MENTAL CAPACITY REPORT:
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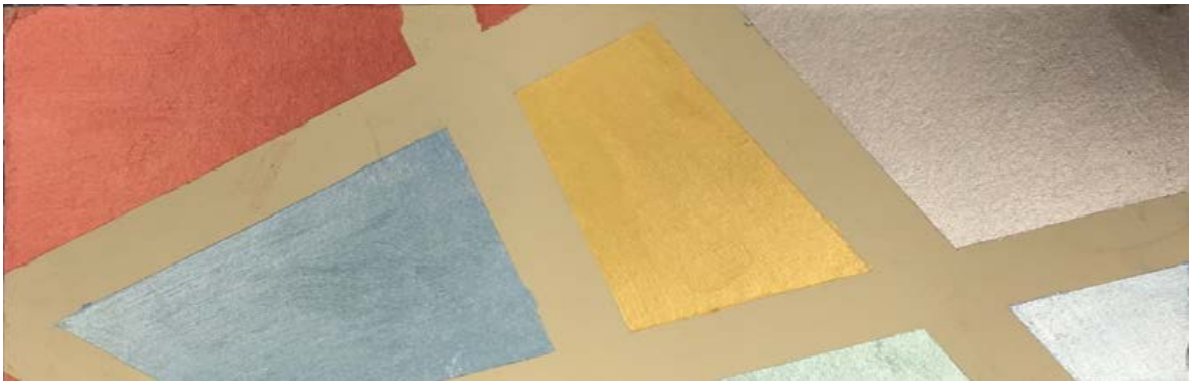

Welcome to the June 2024 Mental Capacity Report. Highlights this month include:

(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.

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

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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).

[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.

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 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.

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

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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.

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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.

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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 2022). To view full CV click here.

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

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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

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

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

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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:

1. The World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here)
2. 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.

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