Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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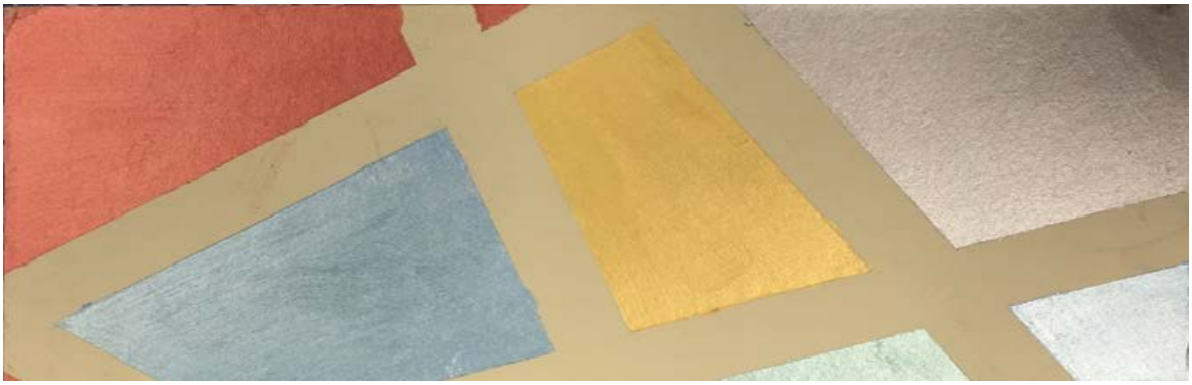

Welcome to the June 2024 Mental Capacity Report. Highlights this month include:

(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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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[1] 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*

[1] 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."

> *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;*
> *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.

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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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