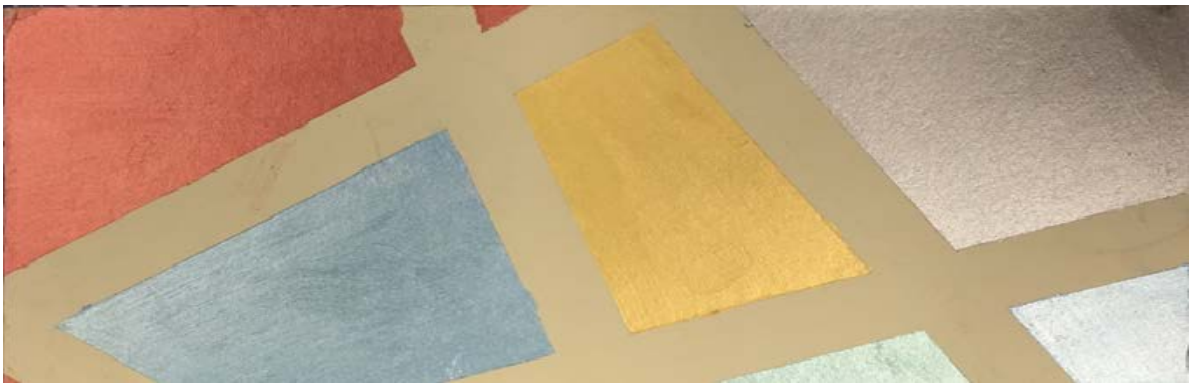

Welcome to the June 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: when no option is a good one, snapshots from the frontline, and are we listening closely enough to the person in the context of deprivation of liberty;

(2) In the Property and Affairs Report: the Powers of Attorney Act 2023 on election hold, contesting costs in probate cases and guidance on viewing LPAs online;

(3) In the Practice and Procedure Report: post-death costs, what does it mean to be an expert in the person, and procedure in brain stem death cases;

(4) In the Mental Health Matters Report: the MHA 1983 under strain in police cells and the hospital setting;

(5) In the Wider Context Report: the inherent jurisdiction – a case, guidance, and a challenge from Ireland; the older child and medical treatment decisions – mental capacity or competence, and Capacity and contempt proceedings – what is the test?

(6) In the Scotland Report: guardianship under examination before the Sheriff Appeal Court and Scottish Government's Mental Health and Capacity Reform Programme.

There are two plugs this month:

(1) For a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

(2) For Lucy Series' blog post about mental capacity and voting.

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.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

Where every option is problematic and the optimism of best interests is not enough

Re A (Covert Medication: Residence) [2024] EWCA Civ 572 (Court of Appeal (Underhill LJ, Peter Jackson LJ, Nicola Davies LJ))

Best interests – medical treatment

Summary

The Court of Appeal considered appeals by the local authority and Official Solicitor against the judgment of Poole J in *Re A (Covert Medication: Residence)* [2024] EWCOP 19, and covered in the April 2024 Mental Capacity Reports. This long-running case about the covert medication of 'A'

without the knowledge of A, or her mother B, for Primary Ovarian Insufficiency has previously been the subject of four other reported judgments. In Poole J's most recent decision, he ordered that A should cease to be given covert medication, be informed that she had been covertly medicated over the last few years and return to the care of her mother. The appeals were supported by the NHS Trust which delivered A's medical care, and opposed by B.

The circumstances of the case were covered in detail in the first instance judgment. In outline, A is now 25 years old and had diagnoses of epilepsy, a learning disability and autistic spectrum disorder. As a result of her Primary Ovarian Insufficiency (POI), A had not through puberty by the age of 18. Following her diagnosis of POI (which posed significant risks to her health), A's treating endocrinologist recommended a course of Hormone Replacement Therapy. The local authority also had concerns that A "*had no social life away from B, no friends of her own, and few independent living skills. Dr X advised that the physical and emotional harm arising from not undergoing puberty were extremely serious but could easily be averted by taking HRT. However, A was refusing HRT and B was saying that she had the capacity to make up her own mind*" (paragraph 12).

In a 2019 judgment, A was removed from B's care and placed in residential care; contact between A and B was supervised and restricted. At that time, it was hoped that A could be persuaded to take the course of Hormone Replacement Therapy. A did not do so, and refused to join in social activities. A's contact with B was further restricted. In closed proceedings in 2020, A was ordered to have the Hormone Replacement Therapy covertly, and A and B were not to be told to prevent A from refusing food and B from seeking to dissuade A from taking covert medication. The fact of the closed proceedings was not revealed to B or observers of the case until 2022, prior to which time both B and observers expressing confusion as to why A was not receiving the Hormone Replacement Therapy which had been a central reason it was considered to be in A's best interests to be removed from B's care. A was not informed at that time, and B was ordered not to inform A of what had taken place.

By 2022, A had achieved puberty, and required only maintenance medication for her POI. A's willingness to socialise had somewhat increased. B agreed to seek to try to persuade A to take the covert medication, with B hoping that this would be the start of a process for A to return to the family home. The statutory bodies were ordered to draw up a plan for a transition to open medication with A's consent and the informing of A about her medical history. A and B resumed contact in November 2022 "*though the professionals had increasing concerns about the perceived negative effect of B's influence on A's previous willingness to engage in very limited activity outside the placement*" (paragraph 25).

By late 2023, despite many sessions with health professionals, A continued to reject her diagnosis of POI. The case was listed for a hearing in January 2024 to consider A's best interests with respect to her residence and care, with B and A expressing very strong wishes for her to return home, and the statutory bodies and Official Solicitor (acting on behalf of A) opposing this and arguing that the court should rule out a return to B's home, with A to move to a supported living accommodation in due course (once one had been more fully explored).

At the January 2024 hearing, the plan which had been ordered in autumn 2022 to transition A to openly take medication was not in effect, despite repeated efforts which had been undertaken, and A was still receiving medication covertly while living away from B. B offered a plan for how she

would seek to persuade A to take her medication. At the hearing, A's endocrinologist discussed the risks of stopping maintenance HRT, though A's having gone through puberty was now an irreversible process. For various reasons, the hearing experienced delays, and the parties filed written submissions; the judge handed down judgment on 20 March 2024, concluding that it was in A's best interests to return home, for covert medication to cease, and for A to be informed that she had been covertly administered Hormone Replacement Therapy.

In the first instance judgment, Poole J considered that "*the feasible options are all fraught with risk and it is difficult to foresee a good outcome for A, whatever the decision; the decision about residence is bound up with the continuation or cessation of CM, and all parties had approached the hearing in that way*" (paragraph 51). Poole J did not think that, after five years and many heavy and restrictive interventions, further efforts to persuade A to take medication were likely to succeed. He further considered that it would not be feasible to simply never tell A about her medication, and telling her may be a potential route to her taking the medication on a voluntary basis (this had not, in any event, been attempted). Poole J also considered that B was "*heavily responsible for A's isolation and lack of physical, mental, and social development', their relationship was 'enmeshed' and '[r]eturning home will expose A to a substantial risk of harm flowing from the nature of the relationship between her and B*" (paragraph 59). However, Poole J found that B's influence on A would persist even if they were not in regular contact (as had occurred for the last five years), and that A and B had a very close bond. He thus concluded it was in A's best interests to go back to her mother, as she strongly wished to do.

The appeal

Eight grounds of appeal were brought by the local authority and Official Solicitor, supported by the NHS Trust.

Giving the lead judgment in the Court of Appeal, Peter Jackson LJ first made five general observations about matters of principle which would appear to have application far beyond the present case:

> *88. The first is that A's circumstances are highly abnormal, even in the world of the Court of Protection. As a result of a series of careful best interests decisions she has been taken from her home, separated from her family, and detained against her will in Placement A for five years. She has resolutely rejected HRT, but for well over half of that time she has been taking this significant medication in ignorance. The judge was right at [59] to regard these matters as very serious interferences with A's rights, particularly as the main goal of HRT had been achieved, and to face up to the fact that there was no obvious end in sight to the present state of affairs.*
>
> *89. The second matter is the length of time that the proceedings have lasted. The overriding objective in rule 1.1 of the Court of Protection Rules 2017 requires the court to deal with a case expeditiously, fairly, proportionately and economically. Rule 1.3, which mandates active case management, requires the court to avoid delay and keep costs down. The burden is always on those arguing for proceedings to be extended, and submissions that the judge's decision was premature or rushed have to be seen in the context of proceedings that had continued since April 2018. Their exceptional length was bound to influence on the court's approach to case management, including its decision about when a final decision should be made.*

90. Third, and relatedly, the Court of Protection exists to make decisions about whether a particular decision or action is in the best interests of the individual. It is not a supervisory court, as confirmed by Baroness Hale, giving the judgment of the Supreme Court in N v ACCG [2017] UKSC 22, [2017] AC 549 at [24]…The Court of Protection is not, therefore, A's guardian, and nor are any of the professional parties, whatever duties they may owe her. This should not be forgotten amidst the need for rolling reviews of the 2020 CM order, and the fact that B's application, issued in April 2022, remained undetermined for so long. The Court of Protection has become a fixture in A and B's lives. If that is necessary because the court is for good reason unable to bring its involvement to an end, so be it, but it should not be mistaken for normality. In this connection, I repeat what I said in Cases A & B (Court of Protection: Delay and Costs) [2014] EWCOP 48, in a paragraph approved by Sir James Munby P in this court in N v ACCG (see Re MN (Adult) [2015] EWCA Civ 411, [2016] Fam 87 at [104]):

> *"14. Another common driver of delay and expense is the search for the ideal solution, leading to decent but imperfect outcomes being rejected. People with mental capacity do not expect perfect solutions in life, and the requirement in Section 1(5) of the Mental Capacity Act 2005 that "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests" calls for a sensible decision, not the pursuit of perfection."*

Here, the court's task was to select the best practical outcome that was realistically available, even though all options were, to say the least, imperfect. It was beyond its powers to eliminate risk or make A's many problems go away.

91. Fourth, while the Court of Protection's role is not supervisory, it is inquisitorial. Subject always to the demands of fairness, the judge was obliged to reach his own assessment, and he was not limited to choosing between the positions taken up by the parties. The demands of fairness are sensitive to context, and in the present context the parties were entitled to have the opportunity to present evidence and argument about the outcomes that were properly open to the court before a decision was made.

92. Lastly, I repeat that this was a genuinely difficult decision. The case, described by all the parties as very finely balanced, had become stuck. The direction of travel identified by the court in September 2022 had not been advanced. All the professional advice went one way, and A's litigation friend, the OS, was advocating an outcome that was directly contrary to her wishes. The only party who argued for a different outcome, B, had limited credibility and was the subject of justified criticism for her misguided and gravely damaging parenting. A's predicament called for an energetic response from the court, one way or the other. In these circumstances, the well-known statement of Baroness Hale in In re J (a child) [2005] UKHL 40, [2006] 1 AC 80 is on point:

> *"12. If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is also a matter for the trial judge. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere:*

> *see G v G (Minors: Custody Appeal) [1985] 1 WLR 647. Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful, as this judge undoubtedly was, in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter."*
>
> *This judge had lengthy experience of A's situation and his judgments show a profound understanding of all aspects of this exceptionally difficult matter. We should therefore pay particular respect to his thorough and considered evaluative decision.*

Starting from these "general observations," the Court of Appeal considered Grounds 1 and 2. Ground 1 was that "*the court was wrong to make a final determination in relation to residence when neither B, nor any other party, sought a final determination of that, or any other, issue*" (paragraph 94). Ground 2 was that the court erred in making "*a final decision that was not in accordance with the relief sought by any party without giving the parties the opportunity to make oral or written submissions about the proposed outcome*" (paragraph 95).

In respect of these grounds, the local authority submitted that Poole J erred in making "*this decision without exhausting all other avenues*" (paragraph 65). "*The decision did not need to be made now and the judge should have canvassed his proposed disposal with the LA and the Trust in advance, since they were to be charged with taking protective measures to facilitate the placement at home. That should have been done by convening a hearing for oral submissions or at least by informing the parties of his intentions and asking for further written submissions*" (paragraph 65). The Official Solicitor and Trust supported the proposition that Poole J ought to have given the parties more notice of what he was contemplating, and that he was considering sending A home on a final basis rather than on a trial basis. They argued that parties did not have the opportunity to make specific submissions on this proposal. B disagreed, submitting that "*the case needed direction amidst continued drift. A was living under draconian restrictions, with ongoing breach of her rights of which she was unaware. B's application had been repeatedly adjourned and all attempts to persuade A to take HRT had failed. Despite the direction set by the court in 2022, the other parties had put forward no proposal to end CM and were saying that A must therefore stay in care. The hearing was listed for the big decisions to be taken, and the parties had fair warning of them*" (paragraph 68). B submitted that it was irrelevant that none of the parties recommended the outcome chosen by the judge.

The Court of Appeal was unpersuaded by Ground 1. The statutory bodies and Official Solicitor were seeking a final order dismissing B's application that A should be returned to her care. "*It is true that B was only seeking an interim order, but she was in a weak litigation position and the judge was not constrained by her forensic stance. Even though the professional focus was understandably on the issue of HRT, it is important to remember that from A's perspective the most important matter was her residence. Looking at the history of the litigation as a whole, in my view the issue of her return home was at large and long overdue for decision*" (paragraph 95). "*As to the*

submission that no party was seeking that the proceedings should come to an end, I have noted that proceedings should only continue when they need to" (paragraph 96). "*In relation to Ground 1, I therefore conclude that there were strong reasons for the judge to make a final decision in principle, while allowing an opportunity for a discussion of implementation at a subsequent hearing. This was an order that was properly open to him, whether or not the parties expected it, and no party suffered unfairness thereby. The course proposed by the Appellants and the Trust entailed significant and possibly indefinite prolongation of the proceedings with no very promising outcome beyond the beneficial aspects of continued CM in fragile and controversial circumstances*" (paragraph 97).

The Court of Appeal considered that Ground 2 raised a more substantial issue. Peter Jackson LJ stated that he did "*have apprehensions about the course that the proceedings took once it became clear that oral submissions could not be given at the end of the hearing. Although it will often be an efficient use of resources for closing submissions to be made in writing, the process of oral argument can be of considerable value, particularly in a difficult case. Further, it will generally be good practice for the court to alert the parties by one means or another to the fact that it is considering an outcome not positively sought by them, so that they can make submissions about it or even seek to call further evidence. In this case, once the judge contemplated making a different and final order, he would have been well advised to ask the parties to address that in written submissions or to have investigated the possibility of reconvening for oral submissions, perhaps remotely*" (paragraph 99). However, Peter Jackson LJ was not persuaded that this made the proceedings unfair, where Poole J "*had flagged up this issue as long ago as September 2022 (see paragraph 21 above) and he found, in my view rightly, that the issues of residence, HRT and CM were bound up with each other* [….] *I consider that the judge was entitled to grasp the nettle without hearing further submissions about it* […] *Residence, HRT and CM had been live issues for years and the judge was well aware of the entrenched positions of the parties. It would have been preferable for him to have alerted them in some fashion to the court's intention, but they had extensive opportunities to present evidence and argument about all outcomes that were properly open to the court. The fact is that the judge's view of the case differed from that of the parties. His decision may have surprised experienced advocates, which puts one on inquiry, but that does not of itself render the process unfair. Of particular significance, if further submissions had been invited they would have been a familiar, though no doubt more detailed, rehearsal of arguments that had been exhaustively considered over a lengthy period. Overall, in these particular circumstances the process was not ideal but it was not unfair*" (paragraph 101).

The Court of Appeal dealt more briefly with Grounds 3-8:

Ground 3: "*The Appellants argue that the judge's decision was contingent on the LA and the Trust providing A with 'protective measures' that would mitigate the significant harm to which she would be exposed on a return to B's care. There was no evidence that state-provided protective measures were available or would be effective to protect A from harm*" (paragraph 70). The Court of Appeal found these arguments 'unconvincing.' "*The type of harm that A is likely to suffer at home is well documented. The judge will have had a broad idea of the type of services that were realistically likely to be available to mitigate the harm and he had evidence about this from the social worker* […] *The court had ample information upon which to make a decision in principle, without which all progress would have been stymied. The anxiety of the LA and the Trust about A's situation cannot deter the*

court from reaching its own best interests decision" (paragraph 103).

Ground 4: "*The Appellants argue the court failed to take into account the unanimous view of A's MDT that it was not in her best interests to be told about CM or to seek its view on the option of A stopping taking HRT. They note that the MDT is not mentioned in the judgment. The judge was wrong to say that the prospect of A not taking HRT at all had not been actively contemplated, when the MDT had actively contemplated it and reached the unanimous view that it was not in her best interests*" (paragraph 74). The Court of Appeal found that Poole J had taken into account the views of the MDT, and "[t]*he position of the MDT was copiously referred to in the evidence and submissions. The social worker's statement alone refers to the MDT almost fifty times and sets out its view with full clarity. The judge devoted eight paragraphs to the evidence of the two most significant members of the MDT*" (paragraph 104). The Court of Appeal found there was "*no substance to this ground*" (paragraph 104).

Ground 5: The Appellants argued that "*the Court wrongly determined that it was in A's best interests to be told about the past CM and that it was likely that at some point A was going to find out*" (paragraph 75). The Court of Appeal considered that the procedural arguments were covered under Grounds 1 and 2; "[a]*s to the substance, the judge was entitled to find, after carefully assessing the evidence, that the ability to maintain CM as a secret was fragile and that controlled disclosure was a better course. That was an evaluative finding that was clearly open to him* […] *Essentially this ground argues that the judge should have acted more cautiously, but he was entitled to consider that a cautious and highly restrictive approach had repeatedly failed since the summer of 2022*" (paragraph 105).

Ground 6: "*It is submitted that the judge misdirected himself at [67] that "covert medication should be used exceptionally, for severely incapacitated persons", and that this led him into error*" (paragraph 81). The parties argued that the relevant guidance dated to 2004, prior to the Mental Capacity Act 2005, and "[s]*ince then, there has been guidance from NICE in 2014 and 2017 and from the CQC in November 2022, in each case containing a short reference to CM. None of that guidance suggests that covert medication should only be used for severely incapacitated persons, nor that there should be an end plan for CM before it is begun. The judge's observation suggests that he doubted that A should have been covertly medicated in the first place*" (paragraph 81). The Court of Appeal found that this "*submission goes nowhere. The judge was not unduly influenced by the guidance or by any misunderstanding about its date and status*" (paragraph 106).

Ground 7: The Appellants argued that "*the court failed to consider that A will be deprived of liberty in B's care*" (paragraph 83). The Court of Appeal found this ground "*insubstantial*" and found that "[t]*he degree of DOL that A experiences at Placement A is markedly greater than she would experience at home because of her strong feelings in the matter. Even assuming she would suffer DOL at home, an analysis of that issue takes the best interests assessment nowhere*" (paragraph 107).

Ground 8: The Appellants argued that "*the court wrongly and prematurely prioritised A's wishes and feelings over her Article 2 and 3 rights. It failed to weigh in the round the very significant medical and social risks to A in returning home. The correct and proportionate decision would have been for A to experience independent supported living with the option of no contact with B so as to promote her welfare and ensure the administration of vital medication*" (paragraph 85). The Court of Appeal rejected *"this wide-ranging submission. The judge scrupulously charted the harm that A had suffered at home and would be likely to experience on a*

return. He made all allowances in favour of the unidentified SIL placement, including the somewhat improbable possibility of CM continuing there. But he was confronted by the reality that A had entirely rejected Placement A and there was no basis for believing that she would accept any other alternative to going home, particularly if it had to be bolstered by stopping contact with B. The argument about the order of precedence of the various ECHR articles is sterile. What matters is the content of the rights that are engaged, not whether they are absolute or qualified" (paragraph 109).

Comment

We would consider that the five 'general principles' in the judgment will likely inform case management in many other long-running cases. There is a palpable impression from both the Poole J first instance and appellate judgment that the situation with A had become stuck. While the parties and professionals involved had plainly made great efforts to seek some 'breakthrough' whereby A's attitude might change and allow a new path forward, Poole J concluded that it this was unlikely, and it did not serve A's interests to keep proceedings in limbo in hope that her views would change. Peter Jackson LJ appears to have been pointedly harking back to his judgment in *A & B* in commenting that the purpose of the Court of Protection is not to seek 'perfect solutions,' but to make 'sensible decisions.' While the Court of Appeal noted a procedural point that it would be preferable for a judge considering an option not suggested by the parties to raise that possibility overtly ahead of a decision to allow for submissions, it clearly felt that Poole J's decision was one grounded in evidence, open to the court and one which made a 'sensible decision' where all available options were far from ideal.

Especially in an environment where it appears that there are so few effective routes of challenge to decisions by public bodies about how social and health care needs are to be made, it can be tempting for all concerned (including on occasion the court itself) to give the Court of Protection the role of guardian. As tempting as that can be, this judgment is a clear reminder that that is not the court's function.

National Mental Capacity Forum Chair's annual report

Rather belatedly, for reasons outside her control, the annual report of the Chair of the National Mental Capacity Forum, Dr Margaret Flynn, has now been published. Its opening sentence is arresting:

> *In 2023, individuals who are subject to the provisions of the Act, their relatives and professionals are witnessing the MCA's networked systems facing potential collapse.*

Amongst other things, the report contains a review of the Forum's work, and a set of case studies concerning capacity across the life course:

> *because the Forum acknowledges that they provide compelling insights into the use of the Mental Capacity Act and the many contexts in which it applies. The following accounts might be seen as (i) prompts to those engaged in updating the Act's Code of Practice whilst we wait for that vitally important task to be completed and (ii) reminders of the necessity of ensuring expertise in invoking and using the Act.*

For a discussion with Dr Flynn about the MCA 2005 in 2024, see this "in conversation" with Alex.

Deprivation of liberty – are we listening closely enough to the person?

Re HC [2024] EWCOP 24 (Victoria Butler-Cole KC, sitting as a Deputy Tier 3 Judge)

Article 5 – Deprivation of liberty

Summary[1]

This case is notable for the approach taken by Victoria Butler-Cole KC (sitting as a Deputy Tier 3 Judge) to the question of deprivation of liberty.

The case concerned the residence and care arrangements for a 27 year old woman, HC, who had had a number of admissions to hospital (including s.3 Mental Health Act 1983) to seek to treat her anorexia. Proceedings had been ongoing before the Court of Protection for some time, although they had in effect been paused for a period of time whilst she was admitted to hospital under the MHA 1983. She had then been discharged from hospital to a placement under a plan she had been in agreement with, and in circumstances where she had apparently assessed as having capacity to decide on her discharge destination. The court had not been informed of any of these matters.

Her current placement, however, had terminated her placement, and the local authority and ICB responsible for meeting her care needs under s.117 MHA 1983 sought an urgent determination of whether it was in her best interests to be moved to a new placement immediately, using physical restraint if necessary. Ms Butler-Cole KC was critical of the lateness of the application, "an application which could and should have been made in early March 2024 when the local authority social worker assessed HC as lacking capacity to make decisions about where to live and receive care, and RC [HC's father] expressed his belief that HC required a further specialist placement, contrary to the advice of professionals" (paragraph 12).

Ms Butler-Cole KC considered there was reason to believe that HC lacked capacity to decide where to live and receive care such that s.48(a) MCA 2005 was satisfied, although she highlighted "defects and omissions" in the evidence before the court, and even though it was "entirely possible" that HC would in due course be found to have capacity for purposes of s.15 MCA 2005.

As to best interests, the options before the court by the end of the hearing were: (1) a forced move to a new placement; or (2) a temporary return to RC's house if HC was not willing to move to the new placement at the end of the last day she could stay at the current placement.

Ms Butler-Cole KC was troubled as to the prospect of HC returning to RC's home, even temporarily, given the complex history of her dependence upon him and (when with him) non-engagement with specialist eating disorder services in the area of his home. She was, however, even more troubled by a forced move, in circumstances (1) where a move against the will of her father was likely to cause her significant distress; (2) the prospect of her settling into the new placement was remote if she felt she had been forced to go there; and:

> *The use of physical restraint to move HC, even on the basis that is a last resort, is not justified. It is neither necessary nor proportionate at this juncture, and I have significant reservations about authorising its use in circumstances where the orders I make are on the basis of s.48 MCA 2005 and there is a dispute about HC's capacity to*

[1] Tor having been the judge, she self-evidently has not contributed to this summary or comment. Her fellow editors would wish to note, though, their delight at seeing this, her first reported judgment as a Deputy Tier 3 Judge.

> *make her own decisions. HC already suffers from anxiety and it seems extremely likely that the use of physical restraint would be a further source of trauma for her. Her litigation friend, the Official Solicitor, does not support the use of force (paragraph 25(iii).*

The court therefore made orders requiring the provision of additional evidence from the statutory bodies and (at paragraph 28), Ms Butler-Cole KC identified that she:

> *will consent on HC's behalf to a move to D House if she is willing to move there. If she is not, then the court consents on her behalf in the interim to her moving home to live with RC, and to receiving the proposed package of domiciliary care. In that event, there will need to be either agreement from RC or orders ensuring that professionals can have access to HC, and can see and speak to her directly and without RC being present.*

The question then arose as to the potential for deprivation of liberty at the new placement, D House:

> *29. Mr O'Brien submitted that in the event HC moves willingly to D House, an urgent authorisation should be put in place and a standard authorisation implemented to authorise her deprivation of liberty, as D House is a locked facility. I raised a concern as to the appropriateness of this approach given that urgent authorisations are not designed to be used when a move is planned in advance, and that the test for capacity in respect of a standard authorisation is equivalent to that applied in the making of a s.15 declaration, which is not a declaration that I have made, or been asked to consider making. Furthermore, given the complexity of the issue of HC's capacity to make relevant decisions, there is a risk that an assessment of capacity by a new professional for the purposes of a standard authorisation might result in a conclusion that HC has the necessary capacity, which would then result in an urgent court hearing being required. On further reflection, Mr O'Brien submitted that the court should authorise HC's deprivation of liberty at D House instead.*
>
> *30. I consider it inconsistent with my determination that it is in HC's best interests to move to D House only if she agrees to go there, to order that once at D House, if she changes her mind, she should be prevented from leaving. If the only reason for not imposing a forced move was the use of restraint during the journey, the two propositions would sit together more easily. But that was not the only reason – there are serious concerns about the impact on HC's mental health and self-harming behaviour of imposing a decision on her to which she objects.*
>
> *31. However, since HC's living arrangements at D House would be an objective deprivation of her liberty, and since I have found that there is reason to believe she lacks capacity to make decisions about her care and residence, substitute consent to her objective deprivation of liberty is required while she resides there willingly.*
>
> *32. I will therefore authorise HC's deprivation of liberty at D House in the event she has agreed to move there, but that authorisation will end if HC changes her mind about staying there and says that she wishes to return to the family home. The case must be returned to court for further directions immediately if that happens, or if it is intimated. In any event, the case will be listed for review and further directions within a short timescale.*

Comment

Paragraph 31 of the judgment represents arguably just as serious a challenge (albeit a shorter and perhaps more subtly framed challenge) to the judgment in *Cheshire West* as that of Lieven J in *Peterborough City Council v Mother (Re SM)* [2024] EWHC 493 (Fam. Put shortly: what is the point of giving substitute consent to something to which HC (albeit incapacitously) is agreeing to willingly? And if she is willingly agreeing to it herself, why should it be viewed as deprivation of liberty – and should the law not listen to her?

Snapshots from the judicial front-line

Two recently published decisions of District Judges (or, to be precise 'Tier 1' judges of the Court of Protection) provide useful snapshots of the work that is carried out day-in, day-out in the Court of Protection but is only rarely reported.

BR v NAR & Ors [2022] EWCOP 57 concerned a case dealt with in 2022, which was not able to be published sooner due to the judge's ill health. The case revolved around a dispute between P's children, one of whom had been appointed as LPA for finances and health and welfare, and who had cared for P in her own home for 8 years. P was 97 by the time of the hearing and had advanced dementia. There were disputes as to whether the LPA should be revoked, and whether the attorney should be paid a sum for providing care to P over the years. The judge grappled with 7 litigants in person and a range of family disputes, assisted by the input of counsel for the OPG. The judgment illustrates the practical reality and difficulties of managing COP proceedings particularly where parties are unrepresented. Ultimately, the LPA for finances was disclaimed (the judgment says revoked but it seems likely this should be a reference to it being disclaimed), and although the court refused to authorise payments already made by the attorney from P's funds in respect of care, a mechanism was set out for the future independent deputy to make appropriate payments to the attorney, with the sums already paid out being treated as a payment on account.

Re MK ("P") [2024] EWCOP 27 also concerned difficult family relationships and an elderly P with dementia. The court had, in 2015, made decisions in respect of P's care arrangements, and had made findings against one of P's children and an injunction against him, preventing him from attending P's home other than for 1 hour twice a week, or from instructing anyone to carry out a further assessment of P without the court's permission. P's son did not agree with P's diagnosis of vascular dementia, or the court's finding that she lacked capacity to make relevant decisions, and disputed her medication regime. The injunctions had been continued since 2015, most recently in early 2021 with a time limit of 3 years. By the time of this hearing, the ICB and the Official Solicitor were in agreement that the injunctions should be made indefinite. P's son had not visited her in accordance with the orders made, apparently due to his objection to the court's decisions. The judge determined that continuing the injunctions on an indefinite basis was appropriate given that there had been no change in the son's position over the years and there was a real risk of disruption to P and her care arrangements.

District Judge Eldergill

District Judge Eldergill is leaving the judiciary in September, to return to practice. He intends to concentrate as before on mental health law; human rights work; chairing judicial or quasi-judicial inquiries into homicides, suicides and human rights breaches; advisory work for the NHS and local authorities; drafting legislation and statutory forms; academia and training professionals. He can be contacted at medicolegal@email.com. We are also greatly looking forward to, and Alex hopes to review, the book that he is leading on the European Court of

Human Rights and Mental Health, providing an article-by-article summary of the most important cases decided by Strasbourg, as well as a thematic summary, drawing together the key issues relevant to practitioners specialising in mental health law, as well as Court of Protection, family and criminal practitioners.

PROPERTY AND AFFAIRS

Powers of Attorney Act 2023

The general election has put a pause on moves towards further implementation of this Act.

Costs contested in probate cases

It is well established that CPR 44.2(2)(a) applies in contested probate cases so that the general rule applies to the effect that the unsuccessful party will pay the costs of the successful party though the court may make a different order.

It is also well established that the pre-CPR exceptions to that rule still apply in contested probate cases.

These exceptions were summarised in *Kostic v Chaplin* [2007] EWHC 2909 (Ch) and *Perrins v Holland* [2009] EWHC 2556 (Ch).

The exceptions "*allow good cause to be shewn why costs should not follow the event*" and require the court to ask:

(1) whether the litigation was caused by the testator or a beneficiary. If so, the court may order the unsuccessful party's costs to be ordered out of the estate;

(2) whether the circumstances, including the knowledge and means of knowledge of the opposing party, led reasonably to an investigation of the matter. If so, the court may make no order as to costs.

These exceptions and their application to a case where probate was contested on the grounds of want of capacity and want of knowledge and approval were recently considered and applied in *Leonard and others v Leonard and others* [2024] EWHC 979 (Ch).

In this case, there had been a clearly successful party so that the starting point was that the clearly unsuccessful party should pay the costs.

At paragraph 14 the court (Joanna Smith J) reaffirmed that a positive case premised on one or both of the exceptions must be made out before the court will depart from the general rule (see *Kostic* at paragraph 6 and *Perrins v Holland* at paragraph 3). It is necessary to make out a "*very strong case on* [the] f*acts*" if an unsuccessful litigant is to get his or her costs out of the estate (under the first exception) (see *Re Plant Deceased* [1926] P 139 per Scrutton LJ at 152; cited in *Kostic* at paragraph 17)

Further, in respect of the first exception, "*the trend of more recent authorities has been to encourage a careful scrutiny of any case in which the first exception is said to apply, and to narrow rather than extend the circumstances in which it will be held to be engaged*" (*Kostic* at paragraph 21). This narrowing of the scope of the first exception (reiterated by Henderson LJ in *Royal National Institution for Deaf People v Turner* [2017] EWCA Civ 385 at paragraph 17) is a function of the fact that, firstly, nowadays less importance is attached to the independent powers of the court to investigate the circumstances in which a will was executed than was the case in Victorian times; and secondly, the courts are increasingly alert to the dangers of encouraging litigation and discouraging the settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party (*Kostic* at paragraph 21).

Joanna Smith J went on to reaffirm that the same narrowing of scope does not apply to the second exception because "*there is …still a public interest that where reasonable suspicions are raised about the validity of wills they should be proved in solemn form*" (see *Perrins v Holland* at paragraph 17).

Lasty, so far as general principles were concerned, Joanna Smith J reaffirmed that even

where one or both of the probate exceptions applies, the point may be reached where the litigation becomes ordinary hostile litigation, from which point the normal rule entitling the successful party to an order for costs comes into effect (see *Walters v Smee* [2008] EWHC 2902 (Ch) per HHJ Purle QC at paragraph 8).

Joanna Smith J went on to consider the circumstances of the case and held that the first exception did not apply but the second exception did until a failed mediation whereafter the unsuccessful party had to pay the successful party's costs.

The successful party had also made a successful Part 36 offer. It was common ground that Part 36 applied and the unsuccessful party sought only to argue (unsuccessfully) that the offer was not a genuine attempt at settlement. Thus, the Part 36 consequences applied from the expiry fo 21 days after the offer was made (which was after the mediation).

The judgment is useful reading as to the way in which the principles are applied as it was a reserved judgment after written submissions from the eminent silks involved. Its length reflects the fact that the costs had mounted to £1.5m.

Viewing an LPA

Changes introduced in 2023 mean all LPAs issued on or after 1 January 2016 will be able to be viewed online including any instructions and preferences written by the donor. The OPG has published new guidance on the "viewing an LPA service," along with guidance for donors and attorneys, so they understand the process to let companies see an online version of the LPA, instead of the registered paper version.

PRACTICE AND PROCEDURE

Capacity, habitual residence, and internet use in Scotland – a Court of Protection conundrum

Newcastle City Council v LM [2023] EWCOP 69 (David Rees KC (sitting as a Tier 3 Judge of the Court of Protection))

International jurisdiction of the Court of Protection – other

David Rees KC (sitting as a Tier 3 Judge of the Court of Protection) has helpfully set out (at guidance as to what has to be done where there is a question of whether it has jurisdiction in a cross-border case:

> *46.* […] *(1) In any case with a cross-border element, the Court of Protection's jurisdiction must be established or determined at the commencement of the proceedings (See Hackney at [87] - [89] and [112] - [113]).*
>
> *(2) If it is not immediately apparent, then a provisional determination should be given pending a prompt determination of the issue (Hackney [89]).*
>
> *(3) The doctrine of perpetuatio fori does not apply in cases involving the Court of Protection's jurisdiction whether or not the 2000 Convention is engaged (Re O at [21]).* [in other words, the fact that the Court of Protection had jurisdiction at the start of the proceedings does not mean that it will retain it throughout]
>
> *(4) The Court of Protection must, therefore, keep the question of jurisdiction under review throughout the proceedings and must be satisfied that it retains jurisdiction at the date of the final substantive hearing (Hackney at [116]).*
>
> *(5) In cases where the 2000 Convention applies (assuming that it is eventually brought into force in England and Wales), a change in habitual residence to another contracting country will mean that the court will automatically lose jurisdiction under Art.5 (see Hackney at [116]).*
>
> *(6) However, a change in habitual residence to a non-contracting country may not prevent the English court from retaining jurisdiction by reference to domestic law (see Hackney at [117]). Whilst the MCA 2005 will not be available in such circumstances, the inherent jurisdiction may, in some cases, provide an alternative source of domestic authority to enable the High Court to take steps to protect an incapacitous individual who is habitually resident outside England and Wales in a non-contracting country. However, there are likely to be limits on the circumstances under which the inherent jurisdiction could be utilised and the orders which could be made thereunder.* [for more on the potential for the inherent jurisdiction to be used, see AB v XS [2021] EWCOP 57 and *Re Clarke* [2016] EWCOP 46]

In the case before him, David Rees KC found that the subject of the proceedings remained habitually resident in England & Wales, despite the fact that she had been placed in Scotland and had been there since 2018 and there was "no doubt" that she was settled there.

> *39.* […] *Nonetheless, I need to consider the conditions and reasons for her stay and these, in my view, point towards her remaining habitually resident in England and Wales. She was initially placed in Scotland because there was no suitable placement closer to her home in Newcastle and, in my view, that remains her principal place of integration and social and family environment. She has*

> *been deprived of her liberty throughout her time in Scotland, which means her experience there is very different to an individual who is not subject to those restrictions. Most importantly, and a factor which I consider has magnetic importance in this case, her stay has, since the outset of these proceedings, been constantly subject to interim orders of the Court of Protection authorising the placement and the terms of the restrictions on her liberty.*
>
> *40. Those interim orders were only ever intended to govern the position until a final hearing in this case, but their interim nature emphasises the inherently precarious nature of LM's placement absent a final conclusion to these proceedings.*
>
> *41. In my judgment, whilst this matter is not on all fours with the position in Re PA, the fact that LM's living arrangements have been subject to review and approval by the Court of Protection on the basis of interim orders throughout the continuation of these proceedings points towards her habitual residence remaining in England and Wales, and I note that the Scottish courts have been willing to recognise and give effect to those orders. I, therefore, agree with the submission that has been made to me by Mr Davies that the interim nature of the orders that have thus far been made authorising her placement in Scotland, deprives LM's residence there of the necessary degree of stability which might otherwise have led to a change in her habitual residence.*

David Rees KC recognised, however, that:

> *45.* [c]*hanges in her circumstances may alter this position. In my view the making of a final order in this case which will not be temporary and not be subject to an ongoing review is likely to tip the scales such that LM will then acquire habitual residence in Scotland fairly rapidly thereafter. Even though that final order will be time limited, it will be a final order. The current proceedings will be at an end and my order will not be subject to any further automatic review by the Court of Protection. Assuming that such an order does indeed cause a shift in LM's habitual residence then any future application to approve changes to the restrictions on her liberty, or to extend the duration of the authorisation will lie to the courts of Scotland.*

That is undoubtedly correct. Indeed, a point that has arisen in a case Alex was in, although not the subject of a reported judgment, was as to the implications of the legal fiction that a decision of the Court of Protection under s.16 is that it is the decision of the person themselves. Looked at through that prism, a final decision that the person is to reside in a placement abroad could be said (in legal terms) to represent the expression of the fixed intention to remain there which may well be decisive in terms of identifying whether their place of habitual residence has changed.

Separately, the judgment also includes an interesting analysis of the capacity of LM to make decisions about using the internet and social media in circumstances where on one occasion she had

> *placed herself in a position of having private or intimate images of herself being made available to whoever she was in a conversation with and that this posed the risk that those images could be used further. I note also from LM's discussion with Ms Heir that LM was not able to properly understand the risk to her of sharing such images. She was able to identify that the third party who received those images could themselves be in trouble if they shared those images more widely, but she did not, in the course of that conversation,*

> *appear to be able to understand the risks to her of those images being shared.*

On the evidence before him, David Rees KC expressed himself satisfied (although on a fine balance) that LM currently lacked capacity to make decisions about internet and social media use. This included not just the fact she could not understand, use and weigh the risks that pictures shared by her could be shared more widely, but also that placing offensive material online could upset or offend others. He noted that he fully recognised that:

> *74.* […] *my decision on this issue will be particularly disappointing for LM who feels that she is being held to a different standard to her capacitous peers. However, as I will explain in a moment, I am satisfied that it is nonetheless in her best interests to be given access to a smartphone in accordance with the protocol devised by the local authority, and this will, I consider, assist her in her use of social media and enable her to continue to learn and build her skills in this regard. Moreover, it was clear from Dr Camden-Smith's evidence that she considers that this is an area where LM's capacity may well improve in the future and, although I have found today that LM currently lacks capacity in this regard, this is clearly an issue which needs to be kept under careful review.*

Given that David Rees KC was making orders about a person physically present in Scotland, one could imagine a situation in which it would have been necessary for him to have considered whether LM's actions could place her in jeopardy under the Scottish (rather than English) framework governing the placing of offensive material online.

For the future, however, and, because David Rees KC made final orders as to LM's capacity and best interests in various domains (for a period of 12 months) the consideration of these matters would fall in future to be considered by the Scottish courts. To remind readers, that framework is **not** the same as that which applies in England – the concept of best interests, for instance, does not apply.

COP User Group Minutes

The minutes of the most recent user group held on 23 April 2024 have been published. It contains amongst other things, discussion of judicial expectations of electronic bundles, and a confirmation in relation to community DoL applications that:

> *an efficient, proportionate approach is required. Medical evidence older than 12 months can be relied upon if it is supported by up-to-date evidence from the solicitor/appropriately informed person that there has been no change of P's circumstances. This can be input into the COPDOL11.*

The minutes also contain a useful list of Court of Protection email addresses available to court users is as follows:

- All paper applications: copapplications@justice.gov.uk
- General Enquiries: courtofprotectionenquiries@justice.gov.uk
- All one-off urgent welfare application (section 16, Section 21). Urgent medical treatment applications. New Trustee matters. Panel Deputy queries and all application made under Registered LPAs and EPAs: copubos@justice.gov.uk
- All applications and queries made on COP DoLs 11: copdols_or_s16@justice.gov.uk

- Filing of Documents and general enquires regarding hearings: courtofprotectionhearings@justice.gov.uk
- Filling of all documents relating to electronic Property and affairs deputyship applications: cop_eapps@justice.gov.uk

Urgent applications and out of hours applications

Sir Andrew McFarlane, the President of the Family Division and of the Court of Protection has issued guidance on urgent applications, out of hours applications and bundles. Although it is said to be for the Family Division of the High Court, the section on out of hours applications at least clearly relates to applications to Tier 3 judges in the Court of Protection. That section provides that:

> *Applicants must only seek an OOH hearing before a judge of the Family Division where:*
>
> *5. The application could not reasonably have been made during the usual court hours and is of such urgency that it requires determination before a court sitting on the next working day.*
>
> *6. The matter relates to (i) the exercise of the inherent jurisdiction of the High Court, (ii) the exercise of a power reserved to a tier 4 judge in the Family Court, or (iii) the exercise of a power reserved to a tier 3 judge in the Court of Protection.*
>
> *7. All applications must be made on notice (including short notice) to the other party/parties unless there are compelling and cogent reasons why the application must be made without notice to the other party or to one or more of the parties.*

Post-death costs

The Supreme Court Costs Office have published a note dated 13 May 2024 explaining the position in relation to costs where P has died. It is specifically directed to deputies. In material part, it reads as follows:

> *Following consultation with the Court of Protection, the correct way to deal with costs after the death of P is confirmed as follows.*
>
> *Costs "up to the date of P's death" are covered by the deputyship order – the relevant COP Rules and precedents on this are clear and no further order is needed for any costs incurred whilst P is alive and lacks capacity, to be assessed.*
>
> *Since the COP's substantive jurisdiction ends with the death of P, the COP has no jurisdiction to make orders about costs incurred after death of P. COP Rule 19.11 is expressly limited to costs incurred during the lifetime of P for this very reason.*
>
> *Costs Officers and Costs Judges assessing any COP Bill that contains any costs incurred post-death, will strike through them and annotate the Bill with the following wording:*
>
> *'Costs post-death are not covered by the existing deputyship order. The COP's substantive jurisdiction ends with the death of P. As the COP has no jurisdiction to make orders about costs incurred after the death of P, the SCCO therefore has no jurisdiction to assess these costs under the COP Rules 2017.'*
>
> *Deputies do not, even for costs incurred during P's lifetime, need to obtain a further Order once P has died before they can seek SCCO assessment. This is additional, and unnecessary, work for the deputy and the COP, and the deputy*

> *will not be paid for this work.*
>
> *To the extent that current OPG and SCCO Guidance contradicts the above it will be amended as soon as practicable.*
>
> *The SCCO is not in a position to issue guidance to practitioners on how to go about recovering costs incurred after P dies.*
>
> *If a Bill has already been filed, please notify the SCCO of the date of P's death as soon as possible by email to SCCO@justice.gov.uk. Where the bill has not already been filed please make sure this information is provided at the beginning of the Bill for assessment.*
>
> *For the avoidance of doubt all Bills for which a Final Costs Certificate has not been issued at the time of P's death should be served upon all interested parties following provisional assessment.*

What does it mean to be an expert in the person?

University College London Hospitals NHS Foundation Trust v HER & Anor [2024] EWCOP 25 (Senior Judge Hilder)

Best interests – medical treatment

In *University College London Hospitals NHS Foundation Trust v HER & Anor*, Senior Judge Hilder had to consider what (if any) weight to place on the opinion of P's sister as to her condition and treatment. P, identified in the judgment as HER, was 53 years old, and living in a supported living placement. In her early childhood HER had a stroke-like episode, which had a lasting effect on a large part of her brain. She was described as also having learning difficulties and epilepsy. She has also been diagnosed as having a metabolic disorder called giving rise to intermittent episodes of acute encephalopathy. HER was experiencing epileptic seizures a few times a month, without warning, and giving rise to risk of Sudden Unexpected Death.

UCLH had a proposed treatment plan, to which HER's sister, identified as SR objected. A preliminary, but important, point was as to whether SR's evidence about her sister's condition and treatment was admissible. The Trust argued that it was simply inadmissible because it was opinion, and she was not qualified to give such evidence. The Official Solicitor, on HER's behalf, argued that it was admissible, but that the court should effectively accord it no weight.

P's sister, identified in the judgment as "SR,"

> *described herself as 'an expert by experience'* […] *and as "an expert as regards HER"* […]. *She does not contend that she is "a medical expert". Rather she says that she has unrivalled knowledge of HER, and HER's experience of life and medical treatment* (paragraph 13(d)).

Senior Judge Hilder identified the expertise of the treating clinicians (no independent medical evidence had been directed. By contrast, she noted that:

> *In contrast: SR is a devoted sister, who has obviously spent a great deal of time and effort trying to educate herself about HER's condition. She has closely observed HER for pretty much all of her life, and therefore has much to say by way of describing HER's reactions to treatment. However, she comes to the issues before the Court as a technical lay-person. Her insight into the relevant medical science is limited to that which can be picked up from publicly available documents - in her evidence she has referred to consulting "Dr. Google" [239]. It is untested by examination or*

qualification or professional discourse, unconstrained by ethical regulation, and uninformed by practice. She is naturally not an objective observer but has an emotional investment in HER.

As Senior Judge Hilder noted, there was in reality little difference as to the practical evidential effect of the approaches taken by the Trust and by the Official Solicitor. However, she continued:

20. There does however seem to me to be a significant difference in how SR is likely to experience the fairness of litigation. If her evidence is excluded, it is as if she had never articulated her position to the Court. If it is admitted but no weight is put upon such matters as she lacks expertise to opine upon, at least she has been heard.

21. I therefore take the following very practical approach to the issue of admissibility of SR's evidence:

a. in reality, both of SR's statements were admitted as evidence in these proceedings, and read by me, before any argument to the contrary was raised by the Trust; and I have heard oral evidence from SR, without any contrary application by the Trust.

b. Therefore, I can only now consider the Trust's argument of inadmissibility as an application that, having already been admitted, SR's evidence should be disregarded in so far as it ventures into matters of medical expertise.

c. Without wishing to lose any of the respect intended in the term "expert by experience", I am clear that this is not the "expertise" for which the Court looks in questions of medical diagnosis and treatment. I do not regard SR as appropriately positioned to give expert evidence about medical matters. In so far as SR's evidence crosses the line into matters which are properly the domain of medical expertise, it can therefore be of no weight.

d. Looking at it in the round, I regard SR's evidence as the attempt of an intelligent non-expert to understand what is being done for and to her much loved sister. In so far as SR's evidence expresses her observations of HER's experience of or reaction to medical treatment to date, I shall consider it as evidence of fact.

As to the substance of the decision before her, Senior Judge Hilder identified that:

*36. The treatment which SR proposes is not being offered by the Trust. It is therefore not an option which HER could choose for herself if she had capacity to do so, and so not an option before the Court. This Court cannot compel clinicians to give a course of treatment against their own professional judgment. So, to be clear, the decision which I have to make in these proceedings is **not** whether I prefer the Trust's treatment plan or SR's. It is more narrow than that - namely, whether I am satisfied that the Trust's treatment plan is in HER's best interests, taking into consideration SR's views about it.*

37. I accept the medical expertise of both Professor Walker and Dr. Murphy. They both struck me as diligent, careful witnesses. I note that, notwithstanding that they come to HER's treatment from differing specialisms, conscious that the approaches of one impact on the concerns of the other, they are in full agreement with each other as to how to treat HER's complex condition.

38. I also note that Professor Walker's

description, at [192], that he "specialises in complex epilepsy within a large multidisciplinary group (one of the largest world-wide)..... [HER's] case will be discussed at our multi-disciplinary team meeting where other neurology consultants specialising in epilepsy (usually 5-8), neuropsychiatrists, neuropsychologists and neurosurgeons can all give their opinion about further treatment options." This team approach is reassurance against any concern - which in any event I am satisfied is not remotely made out - that clinicians are somehow motivated by personal interests as opposed to HER's welfare.

39. I do not doubt that SR is genuinely motivated by concern for her sister's wellbeing but I do not accept that SR's observations of HER over time are sufficient to cast any real doubt on HER's diagnosis, or on the treatment plans of the clinicians who bear responsibility for her care. Where SR's observations are at odds with the clinicians' informed medical views, I prefer the evidence of the clinicians, who are qualified and widely experienced in the relevant medical science. I am concerned that SR's approach pays too little regard to risk, in pursuit of an agenda which is driven in part at least by historical grievance rather than objective current evaluation. I am concerned that her characterisation of HER's experience in the care of treating clinicians so far is markedly different to the independent observation of HER's own representatives that, actually, HER is experiencing a good quality of life, happy and settled in her care arrangements.

40. I have regard to the support of HER's own representatives for the plan which is proposed by her treating clinicians, and the evidence that, whilst she lacks capacity to understand it, she is compliant with and undistressed by her treatment regime.

Senior Judge Hilder ultimately had little hesitation in finding that the treatment plan proposed by the Trust was in HER's best interests. She also went on to find that for SR to attend certain appointments "*would be likely to be unhelpful, even actually harmful to HER in that it would prevent the appointment from being conducted in the best way possible. I am satisfied that it is in HER's best interests that SR does NOT attend these appointments. It would be helpful if [Tm] and/or [Tl] were able to accompany her instead*" (paragraph 52).

The Trust invited the court to go further and make injunctive orders preventing SR from attending or attempting to attend the appointments. Whilst she was clear she had the jurisdiction to grant such injunctions, Senior Judge Hilder declined to do so, having regard to:

a. the ordinary mechanisms which the Trust has for arranging appointments on that basis - as demonstrated in the plan it will be adopting for matters beyond these proceedings; and
b. SR's own assurances to the Court that of course she will abide by the decision of the Court; and
c. the views of HER's own representatives that injunctions are not necessary;

In similar vein, Senior Judge Hilder also declined to grant an injunction to prevent SR from discussing relevant treatment with HER. She noted that she regarded it

*62. […]as very serious that SR has - she accepts - deliberately tried to 'frighten' HER about her treatment plans - or, more accurately, what SR fears may become her treatment plans. [**246**] SR accepts that she told HER "there was a chance that she would be left with a*

permanently hoarse voice, which would seriously impact her ability to sing." I understand why the Trust seeks the serious measure of injunctions to prevent it from happening again.

63. However, I am also mindful that there are - presently - no restrictions on contact between SR and HER. As Mr. Cisneros points out, in those circumstances, practical enforceability of court-imposed prohibitions must be questionable. In reality, the more effective control would be in respect of contact arrangements. (No one asks the Court to take such steps at present.)

64. More positively, SR herself has now acknowledged that, even in her own desperation, deliberately trying to frighten HER into refusing treatment was not an appropriate thing to do. In my view, that acknowledgment is the best hope that she will not behave in such a way again.

65. At this point, I do not consider it proportionate or appropriate to impose this second requested injunction either. I accept SR's assertion, repeated several times during the hearing, that of course she will abide by the order of the Court. She should have an opportunity to be as good as her word. If she is, then she has nothing to fear from further court proceedings. If she proves not to be, then the Court can reconsider the position in the light of circumstances at the time.

SR had raised the possibility of being appointed a welfare deputy (but no formal application was before the court). At paragraph 67, Senior Judge Hilder made clear that this was a non-starter:

a. in these proceedings, the Court has determined the welfare issue, so there is no need for appointment of a welfare deputy;

b. should circumstances so change that welfare deputyship is a plausible need, it is unlikely - on the basis of experience to date - that SR could be considered sufficiently neutral and objective in matters of HER's welfare to be an appropriate candidate.

In a postscript, Senior Judge Hilder noted that:

72. Following the delivery of this judgement, SR asked whether she would be entitled to copies of HER's medical records. I considered this and, consistent with my decisions set out above, concluded that it would not be in HER's best interests for SR to be provided with copies of HER's medical records, unless HER's treating clinicians consider that such disclosure is in HER's best interests.

Comment

The Trust's application to exclude SR's evidence altogether was perhaps slightly surprising, and Senior Judge Hilder was undoubtedly right to recognise the procedural unfairness of denying SR's expertise in her sister, even if that expertise could not and did not amount to expertise in the medical matters at the heart of the case. We frequently talking about doctors being the expert in the medicine, and family members (and others) being experts in the person – but this is expert in seeking to assist in seeking to understand the person's wishes, feelings, beliefs and values. From the judgment, it appears clear that SR was so dominated by concerns about medical matters that she was not, unfortunately, able to assist the court with the expertise that it was really looking to her for, namely as to HER's wishes, feelings, beliefs and values regarding treatment.

Brain stem death and the courts – what to do where there is no clinical justification for hoping for a miracle

University Hospitals Bristol and Weston NHS Foundation v The Mother of G [2024] EWHC 1288 (Fam) (Peel J)

Other proceedings – family law

Summary

University Hospitals Bristol and Weston NHS Foundation v The Mother of G adds to the small but growing body of case-law on the practice and procedure surrounding applications for declarations of death. From the previous authorities, Peel J derived the following principles:

> *i) There is no statutory definition of death.*
>
> *ii) In **Airedale NHS v Bland [1993] AC 789** the House of Lords accepted the validity of a medical diagnosis of death arising from an irreversible absence of brain stem function. As Lord Keith stated at p.856:*
>
> > *"In the eyes of the medical world and of the law a person is not clinically dead so long as the brain stem retains its function".*
>
> *iii) The rationale for the absence of brain stem reflexes being the criteria for death is explained in Appendix 5 of the Code of Practice:*
>
> > *"The brain stem controls all the essential functions that keep us alive,*
> > *most importantly our consciousness/awareness,*
> > *our ability to breathe*
> > *and the regulation of our heart and blood pressure. Once the brain stem has died it cannot recover and no treatment can reverse this. Inevitably the heart will stop beating; even if breathing is supported by a machine (ventilator)".*
>
> *iv) The clinical definition of death in s2 of the Code of Practice is as follows:*
>
> > *"Death entails the irreversible loss of those essential characteristics which are necessary to the existence of a living human person and, thus, the definition of death should be regarded as the irreversible loss of the capacity for consciousness, combined with irreversible loss of the capacity to breathe. This may be secondary to a wide range of underlying problems in the body, for example, cardiac arrest"; and*
> >
> > *"The irreversible cessation of brain stem function whether induced by intra-cranial events or the result of extra-cranial phenomena, such as hypoxia, will produce this clinical state and therefore irreversible cessation of the integrative function of the brain stem equates with the death of the individual and allows the medical practitioner to diagnose death."*
>
> *v) Once brain stem testing has been administered, and where that test has indicated that a person has died by reference to the criteria set out in the 2008 Code of Practice, if that outcome is the subject of a dispute the case becomes one to be decided in the*

Family Division under the inherent jurisdiction of the High Court.

vi) In those circumstances, if there is a dispute about death, the narrow (but vital) issue for the court is whether the person has died.

vii) If the court determines that the subject of the application is not brain stem dead, then it will proceed to a best interests decision either in the Court of Protection (for an adult who lacks capacity) or in the Family Division (for a child).

*viii) If, by contrast, the court determines and declares that the subject is dead, the question of best interests is not relevant (**Re M (Declaration of Death of Child) [2020] EWCA Civ 164** at para 24). The court can proceed to make a declaration of death, and that withdrawal of medical intervention is lawful.*

*ix) The standard of proof in determining whether the subject of the application is dead is on the ordinary civil basis: para 30 of **St George's Hospital NHS Foundation Trust v Andy Casey and others [2023] EWCA Civ 1092**.*

Peel J also added his own observations to those of MacDonald J in *St George's University Hospitals NHS Foundation Trust v Casey* [2023] EWHC 2244 (Fam) about the procedure to be adopted:

i) The application (or claim) is brought under the Part 8 procedure set out in the Civil Procedure Rules where the claimant (usually the Hospital Trust) seeks the court's decision "on a question which is unlikely to involve a substantial dispute of fact" (CPR 8.1(2).

ii) Usually, where brain stem testing has been carried out, there will be no substantial dispute of fact. Hence, the Part 8 procedure is appropriate for cases of this nature.

iii) Under the rules, the claimant must file witness evidence with the claim form (CPR 8.5(1). In cases of this nature, that will ordinarily be one or more statements from clinicians. It is hard to conceive of any good reason why witness evidence should not be filed in accordance with this rule to set out the procedure and conclusions of the brain stem testing; after all, the case must be proved by the claimant.

iv) The rules also provide for an acknowledgment of service by the defendant within 14 days of service of the claim form (CPR 8.3(1)(a)), which should be accompanied by any written evidence upon which the defendant seeks to rely (CPR 8.5(3). There are then provisions for the claimant to file evidence in reply (CPR 8.5(6)).

v) In my judgment, the strict application of these rules is unlikely to be appropriate, save, as I have suggested at iii) above, in respect of the obligation on the Hospital Trust to file evidence with the claim form. Applications for declarations of death by reason of brain stem testing are usually urgent in the sense that it is unreasonable to wait any length of time for determination of such sensitive matters. Absent legitimate reasons for questioning the validity of the tests and their conclusions, the court is likely to feel able to proceed to an expedited hearing, with a foreshortened timetable, requiring the defendant's evidence to be produced in very short order, or perhaps dispensing with the need for formal evidence from the defendant altogether. This seems to me to be legitimate, and consistent with the overriding objective in Part 1 of the CPR, in circumstances where the evidence in respect of brain stem testing is, or

> *appears to be, incontrovertible. It will, however, all depend on the facts of the case. I do not for one moment suggest that an expedited hearing will always be appropriate, but in my view it is likely to be so where there is no realistic basis advanced for challenging the testing procedures or conclusions.*

Applying these principles to the case before him, Peel J had no hesitation in making a declaration (pursuant to the inherent jurisdiction of the High Court) that the 36 year old woman in question, G, was dead. Some of her family wished her to be given more time; her mother also set out a challenge (not further particularised in the judgment) to the validity of the Academy of Medical Royal Sciences' Code of Practice for the Diagnosis and Confirmation of Death. However, Peel J considered that there was:

> *no purpose in further adjourning the case, and it is appropriate to proceed to a conclusion, dispensing, so far as necessary, with the provisions of Part 8. There is no relevant gap in the evidence which needs filling. The brain stem tests were carried out in accordance with the Code of Practice and there is nothing to suggest that any further inquiry would reach a different conclusion. To allow more time in the hope of a miracle has no clinical justification. The family's wish to retain a vestige of hope is beyond reproach, but it has no clinical or other foundation.*

Comment

Not referred to in the judgment, but to be noted, is that the Code of Practice is under review, with a revised version due to be published for consultation in the near future at the time of writing (June 2024). The basis of the challenge to the Code is not set out in the judgment, but it is clear that Peel J, as with the judges before him, was content to proceed on the basis that the Code, containing as it does a clinical definition of death, was appropriate. For those who want to know more about the dialogue between the courts and the clinicians here, we strongly recommend *The Medico-Legal Development of Neurological Death in the UK* by Kartina A Choong, which Alex reviewed here.

One point of note about the judgment is that, unlike the case of Andy Casey, the question of 'consent' to the carrying out brain stem death testing did not arise. In Andy Casey's case, the Trust appeared to consider that it required such consent (a point discussed in the pages of the Journal of Medical Ethics here). Here, it appears that the Trust carried out the tests confirming that G had died. Whilst the judgment does not descend into detail on this point, one hopes that this followed a suitably sensitive conversation with G's family informing them what was going to happen, rather than a conversation seeking their 'consent.' It may be that the next iteration of the Code of Practice contains further detail about what form such a conversation should take. But for the reasons set out here, Alex at least would hope that it does not suggest that it is a matter of consent.

Reporting on deprivation of liberty

Berg & Baptiste v Tower Hamlets [2024] EWFC 92 (MacDonald J)

Other proceedings – family law

In *Berg & Baptiste v Tower Hamlets* [2024] EWFC 92, MacDonald J granted an application, made on behalf of the BBC investigative journalist Sanchia Berg and a colleague, for permission to

identify the former subject of a child DoL[2] order. The request was made in the context of Berg's series, subsequently broadcast/published, following young people, now aged over 18, who had been subject to DoL orders during their invariably troubled adolescents. The report itself is sobering and important reading for any who works in this field.

The judgment is concerned specifically with the application of the Family Rules Act and the permissions required to identify a child involved in such cases. Its focus was the case of Zahra Codsi (spoiler – obviously the application was successful: rightly and unsurprisingly so given it was unopposed by either the (former) child subject or any other party), now a (capacitous) young adult, who had been subject to a DoL order during her early adolescence. The application was made with Ms Codsi's support and, importantly, an undertaking by the journalists involved not to publish medical reports or information concerning Ms Codsi or other parties to the proceedings or the names of social workers or other professionals involved in her day-to-day care.

Ms Codsi's response to being subject to a DoL order is striking. A social worker engaged in the case and speaking on her behalf reported to the court that it had a *"huge and continuing impact on her life. Ms Codsi did not understand as a young person why she was placed under such restrictions, stating that no one explained this to her. Ms Codsi has further stated… that being the subject of such orders felt like a punishment and has created difficulties for her adjusting to life as a young adult and forming healthy relationships*" (paragraph 10).

The BBC's application was made in the context of the marked increase in the use of DoLS in cases concerning children, the concerns expressed within the Family Division about the use of the Inherent Jurisdiction of the High Court to make such orders and the relative lack of public awareness of such orders.

As MacDonald J sets out in a lengthy and helpful section on the law, proceedings under s.25 of the Children Act 1989 are confidential pursuant to s.97 Children Act and s.12 Administration of Justice Act, 1960. As he notes, citing Munby J (as he then was) in *Re B (A Child)(Disclosure)* [2004] 2 FLR 142, s.12 Children Act does not prohibit the publication of the text or summary of the whole or any part of the order made in proceedings relating to the exercise of the inherent jurisdiction with respect to children and proceedings brought under the Children Act 1989 nor:

> *i) The fact, if it be the case, that the child is the subject of proceedings under the Children Act 1989, a ward of court and the subject of wardship proceedings or of proceedings relating wholly or mainly to his or her maintenance or upbringing;*
> *ii) The name, address or photograph of such a child;*
> *iii) The name, address or photograph of the parties or, where the child is a party, the other parties to the proceedings;*
> *iv) The date, time, place or a past or future hearing of such proceedings;*
> *v) The nature of the dispute in such proceedings;*
> *vi) Anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place;*

[2] The judgment noted that these orders are colloquially referred to as "DoLS orders." To avoid perpetuating the continued mass confusion about the difference between court ordered deprivation of liberty and the DoLS framework, we refer here to "DoL orders."

> *vii) The name, address or photograph of the witnesses that have given evidence in such proceedings; and*
> *viii) The party on whose behalf such witness has given evidence.*

> *20. In Re B (A Child)(Disclosure), Munby J (as he then was) further made clear that s.12 does prohibit the publication of the following information:*
>
> > *i) Accounts of what has gone on in front of the judge sitting in private;*
> > *ii) Documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts, notes of evidence or submissions, and transcripts or notes of judgment.*
> > *iii) Extracts or quotations from such documents;*
> > *iv) Summaries of such documents.*

As provided in *A v Ward* [2010] 1 FLR 1497, what brings a document within the scope of the Administration of Justice Act 1960 is the fact that the information contained within it relates to proceedings, *not* the mere fact of its confidentiality.

As MacDonald J noted at paragraph 22:

> *the information that the BBC seeks to have disclosed to it and, subject to editorial decision making, to publish, the publication of the text or a summary of the whole or part of the orders made in respect of Ms Codsi will not of itself be contempt of court, except where a court having the power to do so has expressly prohibited the publication. **The publication of the transcripts of the hearings in respect of Ms Codsi however, and of the documents utilised at those hearings, or extracts, quotations or summaries of the same, will be a contempt of court unless expressly authorised by the court**.* (emphasis added).

A court, when deciding whether to relax the protection afforded to such material by virtue of s.12 of the Administration of Justice Act 1960 must carry out the usual balancing of rights as set down by the House of Lords in *Re S (Identification: Restrictions on Publication)* [2005] 1 AC 593. As set out in *Re S* at paragraph 23 it must balance the Article 8 rights of the subject – in this case, Zahra Codsi – with the Article 10 rights of the publisher, the BBC. MacDonald J cited the following further useful authorities at paragraph 24:

> *In Re S (Identification: Restrictions on Publication) at [17] it was made clear by the House of Lords that in balancing the competing rights engaged, the court proceeds in accordance with the following principles which comprise, as Eady J observed in Mosley v News Group Newspapers Ltd [2008] EWHC 687 (QB), a very well established methodology:*
>
> > *i) None of the rights engaged has, as such, precedence over the others.*
> >
> > *ii) Where the rights are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.*
> >
> > *iii) The justifications for interfering with or restricting each right must be taken into account.*
> > *iv) Finally, the proportionality test must be applied to each, known as 'the ultimate balancing test'.*
>
> *25. In applying what Lord Steyn described in Re S (Identification: Restrictions on Publication) as the*

> *"ultimate balancing test" of proportionality, it is important that the court consider carefully whether the order that is being sought is proportionate having regard to the end that the order seeks to achieve (JXMX v Dartford and Gravesham NHS Trust [2015] EWCA Civ 96)."*

MacDonald J went on to set out at paragraph 27 that where *"freedom of expression"* as addressed at s.12 of the Human Rights Act 1998 is engaged, Article 10 falls to be considered *"where the material in question is journalistic in nature, to the extent to which that information is already in the public domain or the extent to which it is, or would be, in the public interest for the material to be published."*

In terms of provision of transcripts of proceedings to parties and non-parties, MacDonald J referred to FPR 2010 r.27.9 and at paragraph 29:

> *with respect to the position statements and/or case summaries sought by the applicants, I note that, whilst this court is not part of the Transparency Pilot, the standard Transparency Orders made by the pilot courts can provide for pilot reporters to be provided with, on request, documents drafted by advocates or the parties if they are litigants in person comprising case outlines, skeleton arguments, summaries, position statements, threshold documents, and chronologies and an index to the bundle. This reflects what is now a relatively longstanding practice (see R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2013] QB 618)."*

Rejecting the submission that, in the absence of any dissent by Ms Codsi, her Article 8 rights were not engaged, MacDonald J held:

> *32.* […] *I start by reminding myself that neither the Art 10 right to freedom of expression enjoyed by the BBC and by Ms Codsi, nor the Art 8 right to respect for private life enjoyed by Ms Codsi and by the other respondents to the proceedings, has, as such, precedence over the other. By reason of Ms Codsi's agreement to the disclosure and publication of the information sought by the applicants, the rights engaged in this case do not compete as starkly as in some cases. However, where the material in issue is rendered confidential by operation of s.12 of the Administration of Justice Act 1960, where the rights engaged are nonetheless in tension with each other to a degree, and in circumstances where the rights of the other respondents to the proceedings are also engaged, I consider it remains the responsibility of the court to consider carefully the comparative importance of the competing rights and to take into account the justifications for interfering with or restricting each right."*

Having been informed that a similar application was in the process of being made before Judd J, MacDonald J set down the following guidance to be applied:

> *53.* […] *Where such applications are made, the following matters will need to be borne in mind:*
>
> *i) The application for permission to obtain transcripts from proceedings, disclosure of information from proceedings and permission to publish material from proceedings should be made in the first instance to the court in which the original proceedings were conducted. Consideration can thereafter be given to the correct tier of Judge to hear the applications, having regard to the allocation guidance.*

ii) The information sought by applications of this nature is likely to concern proceedings that have concluded. In the circumstances, careful consideration will need to be given to how service of the application concerning disclosure and publication will be effected on the parties to the concluded proceedings, whose rights may be engaged. In cases where only the court which dealt with the proceedings has the contact details for the former parties, it may be appropriate to direct that the court serves the application on such parties.

iii) Where it becomes apparent that there is a dispute regarding the provision and publication of transcripts, it may be necessary for the court to adopt a two-stage process, whereby the transcripts are obtained first, before the court determines whether and to what extent the material in those transcripts can be published.

iv) Where however, as in this case, there is no dispute as to what material should be published from the series of short hearings that occurred (the applicants having indicated that they do not seek to publish medical reports or information concerning Ms Codsi or other parties to the proceedings or the names of the names of social workers or other professionals involved in the day-to-day care of Ms Codsi) it will not ordinarily be necessary for the court to have the transcripts before determining the application.

v) Before determining the application, the court considering the question of disclosure and publication will need to ensure that it is aware of the existence any prior orders made in the original proceedings to regulate publicity following the conclusion of those proceedings.

vi) Where the application is granted, there will need to be clarity as to who will apply for the transcripts and seek any documents from former parties or legal representatives which the court has given permission to publish.

Comment

MacDonald J's judgment was made in the shadow of the President's judgment in *Re X (Secure Accommodation: Lack of Provision)* [2023] EWHC 129 (Fam) and repeats the President's criticism of the state's *"wholesale failure to provide adequate resources to meet the needs of the most needy and vulnerable young people"*. The BBC reports that the judgment enabled are vital reading for practitioners and the general public. While the judgment is made in the Family Division and in the context of orders made under the inherent jurisdiction, the read-across to applications within the Court of Protection is clear albeit, as MacDonald J observes, Ms Codsi's case was remarkable, and likely to be unusual in the context of the Court of Protection, given both her capacity and wholehearted support for the application made. In that context, though, it is worth observing MacDonald J's note of caution at paragraph 34 that even a person enthusiastically wishing to have material disclosed about them has "inalienable" rights:

> *Ms Codsi has a right to respect for private life. The ambit of that right under Art 8 is a wide one, encompassing not only the narrow concept of personal freedom from intrusion but also Ms Codsi's psychological and physical integrity, personal development and the*

> *development of social relationships and physical and social identity (see Botta v Italy (1998) 26 EHRR 241 at [32] and Bensaid v United Kingdom (2001) 33 EHRR 205 at [46] and [47]). In the context of the background set out above, Ms Codsi makes plain that she continues to struggle with her mental health and has had difficulties adjusting to life as a young adult and forming healthy relationships. In these circumstances, on the face of it, importance attaches to Ms Codsi's Art 8 right to respect for private life when placed in the balance.*

It might therefore, in some circumstances, be the case that a court might take the view that the person needs to be protected from themselves as regards the disclosure of material from the proceedings.

.

MENTAL HEALTH MATTERS

The Calocane appeal

R v Valdo Calocane [2024] EWCA Crim 490 (Court of Appeal (Carr LCJ, Edis LJ, Garnham J))

Criminal offences

The Solicitor General sought leave to refer the sentences imposed on Valdo Calocane to the Court of Appeal for the murders of Barnaby Webber, Grace O'Malley-Kuman and Ian Coates in a series of attacks he committed in Nottingham in June 2023, which also left three other people very seriously injured. The application was made under s. 36 of the Criminal Justice Act 1988 on the basis that the sentences were unduly lenient. In a unanimous judgment by Lady Chief Justice Carr, the Criminal Division of the Court of Appeal refused the application. The tragic facts of the case were widely reported in the media and are not repeated here, save to say that the murders and attacks were brutal, senseless and entirely unprovoked.

Mr Calocane had been sentenced by Turner J in January 2024 on a restricted hospital order under ss.37/41 Mental Health Act 1983, following the "*unanimous opinion of the medical experts retained by the prosecution and the defence was that the offender was suffering from paranoid schizophrenia at the time when he committed these offences*" (paragraph 4) "*It is said that the judge failed to reflect sufficiently the multiple aggravating features of the offending when arriving at an appropriate minimum term of imprisonment under a life sentence. Further, the judge failed to take sufficient account of evidence to the effect that the offender's culpability was not extinguished by his mental illness, and the extent of the harm caused. He was wrong not to include a penal element in the sentence. It is submitted that the overall seriousness of the case required the imposition of a life sentence of imprisonment with a hospital and limitation direction pursuant to s. 45A of the 1983 Act ("a hybrid order")*" (paragraph 5).

Mr Calocane, now 32, had come to the UK as a teenager and had graduated with a degree in mechanical engineering from Nottingham University in 2022. His mental health problems did not appear to have started until 2019, and he had no previous convictions (though he had come to the attention of the police on several occasions).

In the criminal proceedings, Mr Calocane's mental health was assessed by three consultant forensic psychiatrist experts, two instructed by the defence and one by the prosecution. A fourth forensic psychiatrist was instructed by the prosecution to review those three reports. A fifth psychiatrist, Mr Calocane's treating clinician at Ashworth, provided a further report prior to sentencing in January 2024. The judgment summarises the reports, setting out what appear to be a history of mental health problems which caused Mr Calocane to interact with health and crisis services, and led to his detention under the MHA in 2020. Mr Calocane is believed to have stopped taking his medication repeatedly, becoming increasingly unwell when he did so. He was lost to services from September 2022 until May 2023, when he attacked two people. He appears to have been very unwell by June 2023. He was transferred from prison to Ashworth in November 2023.

There appeared to be little disagreement in the medical evidence, and the shared opinion of the psychiatrists was that Mr Calocane had paranoid schizophrenia both prior to and at the time of the offences. "*Although he was able to understand the nature of his conduct (although Dr Shaffiullha did not agree with that assertion), at the time of the offences, his recognised medical condition resulted in an abnormality of mental functioning, namely psychosis, which substantially impaired*

his ability to form a rational judgement and to exercise self-control" (paragraph 39(ii). There was no evidence of criminal behaviour prior to the onset of mental illness, and his acts of aggression were linked to psychotic episodes. The psychiatrists who expressed a view on the issue agreed that a hospital order with restrictions was the appropriate disposal of the criminal case.

At sentencing, Turner J determined what the appropriate carceral sentence would be pursuant to sentencing guidelines. Turner considered the options of both a hybrid order, and a hospital order with restrictions, and "*accepted the evidence of Professor Blackwood who concluded that, because the offender's risk to others was driven by his psychotic illness, the risk he posed was best managed by forensic psychiatric services…The regime under a hospital and restrictions order avoided situations in which the risk posed by the offender might increase, or his mental condition worsen, because of delays in recalling and re-hospitalising him*" (paragraph 51). "*By contrast, a period of imprisonment risked non-compliance with medication, a deterioration in the offender's mental state, and an increased risk to others. The Parole Board would be likely to follow the recommendation of the clinicians and Tribunal as to release. Monitoring would principally be by a probation officer: recall to prison, and subsequent transfer to hospital, might take some time*" (paragraph 52). In these circumstances, Turner J had considered "*that the regime which provided the greatest level of protection for the public was a hospital and restrictions order*" (paragraph 53).

The Solicitor General sought to persuade the Court of Appeal that this disposal had been unduly lenient. After reviewing the statutory scheme, sentencing guidelines and relevant authorities, the Court of Appeal emphasised that *"[t]his is a challenge to the decision of a highly experienced judge who was immersed in the procedural history and detailed evidence of the case. His decision was reached after two days of submissions and oral evidence from three appropriately qualified medical experts"* (paragraph 74). The Solicitor General was not arguing that Turner J had made an *"error of principle in his approach* […] [i]*nstead, the challenge is to the judge's evaluative assessment of which option was appropriate*" (paragraph 75). It was not suggested that "*a hospital and restrictions order would be wrong in law or as a matter of principle. Instead the parties advanced competing submissions as to whether one option was better than the other. For the prosecution it was said that a hybrid order was appropriate; the defence advocated a hospital and restrictions order*" (paragraph 76).

The Solicitor General's referral process is for sentences which are 'unduly' lenient, and the scheme is designed to deal with cases where judges have fallen into "gross error". In "*sentencing an offender who satisfies the criteria in s. 37, the court has to have regard to both the need for punishment and the protection of the public*" (paragraph 79). While it was accepted that there were aggravating factors in this case, in determining the appropriate sentence, the Court of Appeal considered that Turner J had appropriately determined the uplift to the sentence starting point. "*In determining the final disposal, the judge, as he recognised, had to consider whether a penal element was necessary. Because the offender's level of retained responsibility was low, and in circumstances where the offending would not have taken place but for the offender's schizophrenia, the judge was entitled to conclude that a penal element was unnecessary*" (paragraph 84). Carr LCJ set out the practical considerations Turner J considered in reaching his decision:

> *86. The judge properly took into account, first, that under the s.45A regime, the*

> *Parole Board would be likely to follow the release recommendation of the clinicians and Tribunal; secondly, that monitoring thereafter would be carried out principally by a probation officer rather than a mental health practitioner; and thirdly, that recall to prison, and subsequent transfer to hospital, might take some time. He reached what was the perfectly reasonable conclusion that a period of imprisonment, as might follow the making of a hybrid order, risked non-compliance with medication, a deterioration in the offender's mental state, and a consequential increased risk to others.*
>
> *87. By contrast, as the judge said, the ss. 37/41 regime avoided situations in which the risk posed by the offender might increase, or his mental condition worsen, because of delays in recall and re-hospitalisation. Such an approach, focussing on the question of public protection, was entirely in line with the comments in Edwards at [12] as set out above, namely "the graver the offence and the greater the risk to the public…the greater the emphasis the judge must place upon the protection of the public…"*

Where Mr Calocane was considered to "*always present an extremely grave danger to the public if he is ever released* […] [t]*hat danger may be mitigated by medication if he is compliant with the treatment regime and if the medication is effective* […] *the extreme violence perpetrated by this offender makes it very likely that, whichever of the two options had been adopted, he will spend the rest of his life in a secure hospital*" (paragraph 90). Carr LCJ found that:

> *…the risk caused by any non-compliance with the medication regime or any failure of the medication to control the psychosis is so high that release into the community can properly be assessed as "very unlikely". On this approach, it is even harder to label the hospital and restrictions order unduly lenient, since it will have the same effect as the only other available option.*

While expressing profound sympathy for the victims and their families, the Court of Appeal concluded that there had been no error in the sentencing exercise, and refused leave.

A legal framework under intense stress: the MHA 1983 under the judicial microscope

One of the most difficult areas where the law runs up against practical realities is in relation to addressing the consequences of a mental health crisis requiring potential admission to hospital. In theory, the Mental Health Act 1983 should provide a seamless framework, complete with timelines, to allow:

- The safe custody of a person who has been brought to an appropriate place of safety by the police after having been found in a public place in mental health crisis;
- The multi-disciplinary assessment and, where appropriate, admission of that person to hospital to assess and treat them.

In practice, it is often simply not possible to operate that framework within the timeframes provided for by Parliament.

What then happens, or should happen in such case has been considered by Theis J in *Surrey Police v PC & Ors* [2024] EWHC 1274 (Fam). The chronology of the case requires to be set out in full, as a snapshot of the system under strain.

> *4. On 24 April* [2023]*, PC was arrested regarding an offence of criminal damage. The arresting officers had concerns in respect of PC's mental health. Although consideration was given as to whether he should be removed to a place of safety under the*

Mental Health Act 1983 an ambulance was called. Due to delays in the ambulance arriving the officers decided to take PC to a hospital that was operated by Surrey and Sussex NHS Healthcare Trust ('the Trust')).

5. PC was taken to the Emergency Department of the East Surrey Hospital where he was given a 1mg tablet of lorazepam at 10.22, with a further 2mg dose at 10.47. PC was assessed by a psychiatric liaison nurse employed by the Trust, the notes describe PC as 'agitated, aggressive, shouting and swearing, flushed'. The plan was to see how his mental state was over the next 24 hours given the suggestion of drug use. He was medically fit to be discharged and PC was taken to a police station.

6. The police raised concerns about the circumstances of PC's discharge from hospital. The Trust responded that PC was discharged from the psychiatric liaison service and the pathway for people under arrest is for them to be assessed by the Criminal Justice Liaison and Diversion Service ('CJLDS') and that was the plan in place for him.
7. PC arrived at the Police custody centre just after noon. Following being booked in he is recorded as having spent the rest of the afternoon sleeping in a cell.

8. The following morning there remained an issue regarding PC's mental health. He was seen by the CJLDS nurse. The Approved Mental Health Professional service ('AMHP' pursuant to s114 Mental Health Act 1983 'MHA 1983') at the local authority was contacted by CJLDS. They did not arrange a Mental Health Act assessment as they were advised that PC was not fit to be assessed. They suggested that he was kept in the police station as a place of safety under s 136 MHA 1983, which was done at 10.44. CJLDS and the Trust attended a meeting and updated the police about midday, informing them that PC was in line for the next bed. The local authority were advised that his PACE clock would expire around 12.30 pm so there was no legal framework to hold PC after that time. The local authority also suggested that PC was transferred to a Health Based Place of Safety ('HBPoS') as soon as one was available.

9. During the morning the records describe PC's presentation was mixed; at times he appeared florid and delusional and at other points was aggressive and threatening self-injury. By 11.58 the police noted their very real concern that he remained in their custody and that PC was 'clearly having a mental health crisis'.

10. At 2pm there was a meeting to discuss the availability of a bed at a place of safety. Although different accounts are given by the various public bodies as to the availability of beds, the result was nothing was available. During the afternoon the nurse who was responsible for healthcare in police custody became increasingly concerned. The local authority state they did not receive any update regarding PC's presentation nor were they advised that he could be assessed under the MHA 1983.

11. At around 7pm the AMHP and psychiatrists arrived at the custody centre. Both psychiatrists recommended that PC be detained under s2 MHA 1983, however there was no bed available for him. By 7.46pm it was known that there may be an issue in respect of the legal framework that would enable PC to remain in police custody until a suitable bed was found.

12. The detailed chronology prepared by the Trust sets out the efforts made by them to locate a bed for PC. At around this time the police referred to PC by a different name and he was not known on the Electronic Health Record, which caused some confusion.

13. By just before 10 pm the police record they were informed by the Trust there was no bed available for the foreseeable future, although this description of the time frame is disputed by the Trust. In any event, it was said there would be an urgent review in the morning. Around that time PC was becoming more agitated in the cell, he started to demand sedation and the custody sergeant described PC as 'unmanageable' at this time.

14. The police asked for help stating they required help from a mental health professional to keep PC safe. The Trust's on call Registrar agreed to prescribe sedative medication and the Home Treatment Team ('HTT') East & Mid Surrey confirmed that lorazepam was available in stock and the HTT Night Nurse would take it to the custody centre.

15. In the early hours of the next day PC's presentation deteriorated further. He was recorded as being 'out of control'. He was placed in a body cuff. The lorazepam arrived about the same time and a health care Practitioner (nurse), employed by Mountain Healthcare was able to give the medication to PC. It was 2x1mg tablets, which he eventually took with water whilst still in the body cuff. Due to high level of concern about PC he had been on constant observation since the previous evening.

16. The lorazepam had a calming effect and the body cuff could be removed. At 6.32 the custody sergeant reviewed PC's ongoing detention and noted the real concern about PC's continuing detention describing it as 'lawful and the only reasonable place for him to be held until the appropriate services facilitate their duty of care'.

17. During the morning conversations took place between the police and Trust. PC became agitated, at times he was placed in a body cuff and restrained by five police officers. A further period of detention under s 136 MHA 1983 was implemented.

18. Ongoing discussions between the public bodies covered the limits to the use of s 136. At one stage a senior manager at the Trust was reported to suggest the police could rely on the common law doctrine of necessity to detain PC, the Trust do not accept this report. The AMHP advised that common law could not be used but that a second s136 could be used, which accorded with the advice from the police legal adviser. They considered whilst it was not good practice it was lawful. There were discussions as to whether an application to court would be necessary but none of the public bodies alerted the Official Solicitor.

In the early evening of 25 April 2023, the police made an urgent out of hours application to the court to authorise the deprivation of PC's liberty in the police custody suite due to their concern that a second period of detention under s 136 would expire later that evening. Initially the application was made seeking orders in the Court of Protection, they were ultimately made under the inherent jurisdiction due to the urgency of the situation and to cover the short period of time before a bed was available.

The hearing took most of the evening due to delays in making effective contact with the relevant public bodies to enable them to join the

urgent hearing. The recitals to that order were attached to the judgment, and included the interesting observation that:

> *On the basis of the information before the court, it agrees with the submission on behalf of the Official Solicitor that it cannot authorise the ongoing deprivation of PC's liberty under the Mental Capacity Act 2005 as he would be ineligible due to the provisions of schedule 1A.*

The next morning, PC had been detained under s.2 MHA 1983 and conveyed to a bed. Theis J listed the case for a further hearing the next morning.

In her judgment, Theis J recorded the "overarching concern" of the Official Solicitor in that "*PC was clearly vulnerable and ill yet had been left in a police custody suite with what the Official Solicitor considered was inadequate care and support. In The Mental Health Act 1983 (Places of Safety) Regulations 2017 SI 2017 No 1036 Parliament limited the circumstances in which a police custody suite may be used as a place of safety, yet there was no apparent urgency or significant concern about this situation on behalf on the relevant statutory agencies*."

Theis J then identified a further series of specific concerns outlined by the Official Solicitor:

> *23. First, the AMHP service upon initial request on the morning of 24 April 2023 appears to have delayed the mental health assessment on the basis that PC may have been intoxicated. By the time of that initial request PC had been detained for 24 hours. The local authority state they were told PC was intoxicated, which is not accepted by other agencies. Whatever was said the essential facts raised further questions that were not followed up, when they should have been.*
>
> *24.Second, by 2pm on 23 April the AMHP service further delayed any assessment on the basis that PC may have been intoxicated but they had not seen PC, he had by then been in custody for about 29 hours. The local authority state this view was based on prior information the AMHP received which had not been updated. Again, this raised further questions that were not followed up, when they should have been.*
>
> *25. Third, by 7.46 pm on 24 April it was known to the police and the local authority that there might be an issue as to the legal framework under which PC was detained in police custody but it took a further 24 hours, and only after intervention of the court, for there to be any proper consideration as to the legality of PC's situation and for him to have any form of independent representation.*
>
> *26. Fourth, the Official Solicitor has concerns about the circumstances of the lorazepam being given in custody. It was prescribed by a medical practitioner who had not seen PC. The Trust have acknowledged this concern and confirmed it is raising it internally. Also, it was given to PC whilst he was in the body cuff and no consideration is recorded as having been given as to whether PC had capacity to consent to being medicated with lorazepam.*
>
> *27. Fifth, on the morning of 25 April there was no recorded handover between the AHMP from the Emergency Duty Team, which the local authority accept. By 2.45 pm on that day it was clear the AMHP who had conducted the first assessment was not going to be available until later in the day to make any application for admission. Effectively, there was no means to admit PC to hospital under s 2 MHA 1983 unless a further assessment was undertaken. The Official Solicitor*

> *considers that this could and should have been obvious by just after 9.30 am that morning when the AMHP realised they could not access either of the medical recommendations of the previous day. The local authority state it was apparent to the AMHP that there was no bed, so a further assessment would not have resolved the issue regarding the ongoing legal framework regarding PC's deprivation of liberty.*
>
> *28. Whilst the Court and the Official Solicitor recognise the difficulties the public bodies are operating under in such a difficult and dynamic situation it is nevertheless important the focus remains on the relevant legal authority being exercised to detain PC. Article 5(1) ECHR guarantees that no one will be deprived of their liberty save in accordance with a procedure prescribed by law. The notion of 'lawfulness' requires a fair and proper procedure offering the person sufficient protection against arbitrary deprivation of their liberty.*

Theis J was invited to depart from the general rule in proceedings under the Court of Protection Rules 2017,[3] the Official Solicitor making an application for either all her costs to be paid by the local authority, or for her costs to be shared between the public bodies. The application was founded on the late stage the Official Solicitor was notified of the application and the lack of clarity about the legal basis for the application. Theis J acceded to that application:

> *39. I have reached the conclusion that there are reasons to depart from the general rule in this case. It must have been clear that in bringing the matter before the court PC was going to need to have a voice and be able to participate in the proceedings, either directly or indirectly. Whilst the police made the application I accept the submissions on behalf of the Official Solicitor that in this situation the local authority had the most experience and, in my judgment, should have taken a more proactive role, bearing in mind their statutory responsibilities and the growing uncertainty there was about the applicable legal framework. In the end, the police had little choice but to make the application because of the situation they found themselves in. There should be been more active collaboration between the relevant public bodies.*
>
> *40.As to what order should be made I am satisfied the local authority should pay the Official Solicitor's costs. The Official Solicitor should have been given more notice of this situation and the potential of an application being made. The local authority could and should have taken more active steps to ensure that was done and to support the other public body, the police, who are less experienced in these type of applications.*

Theis J then endorsed the guidance advocated by the Official Solicitor for future cases that involve an application to the court to authorise the deprivation of an individual's liberty in the police station either under the inherent jurisdiction of the High Court or section 4A of the Mental Capacity Act 2005.

> *(1) Any such application should only be made in exceptional circumstances. Every effort should be made to avoid*

[3] Although, technically, it may have been that even if the application started in the Court of Protection, Theis J was actually sitting at the material times as a High Court judge exercising the inherent jurisdiction, in which case the CPR, rather than the COPR would have applied. However, the starting point in welfare cases is the same: see *Redcar & Cleveland Borough Council v PR* [2019] EWHC 2800 (Fam), so nothing would turn on this.

such an application having to be considered by the Out of Hours judge.

(2) If such an application is made, or is being considered, it should be brought before the court as soon as possible during normal court sitting hours. In particular, as soon as an issue is identified that there may not be a suitable legal framework for continued detention to take place.

(3) Each public body involved in the circumstances of the deprivation of liberty should be joined as a party to the proceedings and/or given sufficient notice (preferably during office hours) that such an application is going to be made and the court will consider if they should be joined as a party. In PC's case that would have included the local authority that provided the AMHP service, the Trust which is providing/commissioning the bed and the police force which is physically detaining the person.

(4) The application should be supported by evidence, ideally in the form of one statement, which explains the relevant chronology, the steps that have been taken to find an alternative and what care and support the person will receive/has received whilst in police custody and the relevant legal framework. Should the application include authority for physical or chemical restraint the legal basis of that restraint should be set out clearly, as well as the underlying factual/medical evidence as should details of the nature of any such restraint sought.

(5) The Official Solicitor should be alerted in good time prior to any application being issued.

(6) The relevant public bodies involved in the application must actively consider in advance of any application being issued how the person who is deprived of their liberty will be enabled to participate in the proceedings. If this is to involve the Official Solicitor acting as litigation friend or advocate to the court consideration must be given by the public bodies as to how to provide the Official Solicitor security for her costs.

Comment

Perhaps the most striking feature of this case is that an application was brought at all. Roaming the country as we do both virtually and in person and hearing in different ways from those involved on all "sides" (as it can all too often feel) of situations where stretched public bodies are addressing the consequences of mental ill health, we can attest that the particular cocktail of circumstances described above may be unusual, but they are undoubtedly not unique. Communication difficulties, electronic records failures, confusion over lines of responsibility, shortages of beds, and differing legal advice being given to different people with different degrees of confidence are all too common. What is very much less common is for one or other of the bodies in question actually to bring an application to court to seek to resolve the situation in real time. The case is a helpful and important reminder that (1) the courts are available 24 hours a day, 7 days a week, 365 days a year to assist; but (2) advanced judicial grumpiness will ensue if recourse is not sufficiently timely.

It is perhaps of interest that the Official Solicitor did not on PC's behalf invite the court to determine whether he had, in fact, been lawfully deprived throughout the relevant period. It may well have been that the Official Solicitor took the view that, even if tenuously, there was sufficient authority at all points up and until the application was made (at which point s.4B MCA 2005 would have kicked in). But the fact that there were so

many doubts about the position being expressed by different people at different points is problematic, both as regards legal literacy, but more fundamentally as a sign of a legal framework under intense real world stress.

Guidance which should not be needed

The Health Services Safety Investigations Body (HSSIB) has published an investigation report which should not be needed. Following on an from an interim report last year, it sets out (based on a case-study of a woman called 'Leah') all the problems that arise where children and young people with mental health needs are being housed, often for sustained periods of time, in paediatric wards in acute hospitals. Whilst it seeks to make the best of a bad job by framing it as how the design of paediatric wards can be improved to cater for the needs of such children, the reality is that admission to such a ward should be the exception, and solely for situations where the primary need is one that can only be met in a physical health setting. As the report hints, and we are very aware, it is all too often now the norm that such wards are being used to pick up the absence of appropriate community settings, and whilst statutory services argue about who is responsible. One striking absence from the report is any discussion of the (distinctly questionable) legality of many of the situations which are occurring day in, day out.

THE WIDER CONTEXT

The inherent jurisdiction – a case, guidance, and a challenge from Ireland

Two recently published decisions of Cobb J have shone a light on the lesser spotted beast that is the inherent jurisdiction of the High Court to protect adults who are vulnerable[4] but who do not fall within the scope of the Mental Capacity Act 2005. Both decisions in *Wakefield Metropolitan District Council v FH* & Anor relate to the same couple; the first dates from 2021, but was not published until very recently, at the same time as the second decision from 2024.

The couple had been married for some sixty years by the time of the first hearing, which resulted in an oral judgment, now transcribed. The wife, FH, had very extensive care needs, which had been provided by her husband, MH, who himself had his own care needs. Cobb J noted (paragraph 4) that "*one important agreed fact on the information that I have received is that they deeply love each other and want to be together.*" However, in the next paragraph, he identified that "[o]*ver a period of time stretching over years, a number of concerns have been raised with the local authority adult social services about the dynamics of the relationship between MH and FH in which it is said that physical and verbal abuse have been a feature. JS [the social worker's] professional view is that FH is subject to coercion and control by MH, who it is said manipulates her.*" FH had been admitted to hospital in circumstances of very considerable distress, having apparently fallen out of bed. Cobb J noted from the audio recording of the Care Line phone call made (it is not clear by whom) that "[w]*hat was striking about MH's response to that situation was that he appeared to show no empathy or care for her in her situation but, on the contrary, demonstrated high levels of verbal abuse of her, both directly to her and at her. It makes, if I may say so, extremely distressing listening*" (paragraph 6). It was those circumstances which led to the urgent application being made under the inherent jurisdiction for an order protecting FH and facilitating her move into a care home.

Cobb J identified that:

> *17. On the evidence that I have read, and I am conscious that of course the evidence that I have read has not been subject to testing or other live scrutiny, and on the submissions that I have heard from the local authority, from Mr Kennedy on FH's behalf, and from MH himself, I declare myself satisfied that this is a case in which the court could, and indeed should, exercise exceptionally its inherent jurisdiction in respect of FH. The narrative statement of JS, summarising a history of coercion, control and abuse over a number of years, was, I must emphasise, brought vividly and worryingly to life by the content of the audio recording which I heard before the hearing began. That audio recording, in my judgment, revealed an unacceptable and, in some measure, shocking level of intolerance, abuse and lack of empathy and care on the part of MH towards his wife. While the circumstances in which that recording were taken may have been circumstances of very considerable stress and pressure to MH, that does not in my judgment explain or excuse that which I heard, including the language and the offensive names which he called FH during the course of*

[4] This is the term that the High Court uses, as opposed to (for instance) "adults at risk" as per the Care Act 2014 approach.

fifteen minutes of fairly unrestrained abuse.

17. In my judgment, FH requires the protection of the court at this stage to ensure that she does not return, at this stage, I emphasise, to the home which she shares with her husband and into his primary care. I am satisfied that the local authority has made out its case for an order which will ensure that FH remains at Dewsbury Hospital until she is fit for discharge, and that upon that stage being reached in her recovery, that she then be transferred to a care home, probably HH Care Home, for the immediate future.

18. I am satisfied that where it is necessary, it is indeed proportionate for modest forms of restraint to be used to ensure that FH is enabled to make that journey and then remain at the care home. I am comforted to know that arrangements will be made for MH regularly to visit FH, subject to him testing negative for Coronavirus through the lateral flow tests, and that short visits will be permitted to enable them to see each other. In the meantime, further assessment can and should be made of her care and support needs so that plans for her return home can be contemplated, evaluated and, as appropriate, implemented.

19. I will authorise Wakefield Metropolitan District Council to convey and place FH at such a care home as I have indicated, because I am satisfied that it is necessary, proportionate and plainly in her best interests. I propose to direct that, within seven days of FH's placement at an appropriate care home, the local authority shall serve a statement updating the court as to MH and FH's views, wishes and feelings, whether she has settled, providing details of the care and support FH is in receipt of, and filing an interim care plan for her future care.

By 2023, further proceedings were on foot. In the March 2024 judgment, Cobb J was at pains to emphasise (paragraph 10) that FH had capacity to make the relevant decisions, and to conduct the proceedings. He also emphasised that he had:

> *in this particular case, at this particular time,* […] *taken great care to focus on whether there is a need to exercise the inherent jurisdiction, and that if exercising the jurisdiction, I make orders which are both proportionate to the safeguarding issues which lie at the heart of them, and which interfere with the Art.8 rights under the European Convention of Human Rights of FM and of MH only to the limited extent appropriate* (paragraph 11).

Sadly, it appeared that the problems which founded the orders made in 2021 had continued, such that:

> *16. The continuation of the behaviours to which I refer reinforce for me the necessity of protecting FH, so far as this court can do, from the abusive conduct of her husband. In my judgment, a continuation of protective injunctive orders under the court's inherent jurisdiction remains a proportionate response to the risks about which I have read. I have no doubt at all about the love which FH has for MH, and MH for his wife, but MH's aggressive conduct as observed by professionals and care staff, his ungoverned temper at times, his interference with the proper provision of care for FH in the care home, render the making of injunctive orders necessary in FM's best interests. FH rightly accepts that she is a vulnerable person. I can see that for myself and, in this way, the intervention of the court remains utterly justified.*

The parties before the court (but not MH, who had not participated) agreed as to the nature of the orders to be made:

> *18. It is agreed that for as long as supervision and monitoring of MH's relationship with FH is required at Care Home (Y), or elsewhere in the community within resources and/or other facilities provided by the local authority, the funding of those arrangements under the Care Act 2004 will fall properly to the local authority. It has been agreed today that the Trust will accept responsibility for the funding of supervised or supported contact between FH and MH during any time that FH is accessing their medical services. In the meantime, the plan is that the arrangements for MH to see FH will continue with the supervisor being positioned either at the door, or just outside the door of the room where FH is accommodated, but in the line of sight of the supervisor.*
>
> *19. The order that I propose to make prohibits MH from removing FH from her place of residence – currently Care Home (Y) – and that order will continue until or unless I discharge it. MH is further injuncted from removing FH from any of the Trust premises, should FH be relocated to one of the Trust premises in the future. The order will prohibit MH from having direct contact with his wife without third party support, as agreed with the local authority, whilst FH is the Care Home or elsewhere within the community, or as agreed with the Mid Yorkshire Teaching NHS Trust in the event she is resident on Trust premises. Those orders are now to be final orders, although of course it will be open to any party, including MH, to apply to vary or set aside those orders on notice to the others.*

Comment

Given that the inherent jurisdiction can only be used to fill in a statutory gap, it is perhaps of note that both (relatively brief) judgments do not include consideration of any of the relevant statutes that might be in play (this list being drawn from our updated guidance note on the inherent jurisdiction), including s.42 of the Family Law Act 1996 (non-molestation orders which victims, but not public authorities, can seek), the Serious Crime Act 2015 (s.76: which creates a criminal offence of controlling or coercive behaviour where A and B live together and "are members of the same family"), a Domestic Abuse Protection Notice or Order under the Domestic Abuse Act 2021, a Domestic Violence Protection Order under ss.24-33 of the Crime and Security Act 2010, a Stalking Protection Order under the Stalking Protection Act 2019 or other civil remedy such as the Protection from Harassment Act 1997. As a matter of logic, all these remedies must have been considered and in some way found not to meet the needs of the situation.

In this context, it is also very interesting to read the observations of the Law Reform Commission of Ireland on the use of the inherent jurisdiction – a concept which applies in essentially exactly the same way in Ireland as it does here. In Volume 1 of its recent report on adult safeguarding, it notes that its main advantage is its flexibility (paragraph 1.51), but:

> *1.53.* [t]*he inherent jurisdiction also has significant limitations. While this "safety net" is useful, there is a great need for "precision, clarity and certainty", given the seriousness of the matters at hand. Relying on a statutory framework instead of the inherent jurisdiction would avoid the current "potential for over subjectivity" and ensure greater "transparency, democratic oversight and legal certainty". Unlike the inherent jurisdiction, a statutory framework allows for clear thresholds and*

> *safeguards, ensuring that the rights of those who may be subject to an order are appropriately, and consistently, weighed and considered. Only a statutory framework can establish clear standards and thresholds for intervention by reference to which decisions can be assessed and, if necessary, appealed. There is a strong constitutional interest in requiring that potentially very intrusive powers should be conferred, and delimited, by the Oireachtas* [the Irish Parliament]. *The use of the inherent jurisdiction to detain individuals also poses problems in light of Article 5 of the European Convention on Human Rights.*
>
> *1.54. Practically, a statutory framework would also provide greater certainty for relevant professionals in the administration of the care and treatment of persons who are subject to orders currently provided under the inherent jurisdiction. The inherent jurisdiction also necessarily involves recourse to the High Court, which can be a costly and cumbersome process, particularly in comparison to other courts such as the District Court.*

The older child and medical treatment decisions – mental capacity or competence?

Re J (Blood Transfusion: Older Child: Jehovah's Witnesses) [2024] EWHC 1034 (Fam) (Cobb J)

Other proceedings – family (public law)

This was a a characteristically thoughtful judgment from Cobb J, concerning whether authorisation should be given to provide a 17 year old Jehovah's Witness with blood products in a planned operation. In analysing the legal framework, Cobb J was taken to the decision of the Court of Appeal in *E v Northern Care Alliance NHS Foundation Trust and F v Somerset NHS Foundation Trust* [2021] EWCA Civ 1888 (*'E and F'*). He resisted, however, the submission by the Trust that the decision set out the proposition that there can be a point in cases involving the medical treatment of those under that 18 that "*the discretionary powers on the court to intervene convert into a duty on the court to intervene to preserve the young person's life*" (paragraph 33).

Cobb J noted at paragraph 35 that:

> *I do not interpret the remarks in Re E & F set out in the foregoing paragraphs (§33/34) to mean that where proposed medical intervention carries with it any risk of loss of life, the court is obliged to authorise treatment so as to preserve the young person's life. That would be to negate the lodestar of welfare in the widest sense. Nor do I believe that those remarks are intended to contradict the earlier remarks about the two transcendent factors in play when considering the welfare of a mature young person (see [50] Re E & F, and §31 above). When considering authorising medical treatment which is opposed by a competent young person (using 'competent' in the context of Gillick above), it is crucial that the court should consider, among other factors, the chronological age and level of maturity of the individual young person, their intelligence and understanding of the issues and risks, the nature of the specific decision to be made, objectively the full set of risks involved both ways (of having or not having the treatment and its consequences), the reasons given by the young person for their decision, and the prospective quality of the life to be lived should the unwanted treatment be successful in preserving the minor's life. As the Court of Appeal made clear in Re E & F it is important that the court identifies:*
>
> > *"… the factors that really matter in the case before it, gives each of them*

> *proper weight, and balances them out to make the choice that is right for the individual at the heart of the decision" ([52]).*

Applying the legal framework set out in *E & F* to the facts of the case before him, Cobb J found that, although it was very small, the risk of serious haemorrhaging did exist, and that there was a need for intervention, such that the need to consider authorising the giving of blood could not be avoided.

As to J's welfare, Cobb J made clear he had:

> *44.* […] *found this to be an extremely finely balanced decision which directly and poignantly engages the "two transcendent factors" referred to in Re E & F, namely the preservation of life and personal autonomy. It is plain that the subject young people in Re E & F felt "aggrieved" ([5]) that their views were overridden, and I am satisfied that J would feel the same. Even though the body of case law to which I have been referred has generally concluded with a decision in favour of treatment, I am conscious that "that is not the invariable outcome" (per Re E & F at [65]). To be faithful to the rich seam of pronouncements in this area I wish to emphasise that judicial 'respect' for the 'views of the mature child' is not a tokenistic mantra; it must be given true meaning, and where appropriate, full effect. To some degree this is demonstrated by the decisions of Moor J in A South East Trust v AGK[2019] EWFC 86 and to the decision of Cohen J in A Teaching Hospitals NHS Trust v DV (A Child) [2021] EWHC 1037 (Fam), where the objections of young people to the administration of blood products held sway. However, the distinguishing feature between those cases and this is that in AGK and DV no significant opposition was offered by the medical profession to the minor's objections.*
>
> *45. J is only a matter of weeks away from being an adult as a matter of law. He has limited – but nonetheless evolving – experience of mature decision-making; he has first-hand experience of the death of someone of whom he was fond. He already shows many attributes of adulthood. I found him to be an impressive young man with clear thoughts and expression. I am satisfied that he knows his own mind, and is aware of the risks to which he is exposing himself in declining blood products in the unlikely event that they would be needed in this operation. J's clear and unequivocal decision in this regard, and his reasoning, are rooted in his faith; I respect his well-recognised right under Article 9 of the ECHR to manifest and observe his religion. The Applicants recognise that J's beliefs about blood products are "long held and considered". I accept that if I were to accede to this application and blood products were therefore administered intra-operatively or post-operatively, this would be likely to affect J's sense of self-determination, his fidelity to the tenets of his religion, and the quality of his life going forward. I am satisfied that while blood products may save his life, their administration against his wishes would lead to him experiencing a much reduced quality and enjoyment of that saved life, and he would be 'tormented' by having other blood in his veins.*
>
> *46. Having weighed all of the matters outlined above, I have concluded that in this case it is in J's best interests for his own decision to refuse the administration of blood or blood products in surgery to prevail, and I propose therefore to refuse the application for the court's authorisation to administer blood products in the event of emergency in the upcoming operation.*

> *47. The order must reflect my conclusions about J's competence to participate in this litigation without a guardian, and to make decisions about the planned medical treatment. I shall declare that it is lawful, being J's decision and in accordance with his best interests, for his treating clinicians not to administer whole blood or primary blood products, even if in the opinion of the treating clinicians the transfusion of blood or blood products may preserve J's life, or prevent severe permanent injury or irreversible physical or mental harm. I shall further provide that if prior to the procedure J consents to having such blood or blood products, such treatment will be provided as long as his clinicians consider this to be clinically indicated.*

In a postscript, Cobb J relayed that the surgery did proceed, that it was successful, and the post-operative period has passed without complication.

Comment

For those working with Jehovah's Witnesses, this guidance from the Association of Anaesthetists of Great Britain and Ireland may be of assistance.

Cobb J's statement that the need for judicial respect for the views of a mature child is clear and important. It is also clear and important that this case was framed as one where J was recognised as having the ability to make his own decision, the relevant question being whether it should be overridden. This is very much in line with the decision of Munby J in *NHS Trust v X*, the most detailed post-Human Rights Act 1998 analysis of the position of children who wish to refuse treatment. In *NHS Trust v X*, Sir James Munby also made the important point that (at paragraph 78) consent and refusal are two sides of the same coin of the child's ability to make a decision. That approach is important, because it helps avoid the temptation to deny that the child has the ability to make a decision which the medical professionals do not like. The more respectful approach, we would suggest, is agree that they have that ability, and then focus clearly in on whether there is some countervailing factor of sufficient strength to override it.

One oddity about J's case, though, is that Cobb J framed the question of J's ability to make the decision as a matter of *Gillick* competence.[5] At paragraph 24, Cobb J had no hesitation in concluding that:

> *J is a competent young person with an understanding, maturity, and intelligence which equips him well to make his own decision, and give consent, in relation to the medical treatment issues, in line with the principles discussed in Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] AC 112 *at 171 (Lord Fraser), and 186 (Lord Scarman). I consider that he is capable of appreciating fully the nature and consequences of the treatment which is proposed for him; all of these issues are questions of fact (Gillick at p.189/190). I am equally satisfied that the views which he expressed are authentically his own, free from influence of his parents or others.*

[5] To the extent that Cobb J was directing himself by reference to *E & F*, it is worth noting that the question of competence / capacity was not in issue before the Court of Appeal, which also used the two phrases interchangeably (including in relation to a child below 16 – see paragraph 67); that decision cannot therefore be said to represent a definitive determination of the position.

Cobb J does not appear to have been addressed on this point, so it is not clear the extent to which his observations reflect a considered discussion of the matter.

By contrast, Sir James Munby was addressed in detail on this in *NHS Trust v X* at paragraph 77, and set out his views as follows:

> *(1) Until the child reaches the age of 16 the relevant inquiry is as to whether the child is Gillick competent.*
>
> *(2) Once the child reaches the age of 16:*
>
> > *(i) the issue of Gillick competence falls away, and*
> >
> > *(ii) the child is assumed to have legal capacity in accordance with section 8* [Family Law Reform Act 1969]*, unless*
> >
> > *(iii) the child is shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005.*

Sir James Munby's approach has recently been followed by Cusworth J in the context of life-sustaining treatment (see here), and also MacDonald J in the context of gender-affirming treatment (see here). Conversely, it would be possible to read the decision of Judd J in *O v P & Anor* [2024] EWHC 1077 (Fam) (also concerning gender-affirming treatment) as if *Gillick* competence remained the test post-16. However, this was not the central focus of the case,[6] so it is not clear that this can be prayed in aid as a case in the competence camp.

On one view, we are in the unhelpful situation in relation to 16 and 17 year olds where four possibilities present themselves:

- Mental capacity and competence mean different things and some judges are applying the wrong test.
- Mental capacity and competence mean the same thing, in which case interesting (as in difficult) questions apply as to why Parliament uses the two different terms in the same legislation (see for instance the Mental Health Act 1983 provisions relating to treatment in the community, which draw a distinction between competence for children under 16 and mental capacity for those aged 16 or over).
- Mental capacity is the test to apply in some medical treatment situations but not others, in which case the question arises to which test to apply and why.
- Mental capacity is necessary but insufficient, which may feel intuitively true, but again raises questions as to what else is needed and how to tell whether the person has it.

Our wait for the next iteration of the MCA Code continues; that may give an opportunity for clarification, but cannot make the law. Given that there is ever greater focus on the ability of children to make their own decisions, not least in the context of gender affirming treatments, I would hope that we can get (likely appellate) level of the position sooner rather than later. In the meantime, and not just because Alex was in *NHS Trust v X*, he at least would suggest that Sir

[6] Which was, in effect, on whether the court could or should ever prevent a child (with the requisite ability) from consenting from treatment being offered by a treating doctor (see paragraph 57). As Judd J implicitly recognised, and the Cass Review explicitly sets out in chapter 16, any treatment, whether gender-affirming or otherwise, must be clinically appropriate for it to be on the table (and hence for questions of competence / capacity to be relevant).

James Munby's analysis – the most detailed since the MCA 2005 came into force – is the correct one.

Capacity and contempt proceedings – what is the test?

What is the test to decide whether you can defend yourself against a charge that you are in contempt of court? That was the question before the Court of Appeal in *Solicitors Regulation Authority Ltd v Khan & Ors* [2024] EWCA Civ 531.[7] Helpfully, but perhaps not entirely surprisingly, the Court of Appeal has made clear that the test to apply if charge is that you have committed contempt in civil proceedings is that contained in the Mental Capacity Act 2005. Giving the lead judgment of the Court of Appeal, Nugee LJ rejected the proposition that the approach should be that applied in criminal proceedings, ie whether the person is fit to plead and stand trial. He found "entirely persuasive" the argument put forward by the SRA, namely that the test was governed by Part 21 of the CPR, which applied to Part 81 CPR (setting out the procedure for committal proceedings in the civil courts). Part 21 imports the test for capacity set out in the MCA 2005. However, the MCA 2005:

> *56.* […] *unsurprisingly does not tell you what kind of decisions you need to make in order to conduct proceedings, and specifically in order to conduct proceedings as a defendant to committal proceedings. Here the experience of the criminal courts as to what sort of decisions a defendant might need to make, and what that means in practical terms, might indeed be valuable as an analogy. In this way the Pritchard criteria, although not directly applicable to contempt proceedings, might nevertheless assist in assessing whether a defendant to contempt proceedings lacked capacity within the meaning of the 2005 Act. Thus if one takes the 6 things identified by HHJ Roberts, and endorsed by this Court, in R v M (John), they are as follows:*
>
> > *"(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence."*
>
> *(see paragraph 45 above). With the exception of (3), the others are all just as applicable to a defendant facing committal proceedings for contempt as to a defendant facing criminal charges.*
>
> *57. In summary, the position seems to me to be this. The criminal test of fitness to plead, and the Pritchard criteria, are not directly applicable to contempt proceedings, where the test for capacity to conduct proceedings is that in the 2005 Act. But the Pritchard criteria may nevertheless assist the Court in assessing whether a defendant to contempt proceedings lacks capacity under the 2005 Act as illustrations of the sort of decisions that such a defendant is likely to have to take in order to be able to defend the proceedings.*

On the facts of the case before, the Court of Appeal found that the judge had applied the correct test, and had also been entitled not to adjourn the sanctions stage of contempt proceedings for further medical evidence as to the defendant's capacity to conduct, on the basis

[7] The judgment is a complicated one, as it covers many different grounds of appeal and cross-appeal; we focus here on the sections relevant to those concerned with capacity matters.

that there was no real prospect of being persuaded to accept conclusions in a recently prepared report casting doubt on their capacity. Nugee LJ noted the first instance judge had properly directed himself that, had been satisfied that there was such a prospect:

> *94.* […] *he would have been prepared to find that the finality principle was outweighed or displaced by two factors, namely the real risk of injustice in imposing a sentence of imprisonment in those circumstances, and the fact that in any event the Court could not have proceeded to sanction her until the question whether she was a protected party had been determined and if she had been finally determined to be a protected party that would have cast significant doubt on the [earlier judgment reached that the defendant had committed contempt]*

Comment

We so regularly see conflation of the concepts of mental capacity and concepts applied in the criminal context (see our webinar here, and this article here), that it is refreshing to see such a clear-eyed analysis from the Court of Appeal of the interaction between the two. The gilding on the lily would have been if the Court of Appeal identified the information that the defendant needs to be able to understand, retain, use and weigh to make each of the 5 decisions set out in the judgment of Nugee LJ. That may have to await another day, but at least it will be an exercise starting from a solid base.

DNACPR decision-making in Wales

Despite the fact that, in many ways, Wales is ahead of England in terms of its approach to DNACPR decision-making, a recent report from the Healthcare Inspectorate Wales has flagged that there is still room for improvement. Of particular note for readers of this Report is HIW's findings in relation to those with impaired decision-making capacity:

> *A key issue to have emerged from our review relates to patients having the mental capacity to make and communicate decisions about CPR, and the quality of how these details were recorded on the DNACPR form. Whilst this section of the form was generally well-completed for people who had capacity, this was not always the case for those who may have lacked capacity. We found some forms and clinical records either contradicted each other, were incomplete, or there was no evidence that a mental capacity assessment had been undertaken and without rationale. We are therefore not assured, based on the records we reviewed, that the DNACPR decision making process is always completed in line with the all-Wales Policy, for patients who were deemed to lack capacity. This issue must be addressed by health boards and trusts.*

It would also be really helpful, we suggest, if Wales at least could implement HIW's recommendations that:

> *Welsh Government should consider the benefits of an all-Wales electronic patient repository for recording DNACPR decisions, for instance within Welsh Clinical Portal, to help achieve prompt and robust communication of these decisions throughout Wales. This would benefit patients and those close to them, communication nationally across different health board teams in secondary care, and community and primary care, and in care homes, and emergency services.*

Given the zeal with which technology is peddled by evangelists, it is depressing how difficult it seems to be to bring about such (apparently) simple things as ensuring joined-up information

about DNACPR recommendations, advance decisions to refuse treatment and advance choice documents about preferences in the mental health context.

IRELAND

A Revival of Wardship?

As discussed in previous reports, there has been significant developing jurisprudence in relation to the court's jurisdiction to make detention orders following the commencement of the Assisted Decision-Making (Capacity) Act 2015 ('ADMCA') and the repeal of the Lunacy Regulation (Ireland) Act 1871. The most recent development on the issue is *In the Matter of AJ [2024] IEHC 166*. In this case Mr. Justice Dignam considered whether the High Court had jurisdiction to make detention orders outside of the wardship process and notwithstanding the pre-existence of an order under the Mental Health Act of 2001 ("2001 Act"), pursuant to Section 9 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act").

Background

By way of background, AJ is a young man diagnosed with moderate disability, autism spectrum disorder, significant speech and language and communication difficulties and had a history of aggression towards other people and causing damage to his living environment. He lived with his family his entire life until his admission to an approved adult mental health unit pursuant to the 2001 Act. Prior to this, he attended school in a local national school's autism unit until its closure and then had a period of homeschooling until his enrolment in the autism spectrum disorder unit in the local secondary school, which AJ's mother described as being negative and traumatic. After his graduation, he joined a day service, albeit the placement broke down. While attending the day service, a number of untoward incidents had been reported which eventually necessitated his admission to the hospital – the approved centre – under the 2001 Act. While he was initially discharged in August 2022, he was admitted anew to the approved centre in November 2022 upon his mother's application and upon the recommendation of his general practitioner due to his aggressive behaviours. Despite having been released in December 2022, he was readmitted to the approved centre just two weeks after he was last discharged. The admission was renewed on several occasions in light of the finding that AJ was suffering from a mental health disorder. His detention in the approved centre has been continuous since January 2023. The Health Service Executive were of the view that his continued detention therein was his detriment and therefore the HSE sought to transfer AJ from the approved centre to an alternative residential setting and to detain him therein.

The High Court determined the matter by considering and resolving the following issues:

(a) Whether the court has jurisdiction to make a detention order on the basis of Section 9 of the 1961 Act.

The court considered section 9 of the 1961 Act which vests in the High Court the jurisdiction in lunacy and minor matters previously held by the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, and, before the operative date, the existing High Court, exercisable by the President of the High Court or an assigned judge and section 19(1) of the Courts of Justice Act 1924 which transferred the jurisdiction in lunacy and minor matters from the Lord Chancellor of Ireland to the Chief Justice. The court noted that in *AC v Cork University Hospital* [2020] 2 IR 38 O'Malley J held that section 9 directly vests jurisdiction in the High Court rather than transferring it, with the President of the High

Court exercising powers conferred by s.9(1) 1961 Act. The court noted that the section 9 jurisdiction is a "*broad protective jurisdiction*" and that the Lunacy Regulation (Ireland) Act 1871 regulated but did not define the jurisdiction, which is broader than the Act's provisions, as explained by O'Malley J in *AC* and Geoghegan J *In The Matter of Francis Dolan* [2007] IESC 26, [2008] 1 ILRM 19. In terms of its basis, the court noted that the Supreme Court has held that the jurisdiction in section 9 originates from Article 40.3.2 of the Constitution and reflects the constitutional duty to protect the personal rights of those who lack capacity. The court found that section 9 is the "*direct or immediate source*" of the court's wardship jurisdiction.

In terms of the court's power to make detention orders, the court found that the power to make detention orders under its wardship jurisdiction in section 9 is well-established, as affirmed by MacMenamin J in *HSE v AM* [2019] 2 IR 115 and the more recent cases *HSE v KK* [2023] IEHC 306 and *HSE v MC* [2024] IEHC 47, and is also supported by the ADMCA, particularly Part 10. However, there was a clear difference in the present case as *AJ* is not a ward of court. The references to the power to make detention orders in various cases pertain specifically to individuals who are wards of court or subject to a formal wardship process, as highlighted by O'Malley J in *AC v Cork University Hospital*, Hamilton CJ in *Re a Ward of Court* (No. 2) [1996], MacMenamin J in *HSE v AM*, Hyland J in *HSE v KK*, and Barniville P in *HSE v MC* [2024].

Given *AJ* is not a ward, and there are no wardship proceedings, the question before the court was whether section 9 allows the court to make a detention order for someone not in wardship. The court found that while previous cases suggest that detention orders under section 9 are typically within wardship, there is a basis to conclude that the court has the standalone power under section 9 to make detention orders outside wardship, grounded in the vested jurisdiction from the Lord Chancellor and the constitutional imperative to protect personal rights. The court considered the decisions *In Re Birch* (1892) and *In Re Godfrey* (1892), where Ashbourne LC found that the jurisdiction, part of the royal prerogative, was intended to provide personal care and protection for these individuals, and was not limited by any specific statute. The court therefore concluded that "*the jurisdiction vested in the High Court by section 9, is not limited to formal wardship processes*".

Considering the issue of the repeal of the 1871 Act the court relied on the decision of O'Malley J in *AC v Cork University Hospital* [2020] 2 IR 38 where she sad that the "*1871 Act regulates certain aspects of wardship but does not create the wardship jurisdiction.*" As a result, Mr. Justice Dignam found that "*the Lord Chancellor's jurisdiction that was vested in the High Court by section 9 was not limited to or by the 1871 Act*". The court found that while the ADMCA repeals the 1871 Act it does not repeal section 9 of the 1961 Act, which suggests that the Court's protective jurisdiction under section 9 continues to apply outside the formal wardship process.

Crucially, and of significant interest, is the effect of these findings. The court itself notes that "interpreting section 9 as conferring a jurisdiction to make protective Orders outside of a formal wardship process in order to vindicate constitutional rights may mean that the area in which the Court's inherent jurisdiction may have to invoked or even can be invoked is smaller".

In coming to the conclusion that the court has jurisdiction to make detention orders pursuant to section 9 notwithstanding the repeal of the 1871 Act, the court noted that the parties in this case were *ad idem* in terms of the law, therefore there was no *legitimus contradictor*, and the court noted that the conclusions "*must therefore be*

seen as being subject to full argument in an appropriate case".

(b) The impact of The HSE v KK

Ultimately the court distinguished the decision in *KK* (which is under appeal to the Court of Appeal) because *AJ* is not a ward of court. The court noted that the rationale in *KK* that the court did not have jurisdiction under section 9 to make orders in respect of existing wards of court who did not have detention orders in place at the date of commencement of the ADMCA was that those orders would not benefit from a Part 10 review, which would create inequality and unfairness between wards, simply dependant on whether they had detention orders made prior to or subsequent to the commencement of the ADMCA.

(c) The jurisdiction of the High Court to make a detention order under Section 9 of the 1961 Act despite having established the applicable statutory regime, i.e., the 2001 Act.

The issue in the case stemmed from the restriction in the Mental Health Act 2001 that a person be detained in an 'approved centre'. As noted in the background, the approved centre in this case was not a suitable placement for AJ, and the proposed suitable placement was not an 'approved centre'. Thus, while orders were in being under the 2001 Act, the question was whether orders could be made under section 9 to transfer and detain *AJ* in the residential unit, a non-approved centre.

The court again considered the decision in the *HSE v AM*, in which the Supreme Court examined whether the court could exercise its wardship jurisdiction to detain a person who met the criteria for detention under the 2001 Act. The Supreme Court concluded that a person who satisfied the criteria for involuntary admission under the 2001 Act could be lawfully detained through the wardship procedure if it was necessary and appropriate, provided protections were in place to safeguard the person's rights. The Court found that the wardship jurisdiction is broad, covering the protection and management of individuals of unsound mind, and must be interpreted in light of the Constitution and the European Convention on Human Rights. Furthermore, the Mental Health Acts from 1945 to 2001 did not limit the wardship jurisdiction of the High Court and Circuit Court regarding persons of unsound mind. Section 283(1) of the 1945 Act explicitly acknowledged the courts' continuing power to detain such individuals via wardship when necessary and appropriate. Additionally, the Supreme Court held that the two jurisdictions—the wardship jurisdiction and the Mental Health Act procedures—must operate separately. Interweaving the procedures under the 2001 Act with the wards of court procedure was deemed impermissible.

Mr. Justice Dignam therefore found that the High Court has the jurisdiction to make such detention order despite the respondent being subject to an order under the 2001 Act, provided that the following conditions are satisfied:

1. The respondent lacks capacity; and
2. The making of such an order is appropriate, necessary and accompanied by the appropriate safeguards.

The court was satisfied that AJ lacked capacity and found that in "circumstances where the evidence is that the placement under the 2001 Act is inappropriate and may even be prolonging the respondent's detention then it must follow that the matter is more properly dealt with under the Court's section 9 jurisdiction". The court did not determine in the ex tempore judgment delivered how the Orders under the 2001 Act

were to be discharged, but the court noted that it may be that the responsible consultant psychiatrist can discharge the respondent, they could let the most recent renewal order expire, delay the transfer, or use leave provisions with the Court's inherent jurisdiction.

Given the lack of statutory scaffolding from the 1871 Act, the court had to consider the appropriate safeguards afresh, and while not determined in this decision the court noted that consideration must be given to the frequency of court reviews, the required reporting and evidence (whether from the treating psychiatrist alone or also from an independent psychiatrist), the appointment of an independent solicitor versus relying on the Guardian ad Litem, the payment of review costs, and whether there should be liberty to apply.

Conclusion

One would be forgiven for being confused by the status of wardship in Irish law. This is particularly so given the heralding and much drum-beating about the "abolition of wardship" upon the commencement of the ADMCA just over 12 months ago. Even the Supreme Court in a very much *obiter* comment recently stated "*The Oireachtas may abolish an existing jurisdiction, as it did when it enacted the Assisted Decision Making (Capacity) Act 2015, which abolished the wardship jurisdiction of the High Court (and conferred significant new jurisdiction on the Circuit Court)*". Not correct, it seems. As this case found, the wardship jurisdiction very much survived, just not the legislative regulatory framework, due to the repeal of the 1871 Act.

The net result of the findings of the court in this case when coupled with the findings in *KK* is that wards of court cannot have detention orders made under the broad section 9 wardship jurisdiction, unless such orders were in place prior to 26th April 2023, and must alternatively fall back on the inherent jurisdiction of the court. Whereas those who are not wards of court at all can have detention orders made under the section 9 wardship jurisdiction.

Emma Slattery BL

SCOTLAND

Contested guardianship: helpful clarification but fundamental omissions from SAC

On 14th May 2024 the Sheriff Appeal Court issued a judgment in a dispute between an adult's parents about his future guardianship arrangements, which on several points provides helpful clarification to be taken into account by sheriffs at first instance and practitioners throughout Scotland, but which at a fundamental level appears to be flawed. The case is identified as *Colin Boyle (AP)*, Second Applicant and Appellant (the adult's father) *v Molly Denton (AP)*, First Applicant and Respondent (the adult's mother) [2024] SAC (Civ) 20. As the quoted names are stated to be pseudonyms, I refer to the three relevant parties as "the adult", "father", and "mother". At this stage, the case is identified only by its Court Reference GLW-AW247-17. It was decided by Appeal Sheriff B A Mohan, who delivered the opinion of the court; Sheriff Principal A Y Anwar; and Appeal Sherif F Tait.

The only information provided about the adult is that he was 24 years old, and "has autism and a learning disability". We are not given the adult's date of birth, but the judgment narrates that his parents were appointed joint guardians on 4th September 2017, indicating that the order took effect upon[8], or soon after, his sixteenth birthday. Thereafter their relationship broke down, they separated, and they "struggled to agree on matters which affect [the adult's] welfare". The joint guardianship was due to expire on 27th February 2023. Both parents lodged minutes for renewal, each seeking to be appointed sole guardian. The sheriff considered the competing minutes at a hearing on 25th April 2023, and appointed a safeguarder, whose report was issued on 2nd October 2023. In the meantime father's circumstances had changed. He required to re-locate to Ireland. The case called before the sheriff on 3rd October 2023, when the sheriff considered the statutory reports and the safeguarder's report, and heard submissions. According to the Appeal Court judgment:

> *"The parties agreed that a guardianship order was necessary as Andrew was incapable of making decisions about his welfare and no other means was sufficient to protect his interests. However, they continued to disagree about who should be Andrew's guardian and about further procedure."*

Father changed his stance. He no longer sought appointment of himself as sole guardian. He moved for re-appointment of both parents as joint guardians, or failing that for appointment of himself as joint guardian with Glasgow City Council's chief social work officer.

Mother's position remained consistent. She moved for renewal of guardianship on the basis that she would be sole guardian. Father proposed that the adult "should split his time between Ireland and Scotland in order to spend time with both parties". Neither party had adjusted their minutes or answers to reflect the changes that had taken place.

On 3rd October 2023 the sheriff issued an *ex tempore* judgment. On the basis of the reports and oral submissions, he appointed mother as sole guardian, for a period (in terms of the sheriff's interlocutor) of three years, though a note provided by the sheriff indicated that the period was two years. The note was written following lodging of the appeal. It explained the

[8] See section 79A of the Adults with Incapacity (Scotland) Act 2000 ("the Act").

sheriff's reasoning but did not contain findings in fact or findings in fact and law.

The sheriff recorded that he was sceptical of father's proposal that the adult's time should be split between Ireland and Scotland. The sheriff stated that it was not clear "*how such a proposal could be funded nor how the local authority would be able to discharge its statutory duties to Andrew if he lived abroad for half (or at least much) of the time*". Also, the sheriff considered it neither appropriate nor in the interests of natural justice that mother be appointed joint welfare guardian when she did not consent to that role. Additionally, in the interlocutor the sheriff ordered the parents to engage in mediation. The points of appeal were whether (1) the sheriff should on 3rd October 2023 have assigned a proof, and (2) should the sheriff have given his decision in writing?

Commendably, the Appeal Court considered it relevant to address some further questions "because of the volume of AWI applications considered by the sheriff courts in Scotland". Numbered sequentially for the purposes of this Report, those further points were:

> *(3) "What is the status of a safeguarder and their report in Adults with Incapacity (AWI) proceedings?"*
>
> *(4) "Can a party who has made an application to be a sole guardian be appointed by the court as a joint guardian without consenting to that specific joint position?"*
>
> *(5) "Was it appropriate for the sheriff to order the parties to undertake mediation?"*

In the event, in relation to (1) the Appeal Court held that the sheriff had fallen into error. Although that rendered it unnecessary for the Appeal Court to address (2), the Appeal Court noted that this was "a point of wider interest", and (again) having regard to the volume of AWI cases the Appeal Court considered it "appropriate for us to make some observations on the submissions".

(1) *Should a proof have been assigned?*

Appeal Sheriff Mohan quoted Rule 2.31 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 and Rule 3.16.6 in Part XVI of those Rules, dealing specifically with applications under the Act, and concluded that:

> *"These provisions, therefore, give wide discretion to a sheriff considering an AWI application. A party is not entitled to a proof unless the facts in dispute are clearly identified, are both relevant and material, and are likely to have a bearing upon the decision the sheriff is invited to make."*

He referred to *Samantha Young, Appellant* (Glasgow Sheriff Court, 26 July 2013, unreported), a decision by Sheriff Principal Scott QC in which a party opposing a guardianship application appealed a sheriff's refusal to appoint a proof.

> *"But nothing was advanced before the sheriff (or the sheriff principal on appeal) to confirm what matters of fact were being challenged."*

Appeal Sheriff Mohan took the view that:

> *"In the proceedings before us, however, there was plainly a live dispute between the parties about who should be appointed as guardian and on what terms (sole or joint). That was at the heart of the issue the sheriff was asked to resolve. The sheriff had two conflicting applications. It is also clear*

> *that there were identified areas of factual dispute which were relevant to his determination."*

In his note, the sheriff recorded his concerns as narrated above. Appeal Sheriff Mohan commented that these were all matters which go to the heart of the suitability test under section 59(4) of the Act, with particular reference to the elements of accessibility, ability to carry out the functions of guardian, likely conflict of interest, and possible adverse effects of the appointment of an individual on the interests of the adult. The sheriff did not hear evidence, but instead relied on the safeguarder's conclusions about factual matters which father sought to challenge. The Appeal Court concluded that in rejecting father's motion to fix a proof the sheriff fell into error. The Appeal Sheriff quoted Lady Dorrian in *Aberdeenshire Council v JM*, 2018 SC 118:

> *"Where the issue of who is to be appointed is contested, the sheriff would no doubt hear evidence, as he did in the present case, and take account of all of the circumstances known to him. The question of suitability is not determined by a report from the MHO but by the sheriff, as the sheriff in Arthur v Arthur recognised."*

The citation for *Arthur v Arthur*, not provided until several pages later in the judgment, is 2005 SCLR 350, Sh Ct.

One would comment that the Appeal Court did not specify the issues that would have required determination by proof. The Appeal Court did not dismiss the argument for the mother that by proposing that she be re-appointed, albeit as joint guardian, the question of her suitability to be guardian had been accepted by father and was not in dispute. Father no longer sought appointment of himself as sole guardian. As we shall see, forcing joint guardianship with father upon the mother was rejected. There were accordingly no issues of fact to be determined in that regard. That left as the only issues the choice between mother as sole guardian, a role for which she was suitable, or father as joint guardian with the chief social work officer, but it is not entirely clear whether (by the test in *Samantha Young*) anything had been advanced to amount to matters of fact requiring to be determined to make that choice. Under this heading, however, the Appeal Sheriff did refer to "further point" (3).

The Appeal Sheriff did not comment one way or the other on the submission for father drawing on the assertion of Sheriff Principal Kerr QC in *Ward, Appellant*, 2014 SLT (Sh Ct) 15[9] about the need for clarity as to whether the sheriff is hearing evidence or hearing submissions: it might have been helpful for the Appeal Court to re-state that for the benefit of sheriffs at first instance throughout Scotland.

(2) *Ex tempore decision*

The Appeal Sheriff referred to the apparent conflict between (on the one hand) Ordinary Cause Rule 12.3, making explicit provision for *ex tempore* judgments after proof in ordinary actions, and Part XVI of the 1999 Rules permitting a sheriff to regulate procedure "as he sees fit" and even "determine" an application at the hearing; and (on the other) that although section 50 of the 1907 Act confirms that an application must be dealt with "summarily", a "judgment in writing" is nevertheless required by section 50. Helpfully, I would submit, the Appeal Court held that: "*In many cases, such as*

[9] It is necessary that I disclose that I was the appellant referred to.

unopposed applications, the court's interlocutor will provide the necessary written form of judgment. … "Where, however, evidence is heard, a written judgment incorporating findings in fact and law and setting out the reasons for the decision is necessary." One might add that such an interlocutor would require to cover all of the otherwise "missing" points identified in *Aberdeenshire Council v SF (No.2)* [2024] EWCOP 10[10]. See the judgment for the authorities cited by the Appeal Sheriff for the view that a written judgment is required in Summary Applications where evidence has been led.

One hopes that this ruling will end the concerns, frequently expressed, that the dearth of published and accessible judgments under the adult incapacity jurisdiction hinders the development of the jurisprudence of that jurisdiction, and compares unfavourably with the volume of published decisions from the Court of Protection in England & Wales, even after allowing for the obvious difference in respective populations.

The Appeal Sheriff concluded his observations under this heading (located in the judgment after those in points (3), (4) and (5)) by reference to changes contained in the Courts Reform (Scotland) Act 2014 but not yet brought into force.

(3) *Role of safeguarder*

The court rejected father's submission that before a safeguarder's conclusions could be considered by a court, the safeguarder required to be treated or certified as an expert. A safeguarder is appointed for the purposes in section 3(4) and (5) of the Act, not as an expert:

> *[41] …, the role of a safeguarder is not merely to express the wishes and feelings of the adult (since the sheriff is specifically empowered to consider a separate individual for that purpose under section 3(5A)), and nor is it to carry out the functions of an expert witness. The role of the safeguarder is to safeguard the interests of the adult and to report to the court. This may or may not include conveying the adult's views. In practice (as in this case) a safeguarder will usually review the application, interview relevant parties, meet the applicant(s) and the adult, prepare a report, and comment on the application insofar as he or she observes its effect on the interests of the adult. The safeguarder may also appear at any hearing.*

> *"[42] In these proceedings the safeguarder prepared a detailed and thorough report. In her role of safeguarding the adult's interest she was entitled – indeed duty bound – to highlight the difficulties which she observed in the operation of his care plan were he to spend much of his life in Ireland with the appellant."*

It was however inappropriate for the sheriff to give weight to recommendations and observations by the safeguarder "which were based on disputed facts". I would add that the court cannot delegate its own role, including in

[10] I would commend the current work by a practitioner in Edinburgh Sheriff Court to draft, and seek agreement upon, a pro-forma interlocutor which does meet those requirements. *Aberdeenshire Council v SF*, and several other recent decisions, including matters that have become relevant to this case of *Boyle v Denton*, are described and commented on in my three-part series of articles in Scots Law Times of 10th, 17th and 24th May 2024, which seek to justify the title "Scotland in 2024: a human rights blackspot".

matters such as compliance with the section 1 principles, to a safeguarder or to anyone else.

(3) *Consent to joint guardianship*

Relying on authorities cited, the Appeal Court helpfully confirmed that joint guardianship cannot be imposed on an individual unwilling to serve as such. The court quoted with approval from my SCLR commentary on *Cooke v Telford*, (Sh Ct) 2005 SCLR 367:

> *"As regards joint appointment, it is doubtful whether Parliament envisaged that a contest for appointment should be resolved by appointment of both contenders as joint guardians. It is difficult to see how an adult would be appropriately served by guardians forced into a joint appointment which was resisted by at least one of them."*

(4) Mediation

The Appeal Court held that although a sheriff may direct any person "exercising … functions conferred by this Act" to engage in mediation by an order under section 3(3), the sheriff having decided "that the appellant should not exercise any of the functions conferred by the 2000 Act", he could not be directed to attend mediation. However, it is not narrated that the sheriff had held that father should exercise no function under the Act, nor the basis on which that might have been competent. There does not appear to have been any order beyond the appointment of mother as sole guardian. The purported order to engage in mediation would appear to be predicated, and thought necessary, on father continuing to provide some care for the adult, and thus continuing to qualify as nearest relative, jointly with mother.

Flaws: the principles, and involvement of the adult

It is trite that the courts' jurisdiction under the Act is inquisitorial, not adversarial. It is as different from the courts' civil jurisdiction and criminal jurisdiction as they are from each other. Under section 1(1) of the Act the court is required to comply with the section 1 principles in effecting an intervention. In a matter decided by a court, in terms of section 1(2) the person responsible for authorising or effecting an intervention is the person or persons comprising the court. The court must ensure that it complies, regardless of whatever is or is not produced, submitted or pled before the court. In the present case, the Appeal Court's disposal sustained father's appeal and remitted the cause to a different sheriff to proceed as accords[11]. In deciding to remit the cause in this way, the Appeal Court was required to be satisfied that this would benefit the adult, that such benefit could not reasonably be achieved without such intervention, and that the intended purpose of that intervention would be the least restrictive option in relation to the freedom of the adult, consistent with that purpose. The court was obliged to take account of the present and past wishes and feelings of the adult, so far as they could be ascertained by any means of communication. It seems, in fact, that no attempt was made to ascertain the relevant present views, present wishes, past views, or past wishes of the adult in any way relating to the proposition that the determination of who should be the adult's guardian should be subject to significant further doubt and delay, pending a hearing of proof. If this had been an adversarial contest between father and mother, and if the purpose of the court had been to determine that dispute, there might have been good reason for such a proof. But that was not the court's function. The function of the court

[11] Parties were ordered to attempt to agree the disposal of expenses of the appeal and advise the clerk of any such agreement within 14 days, failing which a hearing would be assigned.

was to proceed in accordance with the section 1 principles and the provisions of the Act relevant to the parties' applications.

Strikingly absent from the Appeal Court's judgment is any information at all about the adult. The parents may have agreed that a guardianship order was necessary, and may have agreed that their son was incapable, but that was irrelevant. In fact, beyond that irrelevant agreement there is nothing in the decision of the Appeal Court, nor in the decision of the sheriff as described in the decision of the Appeal Court, to suggest that the adult was in any respect incapable in terms of section 1(6)[12]. There is no narration of the powers sought to be conferred, whether they were identical in each application, and the basis on which each power was determined to comply with section 1.

In modern practice, persons authorising or effecting interventions must also comply with relevant human rights requirements, and contemporary judicial determinations of the application of those principles. Article 6 of the European Convention on Human Rights must be complied with. In practice, the requirements of the European Convention should be interpreted in the light of the UN Convention on the Rights of Persons with Disabilities, and courts should further take account of both the intention of Scottish Government to have provisions of the Disability Convention incorporated into Scots law, and of Scottish Government's acceptance of the human rights basis for relevant areas of law recommended in the Report of the Scottish Mental Health Law Review ("the Scott Report"). Judges operating systems recently reformed to comply fully with those human rights requirements report the paramountcy of the requirement that adults be facilitated to participate personally in all proceedings concerning them or, where that is demonstrated to be impossible even with provision of all necessary support, that the adult be independently represented; and that once a hearing has commenced it should proceed continuously to conclusion[13].

There were two further apparent omissions. Neither court commented on the inappropriateness of the mental health officer's report. It had been prepared before father moved to Ireland. It had not been updated since that material change of circumstances, nor – it seems – did the sheriff order that it be updated (section 3(2)). Even more fundamentally, the MHO report is quoted as having made assertions as to what was in the adult's best interests. A "best interests" test was explicitly rejected by Scottish Law Commission in its 1995 Report on Incapable Adults, which led to the 2000 Act, and which included in an Appendix substantially the text adopted for the 2000 Act. Scottish Law Commission rejected a "best interests" test in favour of the principles, now incorporated in the Act. The UN Committee on the Rights of Persons with Disabilities similarly rejected a "best interests" test in its General Comment No 1[14]. As for Scottish authority, see the decision of Sheriff John Baird in *B, Minuter*, 2014 SLT (Sh Ct) 5[15].

[12] See, for example, the comments of the Lord Sheriff Clerk in *Chowdhury v General Medical Council* [2023] CSIH 13; 2023 S.L.T. 404; 2023 S.C.L.R. 318 (2023 S.L.T., pp.412–413; 2023 S.C.L.R., p.330), which is among the cases described in the article mentioned in footnote 3, and the other points made in Part 1 of that article.

[13] As reported by judges acting on a daily basis under such regimes at the international conference on 9th and 10th May 2024 hosted by the University of Coimbra, Portugal, principally concerned with review of the first five years' experience of Portugal's own reformed regime, but with contributions from other recently reformed regimes (particularly Germany and Spain).

[14] General Comment No 1 on Article 12, paragraph 7.

[15] In one unreported case, Sheriff Baird rejected medical reports accompanying a guardianship application because they had adopted a "best interests" test.

In addition, neither court appears to have considered issues of recognition and enforcement if the adult were to spend significant parts of his time in Ireland, possibly with a guardian resident there. Ireland is one of the states which has recently reformed its relevant regime, and for an Irish court to accept a Scottish guardianship order for recognition and enforcement, it would without doubt look for no less a standard of compliance with modern requirements than did the English court in *Aberdeenshire Council v SF*, in which case the Court of Protection refused recognition and enforcement of a Scottish guardianship order.

Adrian D Ward

Scottish Government announces Reform Programme Delivery Plan

As we went to press, Scottish Government published on 4th June 2024 its Initial Delivery Plan for the Mental Health and Capacity Reform Programme, setting out the range of actions that are either already underway, or planned, in the period up to April 2025. The Plan is available here. It follows consideration by Scottish Government of the Report of the Scottish Mental Health Law Review here and re-engagement with work that Scottish Government has itself done in the past. In accordance with the developing international human rights environment, Scottish Government states that its Reform Programme will "bring changes that give people greater control over their lives, care and treatment". In legal terms, we might reasonably interpret that as continuing to enhance rights to autonomy and self-determination with appropriate provision in law, and with support in accordance with Article 12.3 of the United Nations Convention on the Rights of Persons with Disabilities. Scottish Government's own summary is:

> *"The Programme will work to update and modernise our legislation, in line with developing thinking and international standards on human rights. It will also drive action to better implement rights in practice, ensure that we have the right mechanisms to monitor human rights and respond appropriately to rights and issues as they arise."*

In a section headed "Future Plans", the current Plan is described as a first step with future Plans to include activity "in partnership and at local level". The urgent need for law reform is summarised in a table headed "Strategic Aim 1: Law Reform", a table with target dates, with 15 specific action-points referring to existing adults with incapacity provision, all very broadly stated, and not all involving law reform. Several relate to making good the deficits in training, and in public education, and practices generally, that have increased in recent years. Some have target dates and some do not. The last addresses deprivation of liberty issues with the words "ensuring there are safeguards for the adult in the event of a deprivation of their liberty, including a standalone right of appeal". There is no target date for that.

Various points of significance to AWI law are covered under the heading "Mental Health Law Reform", including work on the definition of "mental disorder" and on "advance choices" (the title proposed by the current European Law Institute project on drafting model laws with supplementary materials for use across Europe, with more project participants from Scotland than from any other of the many European jurisdictions that are participating).

This is a quick reflection of some points picked out from this important document upon its initial publication. We envisage further coverage of this document, from both Jill and me, and of ensuing developments, in future Reports.

Adrian D Ward

Scotland: a human rights blackspot

A note in the May Report anticipated the forthcoming publication of the first instalment of Adrian's three-part article entitled "Scotland in 2024: a human rights blackspot". All three parts were published in successive issues during May. The reference is 2024 SLT (News) 59-63, 65-69, 71-75.

Capacity, habitual residence, and internet use in Scotland

The interlinked questions of capacity and habitual residence arise from time to time, often also linked to issues about particular limitations placed upon an adult, including limitations upon internet use. Another example that has arisen in Scotland more than once is a range of controls designed to limit an adult's addictive gambling. Habitual residence, including when jurisdiction on that basis moves from one court to another, also arises from time to time. In Schedule 3 to the Adults with Incapacity (Scotland) Act 2000, broadly the same rules apply to allocation of jurisdiction among sheriff court districts as they do in cross-border situations. On these points, a cross-border move by an adult has led to another case in which an English court has had to consider aspects of legal provision in Scotland, discussed in the Practice and Procedure section.

Adrian D Ward

Editors and contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com

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

Victoria Butler-Cole KC: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

Neil Allen: neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Arianna Kelly: Arianna.kelly@39essex.com

Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Katie Scott: katie.scott@39essex.com

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

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

Simon Edwards: simon.edwards@39essex.com

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

Scotland editors

Adrian Ward: adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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

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

Conferences

Members of the Court of Protection team regularly present at seminars and 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.

Adrian will be speaking at the following open events: the World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here) and the European Law Institute Annual Conference in Dublin (10 October, details here).

Advertising conferences and training events

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

Our next edition will be out in July. 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.

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

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

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

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

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

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

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

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

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.