
GARDEN COURT
CHAMBERS

Court of Protection Health and Welfare Updates

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Court of Protection
Health & Welfare Update: Capacity

Helen Curtis, Garden Court Chambers

25 June 2020

Introduction

- This section will look at the recent developments of the test for assessing capacity to consent to sexual relations; contact; anticipatory declarations and fluctuating capacity.

- Two broad principles of social policy which, depending on the facts, may not always be easy to reconcile. On the one hand, there is a recognition of the right of every individual to dignity and self-determination and, on the other hand, there is a need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation [*B v A Local Authority* [2019] EWCA Civ 91 para 35]

- Baker LJ in *A Local Authority v JB* [2020] EWCA 735 begins his judgment echoes the two principles above namely autonomy – at the heart of MCA and CRPD – and the need to protect individuals and safeguard their interests. There is then a third principle [para 6]:

- "The MCA and the Court of Protection do not exist in a vacuum. They are part of a wider system of law and justice. Sexual relations between two people can only take place with the full and ongoing consent of both parties".

The information relevant to the decision (s.3(1)(a) MCA)

In *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3 [para 43]
B was a 31 year old woman with learning difficulties, epilepsy and considerable social care needs living with her parents. Her use of social media caused concern and the risk of her being exploited was real. At first instance before Cobb J, [2019] EWCOP 3, declarations were made that B lacked capacity to make decisions about social media, contact with others and consent to sexual relations but had capacity to decide where to live. B appealed the interim declarations and the local authority cross appealed.

"i) the sexual nature and character of the act of sexual intercourse, the mechanics of the act;
ii) the reasonably foreseeable consequences of sexual intercourse, namely pregnancy;
iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse;
iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;
v) that the risks of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom".

B v A Local Authority [2019] EWCA Civ 913

> 'what comprises relevant information for determining an individual's capacity to consent to sexual relations has developed and become more comprehensive over time' [para 47]

- '*Accordingly, we consider that, in accordance with the MCA s.3(1)-(4), the ability to understand and retain those facts at least for a period of time and to use or weigh them as part of the decision whether to engage in sexual intercourse are essential to capacity to make a decision whether to have sexual intercourse. What is critical is not that a person, whose capacity is being assessed, is permanently aware of how sexually transmitted infections may be caught and that protection may be provided by a condom. The assessment is not a general knowledge test. Rather it is an assessment of whether the person being assessed has the ability to understand those matters when explained to him or her and to retain the information for a period of time and to use or weigh it in deciding whether or not to consent to sexual relations*'. [para 57]

- CA allowed the appeal and the cross appeal and did not disturb Cobb J's formulation of consent as part of the relevant information.

LB Tower Hamlets v NB and AU [2019] EWCOP 27 Hayden J

- "The omnipresent danger in the Court of Protection is that of emphasising the obligation to protect the incapacitous, whilst losing sight of the fundamental principle that the promotion of autonomous decision making is itself a facet of protection. In this sphere i.e., capacity to consent to sexual relations, this presents as a tension between the potential for exploitation of the vulnerable on the one hand and P's right to a sexual life on the other". [para 27]

- "At the risk of labouring the point further, I am emphasising that the tests require the incorporation of P's circumstances and characteristics. Whilst the test can be rightly characterised as 'issue specific', in the sense that the key criteria will inevitably be objective, there will, on occasions, be a subjective or person specific context to its application." [para 48, following *B v A Local Authority*]

- "That there is no need to evaluate an understanding of pregnancy when assessing consent to sexual relations in same sex relationships or with women who are infertile or post-menopausal strikes me as redundant of any contrary argument. Nor, with respect to what has been advanced in this case, can it ever be right to assess capacity on a wholly artificial premise which can have no bearing at all on P's individual decision taking". [para 54]

LB Tower Hamlets v A and KF [2020] EWCOP 21 HHJ Hilder

- A – 69 year old woman who had suffered a stroke and been diagnosed with Korsakoff's dementia was living in a care home and wanted to return home. A care package was theoretically available. Was it possible to separate the issue of A's capacity to make decisions about residence from decisions about care? Yes.

- Held: P lacked capacity to make decisions about her care [para 20] but where there is a choice between alternative places in which to receive appropriate care, A had capacity to make that choice ie to decide between options of whether to live at home with a care package or remain in the care home.

- It is not necessary to make a capacitous decision about care in order to make a capacitous decision about residence [para 65]. Residence and care are not decisions made in separate silos (warned against in *B v A Local Authority*). There are differences in the information relevant to making each decision but there is also overlap. 'Overlap does not however imply that a decision in respect of residence somehow *incorporates* a decision in respect of care'.

- Post script: The determination that A lacks capacity to determine the care that she should receive necessarily means that she lacked capacity within the meaning of paragraph 15 of Schedule A1.

A Local Authority v AW [2020] 24 Cobb J

- AW, man aged 35 years old living in a residential care placement. Diagnosed with autism and mild learning disability. No dispute as to diagnosis, evidential focus on functionality test. Although levels of understanding varied there was in fact a basic and profound lack of understanding and capacity did not fluctuate. LA sought declarations to enable safeguarding.

- Held: Each capacity issue is decision and time specific. AW has capacity to consent to and enter into sexual relations, but lacks capacity to make contact with others and to use social media and internet contact. Thus creating the anomaly of the "decision making facility to embark on sexual relations whilst, at the same time, [AW] not able to judge with whom it is safe to have those relations".

- Court went on to hold that AW lacks capacity to make a decision whether an individual he wants to have sex with is safe and what support he requires in having contact with that person.

- A detailed 'best interests' care package was drawn up to define the support which AW will receive so he could safely meet in person – when able to do so – those he has met online.

A Local Authority v JB [2020] EWCA Civ 735

- The facts: JB, man aged 36 living with a complex diagnosis of autistic spectrum disorder combined with impaired cognition. Lived in supported residential placement since May 2014, subject to restrictions on access to local community, contact with third parties and access to social media and the internet. Expressed a wish to find a partner and develop a relationship with them.

- Restrictions imposed primarily to prevent him from behaving in a sexually inappropriate manner towards women, he lacked appropriate social inhibition which, if unrestrained, may result in exposure to the criminal justice system and risk to potentially vulnerable females.

- Roberts J's view [2019] EWCOP 39 'to argue that a full and complete understanding of consent (in terms recognised by the criminal law) is an essential component of capacity to have sexual relations is to confuse the nature or character of a sexual act with its lawfulness' [para 78]. The court said it was not appropriate to increase the bar so that P needs to understand quasi criminal principles.

- The Court of Appeal, while commending Roberts J on seeking to uphold JB's autonomy disagreed and reversed the declaration that he had capacity to consent and remitted the case back.

A Local Authority v JB [2020] EWCA Civ 735 (cont'd)

- The issue on this appeal was 'whether a person in order to have capacity to decide to have sexual relations with another person, needs to understand that the other person must at all times be consenting to sexual relations'.

- What was the relevant information? Set out in para 100:

- (1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;
- **(2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;**
- (3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;
- (4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
- (5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

The Test

- Following *JB*, the test whether P has capacity to consent to sexual relations was framed as whether P has capacity **to decide to engage** in sexual relations. The question whether the information identified as relevant to the decision whether to engage in sexual relations must always include all of the matters did not arise in that appeal.

- May not be the last word.

- This changes the way in which the issue of capacity to consent to sexual relations is approached by the courts and also for social workers and carers. Arguably it makes it a more difficult situation for the long established partnerships/marriage where one partner develops dementia.

- For the future, a transition with more education to ensure those who understand the relevant information as a basis for a declaration, and a need for support in recognising that the consent of the other party is necessary if they are to be found capacitous to engage in sexual relations.

Contact

- *Sunderland CC v AS* [2020] EWCOP 13 Cobb J

AS, 44 year old man with mild learning disability and acquired brain injury (RTA aged 6 years) also living with bipolar disorder. Lived in supported accommodation since 2014. Consideration of capacity to have contact with those known to AS and separately capacity to have contact with those not known to AS. On the evidence there was no distinction to be drawn in this case as AS lacked capacity to make decisions about contact with others whether known to him or not.

- *A Local Authority in Yorkshire v SF* [2020] EWCOP 15 Cobb J

Case concerned decision making capacity of SF, 45 year old married woman with mild learning disability, depression, type 2 diabetes and frontal lobe dementia. Became apparent in 2018 than when SF's husband AF left for work, a man 'Dennis' visited the couple's home and engaged in sexual intercourse with SF – the evidence suggested without SF's consent.
Held: SF had capacity to make decisions about contact with her husband but not generally and had capacity to consent to sexual relations.

Fluctuating Capacity

Cheshire West and Chester Council v PWK [2019] EWCOP 57

- Application by LA for declarations that PWK, a man aged 24, living with autism and learning difficulties lacked capacity to decide where to live; decide on care and support needs; contact with others; social media and the internet; property and financial affairs and use or possession of a car provided by the Motability scheme. PWK lived in a house – not a care home – with another resident where day-today care was provided by a private agency. S.16 authorisation from the Court required.

- Mr Justice Hedley noted that 'when PWK was relaxed and in a good place he might well be regarded as having capacity…when he became anxious his position could be very different….quite often his carers would be confronted with irrational behaviour that could be difficult to manage' [para 9]

- Concluded: that PWK lacks capacity to make decisions about the use of his car. ' I am not convinced that he is always able to retain all the necessary information. However, I am amply satisfied that, because of the acute anxiety that this subject generates in him, he is unable to use and weigh that information as part of the decision-making process'. [para 29]

Anticipatory Declarations

- *Wakefield MDC and Wakefield CCG v DN and MN* [2019] EWHC 2306 (Fam) 5 Sept 2019

- DN, 25 year old man with severe form of ASD and a general anxiety disorder with traits of EUPD. When particularly stressed, anxious and/or aroused, DN experienced ‘meltdowns’.

- All parties agreed that Mr Justice Cobb 'could or should' make anticipatory declarations about 'residence and/or care (and if appropriate P’s best interests) pursuant to sections 15 and 16 of the MCA 2005, to cover occasions when [P] has 'meltdowns' and is at that point (it is agreed) unable to make capacitous decisions'. Anticipatory declarations made pursuant to ss15 and 16.

- Cobb J reached the view that DN was not ‘vulnerable’ and therefore there was no relief via the inherent jurisdiction. He observed: 'It seems to me that the outcome of an anticipatory declaration would provide a proper legal framework for the care team, ensuring that any temporary periods of deprivation of liberty are duly authorised and thereby protecting them from civil liability'. [para 51]

United Lincolnshire Hospital NHS Trust v CD [2019] EWCOP 24

- Francis J looked at the Court's power to make anticipatory declarations pursuant to section 15(1)(c) MCA. CD was 27 year old woman detained under s.3 MHA, 35 weeks pregnant with diagnosis of paranoid schizophrenia and EUPD. Capacitious to make decisions re birth and necessary procedures but a substantial risk that she may become incapacitous at a critical moment.

"I acknowledge that I am not currently empowered to make an order pursuant to section 16(2) because the principle enunciated in section 16(1), namely incapacity, is not yet made out. However, as I have already said, there is a substantial risk that if I fail to address the matter now I could put the welfare, and even the life, of CD at risk and would also put the life of her as yet undelivered baby at risk. As I have said, I am not prepared to take that risk. I am prepared to find that, in exceptional circumstances, the court has power to make an anticipatory declaration of lawfulness, contingent on CD losing capacity, pursuant to section 15(1)(c)" [para 16 (iii)]

"I have already explained above, as I suggest is obvious, that I must work within the [MCA] if at all possible. However, were it necessary for me to say that the unusual circumstances of this case are not covered by the Act, I would have no hesitation in making an order pursuant to the inherent jurisdiction if faced with a situation where the choice is to make such an order or to risk life itself" [para 17]

Guys and St Thomas NHS Foundation Trust and SLAM Foundation Trust [2020] EWCOP 4 Hayden J

- Application heard on 30 August 2019 when R was 39 weeks and 6 days into her pregnancy. Living with diagnosis of Bipolar Affective Disorder characterised by psychotic episodes. Detained in a psychiatric ward. Delay in bringing the application was avoidable and deprecated.

- Ex tempore judgment given pursuant to s.15 MCA and the inherent jurisdiction of the High Court that it would be lawful for the medical team to undertake a C-section on R against her wishes should she lose capacity during labour. Anticipatory declaration granted.

- *It is axiomatic that if anticipatory declarations are to be made relating to the capacitous and which have the effect of authorising intervention and/or deprivation of liberty at some future point where there is unlikely to be recourse to a court (following a subsequent loss of capacity) that should be rooted very securely in law* [para 11]

- Hayden J finds s.15(1)(c) does not restrict its declaratory relief to those whom the Court has found to lack capacity given reference to any act 'yet to be done' – capacity is not a static concept.

Health and Welfare Update: Best interests

Grainne Mellon, Garden Court Chambers

25 June 2020

Introduction

- In this session, I will be reviewing some of the key points in the case law and legal developments in the area of best interests over the last 12 months.
    - Reproductive rights;
    - Recent serious medical treatment decisions and guidance;
    - Wishes and feelings;
    - Residence and care;
    - Contact;
    - Best interests in the context of Covid-19;
    - Cross-border best interests.

(1) Reproductive rights

- **Re AB (Termination of Pregnancy)** [2019] EWCA Civ 1215 11 July 2019: Lady Justice King in CoA overturned decision of Mrs. Justice Lieven to authorize a termination. AB's feelings (as distinct from her wishes – which were not clear) had not been factored in.

  66. The judge had the expert evidence of the psychiatrists on the one hand and the views of those who know AB best on the other, but she did not weigh them up, the one against the other.

  75. In many of the passages set out above, and in particular in her conclusion at [62], the judge made no mention of AB's wishes and feelings or of the views of CD, the social worker or the Official Solicitor. This was, in my opinion a significant omission.

  76. The requirement is for the court to consider both wishes and feelings. The judge placed emphasis on the fact that AB's wishes were not clear and were not clearly expressed. She was entitled to do that but the fact remains that AB's feelings were, as for any person, learning disabled or not, uniquely her own and are not open to the same critique based upon cognitive or expressive ability. AB's feelings were important and should have been factored into the balancing exercise alongside consideration of her wishes.

(1) Reproductive rights ctd

- **NHS Trust v JP** [2019] EWCOP 23: Williams J endorsed the covert carrying out (under general anaesthetic) of a Caesarean section on a young woman. Guidance on element of deception.

  21. It is a fact of the proposed care plan that it will involve an element of deception of JP. In NHS Trust-v-K and Ors [2012] EWCOP 2922; Re AB [2016] EWCOP 66; Re P [2018] EWCOP 10 and NHS Trust (1) and (2) -v-FG [2014] EWCOP 30 the court has confirmed that deception can be compliant with the individuals Article 8 rights provided the best interests exercise has been carried out. It seems to me that if it is in JP's best interests for deception or misrepresentation to take place then the court would be obliged to authorise that. The question of the level of deception would no doubt feed into the evaluation of whether the best interests of JP were met by the plan which involved that deception; the greater the deception the more it might potentially weigh against JP's best interest and vice versa but as a matter of principle seems to me that deception cannot be a bar to authorisation of a procedure. To hold otherwise would be to supplant the best interests of JP by some other principle, perhaps of public policy, that the court should not condone white lies.

(1) Reproductive rights ctd

- **United Lincolnshire Hospital NHS Trust v CD** [2019] EWCOP 24, the court made a declaration under s. 15 in relation to a mother with capacity, authorising a c-section plan if the mother was assessed as lacking capacity to give consent to it at the relevant time.

- **Guys and St Thomas' NHS Foundation Trust v X** [2019] EWCOP 35;order for delivery of baby by caesarean, woman with bipolar disorder: "conflicting beliefs between wanting natural birth and also wanting a live, well and safely born baby."

- **Oxford Univ. Hospital NHS Foundation Trust v Z [2020] EWCOP 20** Woman with mild LD, held that in her best interests to have intrauterine contraceptive inserted (contrary to her wishes – she wanted injection). Remote hearing- issue of participation in process. Knowles J held:

  33. Whilst I accept that the use of an injectable contraceptive accorded with Z's wishes and took account of the least restrictive approach set out in s.1(6) of the Act, it did not in my view effectively achieve the purpose for which contraception was sought, namely to prevent the very serious risks to Z's physical health which further pregnancies would undoubtedly bring. Z's poor compliance with not only past injectable contraceptives but with medical treatment in this pregnancy militated against me endorsing Z's wish to have an injectable contraceptive.

(2) Serious Medical treatment

- **East Lancashire v PW [2019] EWCOP 10 –** application for serious medical treatment (SMT) – amputation – P did not want the surgery Lieven J ordered it (contrast with Wye Valley *Wye Valley NHS Trust v B* [2015] EWCOP 60 where court did not order surgery against P's wishes).

  32. […] very aware of the fact that PW is strongly opposed to having an amputation. This is based at least in part on having had the previous amputation and not wanting an operation. Those are perfectly understandable feelings that would be shared by many. However, the medical evidence shows that PW is either going to have to have an amputation, or the infection will spread and he will die (though in an uncertain time frame). In my view, following Peter Jackson J in B it is appropriate to give weight to PW's wishes and feelings, even though he does not have capacity, and given that those wishes are clearly expressed, strongly and consistently held, give them considerable weight. However, unlike B, PW does not want to die. He does not understand the choices he faces – be is labouring under a delusion that there is an alternative, namely IV antibiotics, which the medical evidence shows will not solve or materially alleviate the condition.

(2) Serious Medical treatment ctd

- **Re GTI [2020] EWCOP 28 (22 May 2020)-**Williams J- authorisation for insertion of PEG;

  60. I take seriously what he said to Mr Edwards, not only the fact of the PEG being intrusive, but more importantly, that the state overriding his wishes and imposing a medical procedure on him would be experienced by him as a gross insult to his personal autonomy and dictatorial…. However there is another side to this from GTI's perspective I think. I do note that GTI said his mother means the world to him. I also see that he speaks positively about his life prior to his injury. He enjoyed socialising and would like to expand his circle of friends. He aspired to meeting a partner… I do not believe that he wishes to continue on a slow decline towards malnutrition, starvation and death… Thus, whilst I accept that in approving the carrying out of this procedure I am overriding his wishes, I believe that in the short, medium and long term it is the best course for him and I hope that at some point in the future he might…see that was so.

  61. The Court of Protection exists to take decisions such as this. It not the decision of the hospital or any of the members of staff, nor that of GTI or his family or of the Official Solicitor. Ultimately the state has delegated the making of decisions such as this to the judges of the Court of Protection and it is we who bear responsibility for these decisions.

(2) Serious Medical treatment ctd

- **The Hospital v JJ** [2019] EWCOP- best interests to use restraint to administer insulin;
- **University Hospitals Bristol v ED** [2020] EWCOP: decision not to give ICU treatment or CPR to woman with very severe disabilities – mother opposed it;
- **Cardiff and Vale Health Board v** P [2020] EWCOP 8 Hayden J (dental treatment)- delay receiving dental treatment- Hayden J neglectful- possible damages claims for delay;
- **United Lincolnshire Hospitals NHS Foundation Trust v Q** [2020] EWCOP 27 (21 May 2020)- order that dental treatment under general anaesthetic in best interests of 58 year old woman with learning disabilities.
- **Barnsley Hospitals NHS Foundation Trust v MSP** [2020] EWCOP 26 (3 June 2020)- Mr. Justice Hayden- advance decision making, personal autonomy; end of life care at [47]: *"this is not a case about choosing to die, it is about an adult's capacity to shape and control the end of his life."*
- **Practice Guidance (CP: Serious Medical Treatment) [2020] EWCOP 2;** when a case needs to be brought to court/when needs a Tier 3 judge- interim guidance pending review of MCA Code of Practice.

(3) Residence and care

- ***AG v (1) AM (by his litigation friend, the Official Solicitor) (2) LBE (3) MH (4) ECCG* [2020] EWCOP 59**: whether in the best interests of a brain-injured man to move from a nursing home to be cared for at home by extended family and CCG-funded carers.

  - On "balance sheets"- this should not be "a dry accountant's exercise which omits what is personal but one that includes the 'personal' element of 'personal welfare'.

  - On best interests- considered *Aintree* in Supreme Court- not a "sterile objective test"- not a case of trying to determine what some hypothetical objective or rational person would decide in this situation when presented with these choices. Nor are we seeking to do nothing more sophisticated than impose on the individual an objective and rational analysis based on professional expertise of what they ought sensibly to do in that situation. The law requires objective analysis of a subject not an object. The incapacitated person is the subject. Therefore, it is their welfare in the context of their wishes, feelings, beliefs and values that is important. This is the principle of beneficence which asserts an obligation to help others further their important and legitimate interests, not one's own. **In this important sense, the judge no less than the public authorities is AM's servant, not his master.**

(4) Contact

- **A Local Authority v PS + HS [2019] EWCOP 60**: Mrs. Justice Judd granted an application for a declaration that PS, an 80 year old woman, lacks capacity to make decisions about contact and that it is not in her best interests to have contact with her former husband granted.

- **Re D (young man) [2020] EWCOP 1:** Mostyn J. refused an application by a mother, subject to a civil restraint order, for permission to make a substantive application, concerning contact with D- her son aged 20 who has autism and is cared for by his father. Test was "whether there is a *"good arguable case has been shown that it is in his best interests for there to be a full welfare investigation of the current contact arrangements"*.

- **Lincolnshire County Council v AB [2019] EWCOP 43**- Mr. Justice Keehan refused application re contact with sex workers- not in best interests;

- **Re SF [2020] EWCOP 19** Mr. Justice Keehan confirms that an injunction can be granted under MCA 2005 to prevent contact by another person with P to support a best interests decision in respect of P.

(5) Best Interests in Covid-19

- **ACCG v AF Mostyn J [2020] EWCOP 16 27 March 2020 :** Decision on whether to remove CANH : the decision in the case seems to be obvious but the significance of the case is that it generated discussion about what is lacking in a remote hearing – after initial review of it as very positive there was more critical appraisal;

- **BP v Surrey County Council and RP [2020] EWCOP 17 and [2020] EWCOP 22 25 March 2020 and 29 April 2020** Hayden J considered best interests in relation to residence and contact in context of Covid-19; reference to European CPT Statement of Principles at [21]- and Article 25 of CRPD- the right to health of persons with disabilities at [22-23];

- **VE v AO and Ors [2020] EWCOP 23, 5 May 2020:** Mrs. Justice Lievan granted a declaration that it was in the best interests of a terminally ill woman to move out of her care home to live with her family- and not a breach of the Health Protection (Coronavirus Restriction) Regulations 2020 (SI 2020/350) for her family to come and collect her. Distinguished BP at [25] [28] [41] and noted the case was not primarily about Covid-19 at [34-35]: *"this judgment is solely about what is in AO's best interests in circumstances where she had terminal cancer and her family wanted her to die at home with them."*

(5) Best interests in Covid ctd

- **Guidance on Remote Hearings- Mr. Justice Hayden- 31 March 2020:**https://www.judiciary.uk/wp-content/uploads/2020/04/20200331-Court-of-Protection-Remote-Hearings.pdf

- New guidance on **Admission and Care of People in Care Homes, dated 19 June 2020**: https://www.gov.uk/government/publications/coronavirus-covid-19-admission-and-care-of-people-in-care-homes/coronavirus-covid-19-admission-and-care-of-people-in-care-homes

- International human rights principles can be a useful tool to bolster arguments and as aid to interpretation of ECHR arguments: Baroness Hale in *Cheshire West v P* [2014] UKSC 19 at [36].
  - Convention on Rights of Persons with Disabilities ("CRPD")- Article 19, 25 and CRPD Committee;
  - UN Committee for Prevention of Torture/ European Committee for Prevention of Torture;
  - UN Special Rapporteur on Persons with Disabilities/ Special Envoy on disability and access;
  - OHCHR, UN Secretary General Policy Briefings- https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_persons_with_disabilities_final.pdf

(6) Cross-border best interests

- An increasingly common point in s. 21A cases is older adults seeking to return to country of birth/childhood- could consider transfer but these cases can be dealt with at DJ level;
- Limited reported case-law but applications growing in frequency- and are (anecdotally) being granted;
- Expert evidence on options for residence and care likely to be crucial- High Commission, Red Cross,
  - Domestic immigration reports and case-law (Home Office Country Information Notes and Upper Tribunal Country Guidance case-law)- a good resource is www.ein.org (subscription.)
- Deputy in England and Wales can be appointed to meet/manage costs of care arrangements abroad.

Recent Developments in Deprivation of Liberty; Personal Welfare Deputies; Mediation in the COP

Recent Cases under the Inherent Jurisdiction for the Protection of Vulnerable Adults

Bethan Harris, Garden Court Chambers

25 June 2020

Deprivation of liberty
Article 5 ECHR

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

....

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

....

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Deprivation of liberty and 16 – 17 year -olds

***Re D (A Child)* [2019] UKSC 42**, 26 September 2019

D suffered from ADHD, Asperger's syndrome, Tourette's syndrome and a mild learning disability. At the ages of 16-17 he lived in residential units A and then B, locked environments, and had the constant attendance by carers. His parents consented to his being accommodated there under s 20 Children Act 1989 and to the restrictions in place.

At first instance, Keehan J held the parents could not consent to what would otherwise be a deprivation of liberty of a 16-17 year old who lacks capacity to make the decision. The Court of Appeal held Keehan J was wrong and that a parent could give consent.

The UKSC held (by a majority): that the CA was wrong; it was not within the parents' zone of parental responsibility to give consent relevant to whether he was deprived of his liberty; there was therefore a deprivation of liberty so Art 5 ECHR safeguards applied.

Re D (A Child) [2019] UKSC 42 - *continued*

Comment

(i) How was the "zone of parental responsibility" potentially legally relevant to whether there was a deprivation of liberty ?

The 3 components of a deprivation of liberty within the meaning in Article 5 are

(a) the objective component of confinement in a particular restricted place for a non-negligible length of time

(b) the subjective component of lack of consent and

(c) the attribution of responsibility to the state

(*Storck v Germany (2005) 43 EHRR).*

It was common ground that (a) and (c) were satisfied. The debate was whether parental consent could count for consent in respect of component (b).

(ii) What is the effect of the UKSC's judgment?

- 16-17 year olds lacking capacity who are in a care setting in circumstances that amount to a confinement (under the "acid test" in *Cheshire West* [2014 UKSC 19- component (a)) attributable to the State must have the benefit of an Article 5 compliant process - a court authorisation or other Art 5 compliant process

Re D (A Child) [2019] UKSC 42 - comment - *continued*

- MCA 2005 applies to 16 and 17 year olds (s 2(5) MCA 2005) (so orders made under ss 4A(3) and (4) and 16 can authorize their deprivation of liberty) but Schedule A1 DOLS does not apply to under 18s – so court orders are required (currently) to authorize the deprivation of liberty.

(iii) What does the case say about the attribution of the deprivation of liberty to the State? Lady Hale confirms that Art 5 requires the State to protect a person from interference with liberty carried out by private persons if it knew or ought to have know of this (at [43]).

(iv) The future – the Liberty Protection Safeguards will apply to 16 and 17 year olds.

Deprivation of liberty and 16-17 year olds – *continued*

Other recent cases

A London Borough v X (by her litigation friend, the Official Solicitor) and Z (by his Children's Guardian)[2019] EWHC B16 (Fam), Theis J, 12 December 2019: in the context of wardship proceedings, the court granted an application for authorization of the deprivation of liberty of 17 year old child who lacked capacity to consent and who was **looked after in the family home**. Useful summary of the law on deprivation of liberty of 16 and 17 year olds who lack mental capacity at paras 44 – 50.

Hertfordshire County Council v NK and AK (By his Children's Guardian) [2020] EWHC 139 (Fam), Macdonald J, 23 January 2020: the court refused an application under the inherent jurisdiction of the High Court for and order to authorize a deprivation of liberty of AK aged 16; **his current circumstances did not constitute a deprivation of liberty** and in the circumstances of this case the court was not prepared to authorize a future deprivation of liberty that could arise at some specified point if his behaviour deteriorated (paras 42 – 44).

Deprivation of liberty – Re X procedure – streamlined procedure or oral hearing?

LB Barnet v (1) JDO (by his litigation friend, the Official Solicitor) (2)OD (3)DD [2019] EWCOP 47, HHJ Hilder, 22 October 2019

The case concerns compliance with PD 11A Part 2, para 33 -Applicant's **duty of full and frank disclosure** and para 39 -**consultation before the application is lodged with the court**

Facts: JDO, a young man with various diagnoses requiring 1:1 and 2:1 care, lived at a supported living placement. The court had authorized his deprivation of liberty by court order in 2017 for 1 year. The LA applied for a renewal by COPDOL11 (a late application, after the previous authorization had already expired). The application contained a statement prepared by the LA signed by JDO's mother stating agreement with the arrangements and that no oral hearing was necessary. JD's father later wrote to the court stating JDO did not like the placement, JDO was not being allowed out, staff were scared to let him out, flat is dirty, staff and social services not ringing them back. The Official Solicitor (OS) had been representing JDO in a clinical negligence case. Shortly before the COPDOL review application the OS had asked the LA to put before the court 2 letters written earlier that year expressing concerns about the placement. The LA did not do so.

The court ordered the removal of the case from the streamlined procedure, appointed the OS as litigation friend, directed the LA to explain why the OS's letters and parents' concerns were not put before the court, and why it had sought to use the streamlined procedure rather than seek an oral hearing.

The LA said: the family had agreed to sign the pre-pared statement; the Official solicitor offered no current available option for the court to consider

LB Barnet v JDO - *continued*

The court made a number of findings that highlight important principles for practice when making Re X applications -

It was held:

- The LA was aware the parents had voiced concerns about the placement and their apparent change of position at least called for exploration (para 53);

- it is not appropriate for the body with consultation obligations to present OD or any person in her position in proceedings with a pre-prepared statement (para 54);

- Failure to put the OS's letters before the court was a breach of the duty of full and frank disclosure (para 55);
- If a person sensibly within the categories of persons who ought to be consulted holds a view contrary to the applicant's the applicant must make that clear on the application irrespective of its own view of the merits of that view: the validity of the streamlined procedure as a mechanism for compliance with the obligations of Art 5 depends on this (para 49).

Deprivation of liberty

DHSC Guidance on DOLS in relation to Covid-19

- **MCA (2005) (MCA) and deprivation of liberty safeguards (DoLS) during the coronavirus (COVID19) pandemic**, updated 15 June 2020
- **MCA (2005)(MCA) and deprivation of liberty safeguards (DoLS) during the coronavirus (COVID-19) pandemic: additional guidance**, updated 15 June 2020
- Includes:

(i) DOLS (Schedule A1 MCA 2005) still apply
(ii) DOLS assessors should not visit care homes or hospitals unless face-to-face visit essential
(iii) Remote techniques should be used as far as possible
(iv) Guidance on using past assessments for DOLS decision-making
(v) Wherever possible the RPR or IMCA should use remote techniques to remain in contact with the person. Face-to-face visits should only occur if absolutely essential, e.g. to meet the person's specific communication needs, urgency or if there are concerns about their human rights
(vi) Guidance on where more restrictive arrangements are necessary due to the pandemic;
(vii) Use of emergency powers under the Coronavirus Act 2020 in relation to persons lacking relevant mental capacity.

Deprivation of liberty

The replacement of DOLS – Liberty Protection Safeguards (LPS)

- The introduction of the replacement scheme for DOLS (Sch A1 MCA 2005) is delayed. It was originally set for October 2020.

- The government has told councils not to prioritise implementing LPS because of the pressures of the pandemic on the health and social care sector and that it will provide “further updates as soon as possible”. (1)

- Prior to the implementation of LPS there will need to be a consultation process on the Code of Practice and regulations that will accompany the new scheme.

(1) reported on 22 June 2020 on www.communitycare.co.uk

Personal welfare deputyship

Re Lawson, Mottram and Hopton [2019] EWCOP 22, 25 June 2019

The court heard the preliminary issue of : **what is the correct approach to determining whether a welfare deputy should be appointed?**

By s 16 (2)(b) MCA 2005 the court may appoint a person ("a deputy") to make decisions on P's behalf in relation to the matter or matters. Ss 16(3) and (4) state principles to which the court must have regard.

The applicants are young people in their early twenties, who lack the relevant mental capacity. Oscar Mottram has autism and severe learning difficulties and lives with his parents, requiring 24-hour care, Domenica Lawson has Down's Syndrome, lives in her own flat supported by carers, goes to college and spends a great deal of time with her parents and Oliver Hopton has severe autism requiring constant and supervision and lives at home. Their cases were crowdfunded.

Personal welfare deputyship

Re Lawson, Mottram and Hopton - *continued*

Hayden J summarised the principles (at [53]) (summarised here only -see the judgment for the full version) :

- The starting point in evaluating an application is by reference to the clear wording of MCA 2005. The Act reflects the twin obligations to protect P and promote his/her personal autonomy

- 18th birthday marks a transition to an altered legal status; "the extension of parental responsibility beyond the age of 18 under the aegis of a PWD may be driven by a natural and healthy parental instinct but it requires vigilantly to be guarded against"

- The structure of the Act and factors under s 4 may well mean that the most likely conclusion in the majority of cases will be that it is not in the best interests of P to appoint a PWD
- This is not a statutory bias or a starting point
- The decision to appoint a PWD involves weighing and balancing many competing factors

- P's wishes and feeling and other factors under s 4(6) will need to be considered; the weight will vary from case to case
- Appointment of a PWD is not a less restrictive option than the collaborative and informal decision taking that s 5 MCA 2005 allows for.

Personal welfare deputyship

Re Lawson, Mottram and Hopton - *continued*

Comment

- The test is one of best interests. Each case depends on its own facts (E.g. application granted in TQ v VT & Ors [2019] EWCOP 68, HHJ Clayton, 13 September 2019).

- The judgment contains some acknowledgment of the difficulties that can arise for parents dealing with services (specifically transition to adult care) and says the remedy lies in promoting good professional practice.

- Practitioners in COP and community care may be acutely aware of some of the stresses and challenges experienced by parent carers, who may articulate a perception of an imbalance of power between them and public bodies, and a view that being appointed PWD could assist.

CoP Pilot Mediation Scheme

- Launched on 1 October 2019 to run for 12 – 18 months
- With a panel of mediators available who will mediate at legal aid rates
- For how the scheme works: see the scheme's website:

"*The scheme is designed for disputes that have resulted in proceedings being issued in the COP. The aim of mediation under the Scheme is to explore whether the parties can reach an agreement about what is in P's best interests, and put this before the Court for approval (so the agreement becomes a Court order), rather than proceed to a contested trial. This means that the parties must agree, not only on the matters in dispute, but also about what information from the confidential mediation can be shared with the Court.*

7. As disputes in the COP involve the best interests of P, the mediator must ensure first that P can participate appropriately in the mediation……"

www.courtofprotectionmediation.uk

The inherent jurisdiction of the High Court for the protection of vulnerable adults - *safety net or lawless void?*

- A separate jurisdiction to the MCA 2005, applicable in relation to individuals who are not lacking capacity in the sense of ss 1 – 3 MCA 2005 but who are vulnerable with in the meaning in the case-law on this jurisdiction.

- A good starting point for the core principles is CA's decision in **A Local Authority v DL [2012] 3 All ER 1062**, which draws heavily on **Re SA** (Vulnerable Ault with capacity: Marriage) [2005] EWHC 2942 (Fam), Munby J.

Recent cases of interest in this jurisdiction

Redcar & Cleveland BC v PR, SR and TR [2019] EWHC 2305 (Fam), Cobb J, 5 September 2019: whilst there was precedent for the court **making orders under the IJ against the vulnerable adults themselves** it was illogical to conclude that PR needed the protection of the court yet to require her by the order to refrain from doing something she wanted to do backed by an injunction: it will always be a question of fact and degree; referring to Wookey v Wookey.

The inherent jurisdiction of the High Court for the protection of vulnerable adults – recent cases - *continued*

Wakefield Metropolitan District Council (1) Wakefield Clinical Commissioning Group (2) v DN and MN [2019] EWHC 2306 (Fam), Cobb J, 5 September 2019

- An example of a case where the person was held not to be vulnerable in the relevant sense and the court would not have been willing to use the jurisdiction to authorise a deprivation of liberty:

DN was a 24-year old man with severe autistic spectrum, disorder and traits of emotionally unstable personality disorder, but not significantly intellectually impaired and capable of clear thinking. The regime at the supported living where he had to lived under a Community Order with a **Mental Health Treatment Requirement** under s 207 Criminal Justice Act 2003 had a regime that deprived him of his liberty. The judge found that **he was not "vulnerable" in the sense of Re SA and Re DL** in that his decision-making in relation to his residence at Stamford house had not been vitiated or so overborne by his circumstances. He was offered a stark choice in the criminal court when presented with the prospect of a custodial sentence if he had not accepted a community order with MHTR but that did not disable him from making a fee choice. The judge would have found in any event that the inherent jurisdiction should not be used to authorise the deprivation of liberty.

The inherent jurisdiction of the High Court for the protection of vulnerable adults – recent cases - *continued*

LB Croydon v KR and ST [2019] EWHC 2498 (Fam), Lieven J, 25 September 2019 – here again the person was found not to be vulnerable in the relevant sense and in any event it would have been too intrusive to use the jurisdiction for the orders sought.

The application was for an injunction to prevent a 59 year old man seriously disabled by a brain injury from living with his wife ST who has bipolar affective disorder and an emotionally unstable personality disorder. They had been married for 40 years. The application was not pursued in the event but the court held that KR **was not a vulnerable adult in the relevant sense** by the time the matter came to court having been living away from ST for 6 months. The judge compared the case with the adult in the case of *Meyers* where the court had made orders of the kind sought (the latter's life had been at risk if he returned home) whereas here the risks for KR were not so great as to justify the intervention contended for anyway. The LA had not properly considered **whether KR would be protected by a less intrusive means.**

Guys and St Thomas's NHS Foundation Trust & SLAM v R [2020] EWCOP 4, 29 January 2020 concerns its use in the context of an anticipatory declaration under s 15 MCA 2005.

Hayden J held that an order under the **inherent jurisdiction could authorise a deprivation of liberty** to authorise pre-emptively a Caesarean section for R in the event that her mental health declined and she lost capacity during child-birth.

Thank you

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Recent developments - a perspective from the Bench.

District Judge John Beckley

25 June 2020