orders where the ECHR has emphasised that it is for the state to establish that a careful assessment of the impact of the proposed measure on the parents and child was carried out, prior to the implementation of the plan, as well as careful consideration of the possible alternatives. These principles of proportionality resonate throughout the whole of the European jurisprudence…*
>
> *20.* […] *when considering whether this case can proceed in the absence of C, it must be justified as both necessary and proportionate. There must be compelling reasons for justifying what must be regarded as an exceptional procedure. Munby J described it as "at the extremity of what is permissible under the Convention" and "a highly exceptional course of conduct", echoing the language of the ECHR in P, C and S v United Kingdom (2002) 35 ERR 31, [2002] 2 FLR 631.*

Hayden J made clear that the application of this principle would be fact-specific.

The Official Solicitor acted as amicus in C's absence in the circumstances set out in paragraph 18 of the judgment:

> *This application was made on 23rd January 2023. I was informed of it at 11:30am. Fortunately, I was able to accommodate it quickly. I signalled that I could hear it by 12pm. In the event, due to difficulties in instructing Counsel, the case was heard at 2pm. Cafcass, understandably, were unable to assist, given the child is not yet born. Nonetheless, I was concerned about the proportionality of proceeding in circumstances where C had purposely not been informed of the hearing. For this reason, I asked counsel for the applicant Trust, Mr Patel KC, to ask his team to make enquiries as to whether the Official Solicitor might be prepared to act as amicus. Ms Castle, the Official Solicitor, readily agreed and I am extremely grateful to her for doing so. Counsel, Miss Gollop KC was instructed.*

In considering the substance of the case, Hayden J noted that C was stating that she was taking retroviral medication, and that she would agree to the baby having it after birth. However, it was also clear that C was very anxious about the treatment, and C had told one of her treating doctors that *'if her baby vomited, she would most likely stop the baby from receiving further medication as she "knows how bad it was for her".'* [24] The court was clear in its findings that C was motivated to do what was best for her baby, but she remained very hesitant in respect of the treatment. Hayden J summarised the risks thus:

> *27. Thus, the identifiable risks here are stark and, to some degree, complex:*
> *i. Based on the history, it is possible that C may simply not co-operate with the birth plan at all;*
> *ii. It seems unlikely that C has been taking the retroviral medication in the period leading up to her birth, thus increasing the risk of infection in labour;*
> *iii. C has a heavy viral load, a poor immune system and has not really ever taken anti-retroviral medication, at any stage since her initial infection. Accordingly, there is risk that her baby will already have been infected i.e., during the course of the pregnancy. This, in conjunction with (ii) above, renders it necessary for the baby to have retroviral medicine almost immediately on birth in order to have the best chance of becoming HIV negative. Thus, time is of the essence!*
> *iv. There is a later risk that C's initial co-operation with the baby's medication may be withdrawn if she considers the baby to be sick.*

Hayden J considered that only an anticipatory declaration could ensure that the baby was treated in

the timeframe which was considered to be crucial for success. The court accepted that C might carry through with her statements that she would give consent to the treatment, "*but it is certainly not possible to be confident that it will. On the baby's birth, it is, to my mind, redundant of contrary argument that it will be the baby's best interest to receive the medication offering the best chance of avoiding infection*" (paragraph 28).

The Official Solicitor tested in the evidence in the matter, and initially submitted that "the exceptional' circumstances required to justify a declaration of this kind being made, in the absence of C, were not met in this case." However, the Official Solicitor ultimately argued that, if Hayden J "*considered that the "exceptional" criteria identified in the case law were met, they would not press against it. I am entirely satisfied that the circumstances in this case, do meet those criteria. The fact that the baby may be able to live with HIV does not mean that he should. It is wholly contrary to his best interests. The doctors and medical team are entirely right to identify the immediate medical treatment as an imperative which establishes a secure basis for what remains an exceptional declaration*" (paragraph 30).

The judgment included a postscript which set out that the matters had proceeded well after the baby's birth:

> *31. In the paragraph above, I have referred to the baby by the male pronoun. As I was concluding this judgment, I was notified that the birth went well. C complied with the anti-retroviral medication immediately prior to the caesarean. Her baby boy is doing well. I have been told that both parents are expressing clear consent to the 28-day treatment regime. I hope that when they read this judgment, they will understand why the Court has taken the course it has. I should also like to extend my congratulations to them on the birth of their son.*

Comment

This matter before the court was one of the utmost urgency, with the happy outcome being that the child's family and treating team worked together to offer treatment to C's child which would dramatically reduce his risk of becoming HIV-positive.

The procedural history is perhaps less apparent on the face of the judgment. C was joined as a party to proceedings, but apparently not notified of the application while it was being considered. It is not clear from the face of the judgment precisely why C was not notified, as no specific findings were made on this point; however, in the context of the judgment, it appears that doctors were concerned that she might attempt to give birth at a centre where she was not known and retroviral treatment would not be insisted upon.

As regards the involvement of the Official Solicitor, it is clear from the face of the judgment that this was on not the basis that C lacked capacity to participate in the proceedings. On the face of it, the Official Solicitor's appointment as amicus was not in line with the position conventionally adopted (and recorded in the near contemporaneous Practice Note about urgent hearings issued jointly with Cafcass) that the Official Solicitor does not act in medical treatment cases in the Family Court/Family Division on behalf of the child. However, paragraph 18 gives the clue, namely that Cafcass considered that it could not act in a case where the child was not yet born (it would, perhaps, have been interesting to note what Cafcass' position would have been had it attended as regards the court's jurisdiction to

make any order in respect of the child).

Andrew Wakefield's malign influence lingers on

In the Matter of B [2023] JRC 008 (Sir William Bailhache, Commissioner, sitting with Jurats Christensen and Hughes)

Mental capacity – assessing capacity

Summary

This was an application brought by the Jersey Minister for Health and Community Services for authorisation 'to procure that' that a man identified as B had vaccinations and boosters in respect of the Covid virus and against influenza. This application was necessary because B's father had previously been appointed by the Royal Court as health and welfare delegate for his son and objected to the vaccinations being given. Under the scheme of the Capacity and Self-Determination (Jersey) Law 2016, the Royal Court retained ultimate decision-making authority, notwithstanding the father's appointment.

This was the latest application in long running proceedings concerned with the medical treatment and care and living arrangements of a young man with profound physical and mental disabilities. Following an earlier hearing, B had moved to a care home to live with four other adults with profound disabilities, all of whom had been vaccinated against Covid and influenza.

Commissioner Bailhache made it plain that the Capacity and Self-Determination (Jersey) Law 2016 "*follows closely the provisions of the Mental Capacity Act 2005, and accordingly that decisions of the English Courts under that Act may have particular relevance to us in Jersey*."

The court heard from Dr Ivan Muscat, a consultant microbiologist, who was the Deputy Medical Officer of Health and acted as one of the island's liaison clinicians with the Joint Committee for Vaccination and Immunisation (which advises United Kingdom health departments on immunisation). It also heard from Dr Adrian Noon, the medical director for primary care. The parents did not place any medical evidence before the court, but the Commissioner recorded this about their reasons for objecting to the vaccinations being given:

> *They believe strongly that it was the result of an MMR vaccine delivered in October 1991 when the First Respondent was approximately 16 months old that his health suffered leading to the chronic neurological disease which he now has. They were advised by Dr Andrew Wakefield that this was so – that the MMR vaccine might lead to behavioural regression and pervasive developmental disorder in children. Indeed, the First Respondent was one of The Lancet Twelve, so named after the article in The Lancet which made those various claims in relation to the safety of the MMR vaccine in or about 1997.*

The Commissioner went on to analyse the accuracy of the parents' account of the impact of the MMR vaccine and found that it was not borne out by the contemporaneous medical records. The court therefore found that it was in B's medical best interests to have the vaccinations.

The Commissioner further went on to consider the wider non-medical issues that arose in this case – namely that because B was unvaccinated he was being shielded so as to reduce his exposure to Covid.

This meant that not only were staff required to wear masks when working with him, but his social interactions had to be restricted. This regime was having a serious impact on B – not only was he socially isolated but he could not participate in hydrotherapy or speech and language therapy (because the person delivering the therapy had to wear a mask).

Unsurprisingly, the Commissioner acceded to the application.

Comment

The Commissioner engaged in a careful weighing of the evidence before the court before coming to a decision on best interests, and the outcome is not surprising. What does not appear to have been considered, though, was the impact on ability of B's father to discharge his ongoing function as decision maker for health and welfare on behalf of his son, in circumstances where the father's beliefs about his son's health were rejected as being inaccurate by the court.

Assisted Decision-Making (Capacity) Act 2015 to be commenced

After a very protracted journey, including amendments introduced even before it had been implemented, it was announced on 24 February that today that Ireland's Assisted Decision-Making (Capacity) Act 2015 would finally be fully commenced on 26 April 2023.

This means, amongst other things, that from 27 April 2023:

- The Decision Support Service will be able to process applications for new decision support arrangements
- The Circuit Court will be able to process applications for Decision Making Representative Orders
- There will be statutory provision for the making and recognition of Advance Healthcare Directives
- Wardship will be abolished and the over 2000 wards of court which currently exist in the State will have a review of their circumstances undertaken by the wardship court and will exit wardship on a phased basis over the next three years.

For reflections on the journey to the Act, we strongly suggest (albeit with a bit of bias as there is a bit from Alex in it), the collection of essays edited by Mary Donnelly and Caoimhe Gleeson called *The Assisted Decision-Making (Capacity) Act 2015: Personal and Professional Reflections*, available for free here. This collection of essays, written from both personal and professional perspectives, highlights both the context for and different aspects of this ground-breaking piece of legislation. You can also watch a video of the launch of the book in November 2021 here. Contributors at the launch included Ms Aine Flynn, Director of the Decision Support Service, Professor Mary Donnelly, School of Law, UCC, Ms Caoimhe Gleeson, Programme Manager, National Office for Human Rights and Equality Policy, and some of the essay authors including Adam Harris, Claire Hendrick, Helen Rochford Brennan, Fiona Anderson and Suzie Byrne.

It is interesting to note that, even before the Act comes into force, it appears to be influencing at least some practitioners in Ireland. In *In the Matter of BW* [2022] IEHC 738, concerning the capacity and best

interests of a young woman in respect of treatment for anorexia, Hyland J observed (at paragraph 12) that:

> *Dr. Cullivan goes through the various requirements of capacity that are now identified in the Assisted Decision-Making (Capacity) Act 2015, which is not yet in force but, nonetheless, these tests are being used frequently by medical practitioners when assessing capacity.*

Dr Cullivan concluded that BW did not have the functional ability to understand or weigh the relevant information, such that she lacked capacity to do so. Hyland J endorsed this conclusion, and therefore took steps on a best interests basis to provide for BW's transfer to a facility in England and Wales, there being no appropriate facility in Ireland.

From an English perspective, the conclusion as to BW's capacity is noteworthy because there was no express identification of a causative nexus between BW's anorexia and her functional inability to make the relevant decisions. This is required in England and Wales (see, authoritatively, paragraph 78 of *A Local Authority v JB* [2021] UKSC 52). Conversely, there is no such requirement in the Assisted Decision-Making (Capacity) Act 2015 which contains (in s.3) a purely functional test, with no 'diagnostic' element.

Narrowly, on the facts of BW's case, an interesting question arises – to which no reported decision appears to relate – as to whether and how the Court of Protection addressed in the proceedings for recognition and enforcement of Hyland J's order the fact that, on the basis of the judgment accompanying that order, BW would not be someone over whom the Court of Protection would have jurisdiction if considered through Anglo-Welsh eyes.

More broadly, many people, Alex included, will be looking with interest to see whether the test contained in the 2015 Act leads to a considerably broader approach to the identification of those lacking capacity to make material decisions in Ireland. Or will, in practice, a 'gatekeeping' function evolve by practitioners and courts identifying a need for an explanation of why the person cannot functionally make the decision, not simply that they cannot?[6]

Diversity, dignity, equity and best practice: a framework for supported decision-making

As part of ongoing work related to the Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, the Living with Disability Research Centre at La Trobe University has published a huge (and hugely interesting) report seeking to set out a framework for supported decision-making. The authors (not all of whom are based at La Trobe) are Christine Bigby, Terry Carney, Shih-Ning Then, Ilan Wiesel, Craig Sinclair, Jacinta Douglas & Julia Duffy. They describe their aim in the opening of the report thus:

> *This research aimed to understand the significance of supported decision-making to the lives of people with cognitive disabilities, identify its essential elements common to anyone with cognitive disabilities in any context, and locate key implementation issues. For this Report, we understand people with cognitive disabilities to include people with intellectual disabilities, acquired brain injury, dementia and mental health conditions. Synthesising the research findings, this Report articulates*

[6] Real enthusiasts might want to look at section V of this paper co-written by Alex.

the benefits of supported decision-making, sets out nine principles and eight essential elements of a 'Diversity, Dignity, Equity and Best Practice Framework for Supported Decision-making' and recommends implementation strategies.

The report may not, perhaps, be quite the last word in this area (it leaves unaddressed, for instance, the question of whether there are some limits to support based not upon risk, but upon the nature of the decision – e.g. very personal decisions such as sex or marriage). However, it makes essential reading for anyone who wants to understand the point of supported decision-making, why it is a confusing phrase[7] (but how to navigate what it really means), and how to think about it in a practical fashion both within current legal frameworks and for purposes of developing those frameworks.

This also gives us the opportunity to flag the work that has already been done under the auspices of La Trobe University which should be much better known in the UK than it is: the La Trobe Supported Decision-Making Framework, the website and e-learning materials for which can be found here, and whose principles are applicable no matter the legal framework under consideration.

[7] Alex would much prefer that the language of Article 12 CRPD was used in this context – i.e. support for the exercise of legal capacity – because that is what is required for compliance with the Convention; because it recognises that it is not just a matter of making decisions, but about acting upon decisions and implementing prior decisions; and because it avoids the sometimes bizarre linguistic tangles which arise in explaining that a decision which is (in fact) being constructed by someone else on the person's behalf may nonetheless represent a supported, rather than a substitute decision.

SCOTLAND

A dissatisfied beneficiary where an executor was attorney

In recent years situations have arisen with increasing frequency where the same person has been appointed attorney and executor, and after death a beneficiary claims to have reason to suspect that the attorney has acted improperly as attorney in disposing of funds or assets of the granter, diminishing the estate on death to the disadvantage of the dissatisfied beneficiary.

Much of the discussion of this situation has focused upon provisions of the Adults with Incapacity (Scotland) Act 2000. Both the current Public Guardian and her predecessor have adopted the view that their functions of receiving and investigating complaints under section 6(2)(c) of that Act are not exerciseable following the death of the adult – being the adult who was granter of a power of attorney in the case of complaints about a continuing attorney relating to the property or financial affairs of the adult. The view that these provisions apply only where the adult is still alive, and cease to be exerciseable upon the death of the adult, are widely accepted. Section 81 provides that where *inter alia* a continuing attorney and/or a welfare attorney uses an adult's funds in breach of their fiduciary duty, or outwith their authority or power, or after having received intimation of the termination or suspension of their authority or power, they shall be liable to repay the funds so used to the adult's account, with interest. Also widely accepted is the view that this does not help dissatisfied beneficiaries in the situation addressed above. There does appear to be wide support for the view that section 81 should be amended to allow a dissatisfied beneficiary in such a situation to pursue the matter against the former attorney following the death of the adult. That, of course, does not help unless and until amended provisions were to be enacted and to come into force.

The apparently gloomy situation for dissatisfied beneficiaries appeared to have been made gloomier by the decision in *Anderson v Wilson*, [2019] CSIH 4; 2019 SC 271, a case involving such dissatisfied beneficiaries in which it was held that the beneficiaries of a deceased's estate had no title to sue for a debt alleged to be owed to the estate. That view was shared by the Lord Ordinary at first instance in the case of *Lesley Currie against Susan Jane Blair, as Executor Nominate of the late John Currie*, a decision reversed on appeal by the Second Division, Inner House, Court of Session on 20th December 2022, [2022] CSIH 58; 2023 SLT 113).

The difference between *Anderson v Wilson* and *Currie* was a simple one. In the former, the dissatisfied beneficiaries had taken proceedings against the attorney/executor as attorney. It was held that the beneficiaries of a deceased's estate had no title to sue for a debt alleged to be owed to the estate. In *Currie*, it was argued that accordingly the dissatisfied beneficiary had no right or interest in the composition of the estate: that was for the executor, as executor, to determine. That the attorney, as such, was not required to account for her intromissions to beneficiaries was not only a necessary implication of *Anderson v Wilson*, but also followed from the express terms of the power of attorney, which provided that the attorneys were only bound to account for their intromissions to the granter of the power of attorney. In such a situation, attorneys were only bound to account for their intromissions to the executor(s). That of course created the circularity which has tripped up many dissatisfied beneficiaries.

The difference in *Currie*, however, was that the dissatisfied beneficiary sued the executor as such. It was argued for her that an action calling on an executor to realise and account for an unrealised asset of the estate was not only competent, but the "usual remedy". The executor owed a fiduciary duty, as executor, to the beneficiary as beneficiary in the estate, and could not lawfully become *auctor in rem suam* by refusing to seek an accounting in respect of the actings of himself as former attorney. It was irrelevant that the same individual was both former attorney and executor. That argument persuaded the Inner House, whose opinion was delivered by Lord Tyre.

The facts largely followed the well-known pattern of such cases. John Currie appointed as his joint continuing and welfare attorneys his daughter Lesley Currie, and his stepdaughter Susan Jane Blair. Susan acted as Mr Currie's carer until he entered a nursing home in July 2014. Only Susan acted as attorney. Mr Currie died on 16th January 2015. In his Will, he appointed as executor his stepdaughter Susan, and bequeathed his estate to Lesley and Susan equally. Lesley became suspicious about the apparently low value of her father's estate. She obtained statements which showed payments amounting in total to £72,835.86 during the time from when he entered the nursing home until his death. Lesley averred that her father was a generous but fair man. It was highly unlikely that he would authorise Susan as attorney to spend so much on gifts for herself and her family. It would deplete his own resources in his final years, and would favour Susan and her family over Lesley and her family, to the financial detriment of the latter. In the action, Lesley had sought production of her father's Will. It had been produced by the time of the appeal hearing. She sought decree ordaining Susan, in her capacity as executor, to seek a full account of her intromissions as attorney, or failing that decree for payment of the sum of £72,835.86. Lesley also sought decree ordaining Susan to produce a full account of her intromissions as executor with the deceased's assets and property, and payment of the sum of £69,545.85.

Lord Tyre stated that the court was satisfied that the authorities cited (see his judgment for them): "*adequately vouch the proposition that a beneficiary who claims that the executor has not realised an asset of the estate may competently raise an action calling on the executor to realise and account for that asset*".

He further held that: "*She [Lesley] avers that a debt consisting of intromissions by the attorney [Susan] in breach of her fiduciary duty was owed to Mr Currie prior to death and is now owed to the estate. As a matter of competency and relevancy, she is entitled to seek an accounting from the respondent, in her capacity as executor, in relation to the ingathering and realisation of such an asset. In this context it is irrelevant that the executor is the same individual as the attorney alleged to be the debtor; the executor is sued in the capacity of being the same person in law as the deceased, and not as the former attorney as an individual*".

He later emphasised that: "*In the present case the reclaimer is not attempting to sue the alleged debtor, ie the respondent as an individual in her capacity as the former attorney; she is exercising her right to receive an accounting from the executor. We do not agree with the Lord Ordinary's characterisation of this as permitting an otherwise incompetent action to succeed through the back door. A competent action has been raised against the correct defender*".

The court was not convinced that Lesley was at that stage entitled to insist upon payment by the former

attorney to the deceased's estate of the sum specified in the action, or such other sum as the court might determine. Accordingly, the court did not dismiss that second part of the conclusion at that stage. Possibilities included that no account was produced, or that monies which the executor did not intend to ingather were owed by the attorney to the estate. Further action might be competent. Accordingly, in the meantime the court left standing Susan's plea to relevancy in case it might require to be argued on a future occasion.

In my article "Powers of attorney: two essential practice points" in the October 2018 Journal of the Law Society of Scotland, I recommended advising granters against appointing the same individual as both attorney and executor. The document in the *Currie* case is not to be faulted in that respect, as Mr Currie appointed both Susan and Lesley to be attorneys. An argument in favour of appointing joint attorneys is that the risk of malfeasance is reduced, because one can monitor the actings of the other. One imagines that neither Mr Currie nor his adviser anticipated that only one would actually act as attorney, despite the joint appointment, and that the other would only review the actings of her stepsister after the death of Mr Currie.

Adrian D Ward

Powers of Attorney Bill

The Powers of Attorney Bill is a Westminster Private Member's Bill, supported by UK Government, which recently completed its Public Committee stage in the House of Commons. It has yet to reach the House of Lords. For primary coverage of it, see the Property and Affairs section of the Report. It is not referred to in this Scotland section because it takes the opportunity to address major and long-standing difficulties affecting the operability of Scottish powers of attorney elsewhere in the UK, including when presented at branches in Scotland of financial institutions headquartered elsewhere in the UK. We report on it here because of its startling and inappropriate failure to address that situation. Such UK-wide operability is still addressed in section 4, the only section still in force, of the Evidence and Powers of Attorney Act 1940, which is in the following terms:

> *4 Proof of instruments creating powers of attorney.*
> *(1)A document purporting to be—*
>
> *(a). . . . . .*
>
> *(b)an extract of an instrument creating a power of attorney registered in Scotland in the books of council and session; or*
>
> *(c)an office copy of an instrument deposited in the proper office of the Court of Judicature under section forty-eight of the Conveyancing Act, 1881, as it applies to Northern Ireland;*
>
> *shall, in any part of the United Kingdom, without further proof be sufficient evidence of the contents of the instrument and of the fact that it has been so deposited or registered.*

In current practice, generally speaking continuing and welfare powers of attorney under the Adults with Incapacity (Scotland) Act 2000 are registered with the Public Guardian in accordance with the provisions of that Act. Registration in the Books of Council and Session was in practical terms

superseded by the registration provisions of the 2000 Act (which came into force on 2nd April 2001). Registration in the Books of Council and Session is generally only resorted to in the event of particular difficulty, or anticipated difficulty, over operability elsewhere in the UK, or upon presentation to institutions headquartered elsewhere in the UK. To do so leads to additional costs.

As regards operability in Scotland of lasting powers of attorney issued and registered in England & Wales, the position was updated in paragraph 16 of Schedule 1 to the Mental Capacity Act 2005, which reads as follows:

> *Evidence of registration*
>
> *16*
>
> *(1) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of –*
>
> *(a) the contents of the instrument, and*
> *(b) the fact that it has been registered.*
>
> *(2) Sub-paragraph (1) is without prejudice to –*
>
> *(a) section 3 of the Powers of Attorney Act 1971 (proof by certified copy), and*
>
> *(b) any other method of proof authorised by law.*

The present Bill seeks to do two things affecting Scotland, or of significant interest in Scotland. They raise a question as to whether they would amend Scots law in a devolved area, and engage the Sewell Convention. That question is briefly addressed below.

Firstly, section 2 of the Bill would amend section 3 of the Powers of Attorney Act 1971 to add "chartered legal executives" to those who may certify copies of powers of attorney under section 3 of that Act, which applies to Scotland. "Chartered legal executives" would be added to those authorised to certify copies under section 3 of the 1971 Act. In practice, Scotland's electronic registration systems depend upon certification of copy powers of attorney, following electronic registration by OPG, under section 3 of the 1971 Act. There may be views whether or not it is a good idea to add English "chartered legal executives" to those who may certify copies of Scottish powers of attorney.

Secondly, the Bill would add in paragraph 16 (reproduced above) a new sub-paragraph (1A) covering electronic registration in E & W. It provides that the record in the E & W register will be sufficient proof of the contents of the electronic power or attorney "in any part of the United Kingdom", and that regulations may be made to provide that a document provided by the E & W Public Guardian in a prescribed manner will be evidence of the contents of the instrument and of the fact of registration "in any part of the United Kingdom". In other words, the Bill, and regulations made under it, would provide automatic recognition and enforcement (and thus "operability") of English electronic powers of attorney in Scotland.

According to section 126(4) of the Scotland Act, the devolution of legislative competence in relation to

"Scots private law" explicitly includes Scots private international law. Does the Bill engage the Sewell Convention? An argument that it does not can be derived from Devolution Guidance Note 10. It provides that "provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers" are the only Bills that are subject to the Sewell Convention, requiring the consent of the Scottish Parliament. The issue, and the argument that the Sewell Convention is not engaged, depends upon whether any of the provisions of the Bill fall within the requirements of Devolution Guidance Note 10.

Whether or not it does, it is disappointing to note that the Explanatory Notes to the Bill simply assert that: "*No legislative consent motion is required in relation to any provision of the Bill*". There is no mention of the representations from Scotland that equal reciprocal provisions should apply across the UK, and that they should extend to measures such as Scottish guardianship orders (and deputyships in England & Wales). That is the crucial point. It waits to be seen whether Westminster will give priority to its responsibilities as the UK Parliament to the whole UK, or continue to proceed as if it were the legislature for England & Wales only.

The issue was raised in rather vague and general terms by Patrick Grady (MP for Glasgow North) in committee proceedings on Wednesday 1st March 2023. We must wait to see whether in consequence Westminster takes up and addresses its UK-wide responsibilities in this respect.

Adrian D Ward

Implementation of Scott Report

This, in tentative terms, is the first of what may well become a long series of items in this Scotland section tracking the progress towards implementation of the Scott Report. This item is tentative because it does not report any concrete, reportable, action, but rather what appear to be significant trends. It can now be asserted that reasonably promptly following upon completion of the Scott Report, Scottish Government has taken up the massive challenge of moving towards implementation of it. As regards the wide-ranging and fundamental reforms proposed by the Report, the process to legislation and implementation is bound to be lengthy. The Scott Report did not include any suggested draft legislation (compare the draft Incapable Adults Bill annexed to Scottish Law Commission Report No 151 in 1995). The relevant question is that of the anxious motorist who has joined the back of a long traffic queue: "Are we moving forward or are we stationary?". At this stage, one can reasonably assert that we are moving forward.

The Scott Report identified matters for priority. It appears that Scottish Government do recognise the need for legislation, particularly on matters which have for too long languished in a stationary traffic queue, and which have become urgent; the most urgent of them being the need at long last for legislation to regulate deprivations of liberty in terms of Article 5 of the European Convention on Human Rights. Here, early indications are that Scottish Government has its foot firmly upon the throttle and is moving forward as rapidly as is practicable. There have been widespread interactions with various stakeholders. These have become fine-tuned, it would seem, on the question whether there could be initial provision to meet the needs of those whose continued detention in hospital is inappropriate, where there is urgent need for a procedure to authorise lawful prompt transfer to more suitable

accommodation. As we have narrated previously in the Report, there appears to be evidence of widespread unlawful discharges from hospital before and during the impact of the pandemic (and still continuing) to care homes without regard to the need for legality, and what appear to be widespread violations of human rights, motivated upon an inappropriate emphasis on "unblocking beds" and demonstrably treating the occupants of those beds as blockages rather than people with the same rights as others. The question is whether initial legislation would address that situation only, or would aspire in the near future to address the whole need for a full deprivation of liberty scheme. One would observe that it is now longer since Scottish Law Commission reported on the topic in 2014, than it was from the 1995 Scottish Law Commission Report (mentioned above) to the first tranche of commencement of the Adults with Incapacity (Scotland) Act 2000; and likewise that England & Wales have had a deprivation of liberty scheme in force since 2009.

There are worrying aspects still evident in relation to the inappropriate "unblocking beds" pressure. One still sees references to section 13ZA of the Social Work (Scotland) Act 1968 to transfer human "blockages in beds" from hospital to other settings. Section 13ZA is concerned with an adult who lacks relevant capacity. Section 13ZA(2) provides that: "*Without prejudice to the generality of subsection (1) above, steps that may be taken by the local authority include moving the adult to residential accommodation provided in pursuance of this Part*". That provision is not ECHR-compliant. It is generally accepted that it is invalid because it would sanction the violation of ECHR, and thus was not within the competence of the Scottish Parliament. In any event, its use is effectively forbidden by "Guidance for Local Authorities: Provision of Community Care Services to Adults with Incapacity" dated 30th March 2007, because that guidance confirms that: "*Local authorities as public authorities must act compatibly with [ECHR] and the power [under section 13ZA] does not allow steps to be taken which would be incompatible with those rights, including depriving an adult of their liberty in terms of Article 5, ECHR*". The sting in the tail is that this provision lurks in the 1968 Act, not in the 2000 Act, therefore anyone acting unlawfully is not included in the exemption from liability in section 82 of the 2000 Act of appointees acting under Parts 2, 3, 4 and 6 of the 2000 Act if they have acted reasonably and in good faith, and in accordance with the general principles set out in section 1 of the 2000 Act.

Notwithstanding the persistence of some "hangover issues" from the past, such as that question of inappropriate use of section 13ZA, perhaps the most positive news so far is that a consensus among stakeholders seems to be in the early stages of emerging that instead of focusing on past deficiencies, and each acting defensively in relation to its own role, stakeholders need to come together in a broadly cooperative "we are where we are" manner to share issues and solutions, and to support Scottish Government in progressing urgently required solutions (including needs for legislation) as rapidly as can properly be achieved.

Adrian D Ward

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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 April. 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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