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Mental Capacity Law Newsletter

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Introduction

Welcome to the October issue of the newsletter. It is significantly shorter than the previous couple of bumper editions: indeed, there has been only one Court of Protection decision of note that has come to our attention, the medical treatment in *M and K*. We do, however, make mention of the important judicial review decision in *Moosa* (relating to funding of family members in CoP proceedings), and take this opportunity to pull together some pointers from recent decisions relating to children that are of relevance to practice and procedure before the Court of Protection.

Where transcripts are publicly accessible, a hyperlink is included. As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk. We include a QR code at the end which can be scanned to take you directly to our previous case comments on the CoP Cases Online section of our website.

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Authorisation of withholding of 'futile' life-sustaining treatment

A NHS Hospital Trust v M and K [[2013] EWHC 2402 (COP)]

Best interests – medical treatment

Summary

The NHS Trust applied for declarations that it was not in M's best interests to receive cardiopulmonary resuscitation (CPR), antibiotics or intensive care treatment.

M was 22 years old and had been born with a congenital abnormality of the brain called holoprosencephaly. This caused considerable loss of brain substance resulting in cerebral palsy and severe learning difficulties. He was confined to a wheelchair and had never been able to walk.

M had been hospitalised repeatedly, spending 79 out of 147 weeks in hospital between June 2010 and April 201, with a total of 18 admissions since 2010. It was common ground that his condition has significantly deteriorated since 2010. At the time of the hearing he was seriously malnourished and reaching the end of his life.

M spent most of his life being cared for by his aunt, K, whom Eleanor King J described as "his psychological and real mother, in every sense of the

word." There was no question that M lacked the capacity to make the decisions about his resuscitation, treatment with antibiotics and admission to intensive care.

The Trust sought an urgent decision on the grounds that M was at risk of dying due to severe malnourishment. Eleanor King J considered the detailed evidence about the M's nutritional state and the impact it had on his prognosis. A gastromony tube and peg had been inserted in 2007 and there was a concern that maximum feeding through the tube would increase M's risk of aspiration pneumonia and may not result in an improvement in his nutritional status. The parties agreed that M's calories would be reduced and the flow slowed down, on the understanding that in the event that this resulted in pneumonia, this would not be treated with antibiotics.

Eleanor King J summarised the law on the provision of medical treatment in such cases, citing *In Re M (Adult Patient, Minimally Conscious State: Withdrawal of Treatment)* [2012] 1 WLR 1653 and *AVS v NHS Foundation Trust* [2001] EWCA Civ 7. Eleanor King J also set out the following extracts from the judgment of Sir Alan Ward in *Aintree University Hospitals NHS Foundation Trust v David James and Others* [2013] EWCA Civ 65 at paragraphs 44 and 45:

> *"As I indicated in my discussion on the meaning of 'futility', what the guidance is concerned with is answering the question: how should someone's best interests be worked out when making decisions about life sustaining treatment? As is stated at 530 of the Code of Practice, it is up to the doctor or healthcare professional providing treatment to assess whether the treatment is life-sustaining in each particular situation. In other words, the focus is on the medical interests of the patient when treatment is being considered to sustain life. That is not to say the doctors determine the outcome, for it is the court that must decide where there is a dispute about it, and the court will always scrutinise the medical evidence with scrupulous care."*
>
> …
>
> *"The fact that I have concluded that treatment would be futile, overly burdensome and that there is no prospect of recovery is but one pointer to where the best interests of where DJ lie. Not to treat him may be in his best medical interests, but the question remains whether it is in his best interests overall, and here I have to accept that the term 'best interests' encompasses medical, emotional and all other welfare issues: see Wall LJ in Portsmouth Hospitals NHS Trust v Wyatt [2005] EWCA Civ 1181 at [84] following Re A [2000] 1 FLR 549.*
>
> *It may not be possible to attempt to define what is in the best interests of a patient by a single test applicable in all circumstances: see Lord Phillips of Worth Maltravers MR in Birk's case at [63], but some help is given by the Mental Capacity Act itself. The court must, pursuant to section 4(6), consider so far as is reasonably ascertainable the person's past and present wishes and feelings, his beliefs and values, and the other factors he would be likely to consider if he was able to do so. The court must take into account the views of those caring for DJ as to what would be in his best interests, and particularly what they consider to be his real wishes and feelings."*

Eleanor King J went on to apply those words to the facts of the present case. She made a declaration that M should not be resuscitated, on the basis that it would provide no therapeutic benefit, taking into account the likelihood of painful rib fractures, further loss of cognitive function, and the inevitability that a successful resuscitation would lead to mechanical ventilation. K agreed with this declaration but argued that M should receive intensive care treatment and should be "given a chance." Eleanor King J did not accept this, stating:

> *"… I am satisfied that there is no therapeutic benefit to M to be ventilated in such circumstances. Such treatment would offer him no prospect of a cure and, far from palliate his life threatening condition, would subject him to*

unnecessary discomfort and indignity.

I accept the evidence that it is highly unlikely that M could thereafter be weaned off a ventilator, and that he would therefore face the prospect of going through the trauma of ventilation only to be withdrawn from then to allow conservative palliative care when the attempts to wean him off the ventilator inevitably failed. I conclude, therefore, that intensive care treatment would be futile by whatever definition, and, that, taking into account all the circumstances, including the wishes of Ms K and her perception of M's wishes were he able to communicate them to the outside world, it would not be in his best interests for such intensive care treatment to be undertaken."

The parties were in agreement that the only circumstances in which it would be in M's best interests to receive intensive care treatment would be where he had an immediately reversible condition, such as nosebleed or peg adjustment. Eleanor King J accordingly made the declarations sought by the NHS Trust.

Comment

The judgment of Sir Alan Ward in the *Aintree* case, and in particular his analysis of the meaning of the word 'futility,' was the subject of detailed scrutiny before the Supreme Court before the summer recess. We await the hand down of the Supreme Court's decision, but in the interim note that tragic cases such as M's make clear why it is so important that there is clarity for both clinicians and family members (not to mention the judiciary) as to precisely what approach is to be taken to the determination of best interests in extremis. It is also of note for the very clear and detailed picture given of the realities of treatment in an intensive care ward, where intensive care can frequently be far from a 'benign' treatment; it being necessary to take a decision against the backdrop of the "*harsh, even brutal, reality of what mechanical ventilation treatment in an Intensive Care Unit means.*"

LSC refusal to provide legal aid to P's brother in CoP proceedings upheld

R (Moosa) v LSC [2013] EWHC 2804 (Admin)

Practice and procedure – other

Summary

This decision is the first decision of which we are aware in which LSC (now LAA) refusal to fund a party to Court of Protection proceedings has been considered by the Administrative Court. It arises in a situation which is not uncommon; moreover, the approach adopted by the LSC that was challenged is exactly the same as that which is now adopted by the LAA.

Court of Protection proceedings were commenced by a local authority in relation to a young man, with considerable and life-long mental and physical impairments and disability, which will inevitably be life-long. He resided in a residential establishment provided and funded by the local authority. His immediate family consisted of his mother and father and a younger brother. A very significant issue in the proceedings in the Court of Protection was (or was potentially) whether the man continued to live long-term in the residential setting provided and funded by the local authority, or moved to live in the home of his parents where his brother also lived. The family wished individually and collectively strongly to argue in the proceedings in the Court of Protection that the man should live at home with them and be cared for by them. In other words, and reading between the lines, it would appear that the man was subject to a standard authorisation under Schedule A1 to the MCA 2005, but in light of the views of the family, the local authority – properly – issued proceedings for declarations to the man's best interests regarding (inter alia) his future residence.

The mother instructed solicitors to act for her. They (correctly) assessed her as ineligible for legal aid, on the basis that she and her husband jointly owned the family home, in which there was equity of around £165,000, i.e. £65,000 above the relevant cut-off of equity in a home of £100,000. The brother was an undergraduate in receipt of a student loan and student funding. There was no

evidence that he possessed any capital at all and no suggestion that he would not be fully financially eligible for public funding.

At the only significant hearing before the Court of Protection, before Charles J, the court was appraised of the matters set out above, and that the brother sought to be joined as a party to the proceedings in the Court of Protection so as to obtain public funding, since he was financially eligible whereas his mother was not. It was not in any way suggested to Charles J that there was any different interest between the mother and the brother in the outcome that they sought and hoped for in the proceedings in the Court of Protection.

The formal order made by Charles J on that occasion joined the mother as second respondent and the brother as third respondent to the proceedings. The order contained a recital in the following terms:

> "*And upon the court considering that* [the brother's] *public funding application to the Legal Services Commission should be dealt with as a matter of urgency to enable him to comply with the directions set out in this order*..."

A note made by the solicitor present at the hearing before Charles J recorded that he informally made the following comment:

> "*I am sure logic will be put to the LSC and, as a family member, the brother has a view he wishes to put to the court ... I acknowledge the point made by the Official Solicitor that the parents are the main respondents and they are seeking funding for their son* [viz the brother] *to put forward their views to the court. I say good luck to them and therefore I am prepared to join their son* [viz the brother] *as a respondent on the assumption that this thinking is put to the LSC and he not have a separate voice from the family*."

The LSC refused the brother's application for funding. The final decision, taken by the Independent Funding Adjudicator, was framed in the following terms:

> "*The client and his mother oppose a Standard Authorisation granted in respect of the patient. It is agreed that to date, both have advanced the same arguments and seek the same outcome from these proceedings.*
>
> *There is no separate interest between the client and his mother. Applying 28.3.9* [of the then-LSC's guidance which provides that 'In general the Commission will only grant Legal Representation if the applicant wishes to put forward a new and significant argument which would not otherwise be advanced. As a rule there should not be more parties separately represented before the Court than there are either cases to put or desired outcomes'] *the Commission will only grant legal representation if a new and significant argument were to be advanced.*
>
> *It is not considered reasonable to fund the third respondent to the proceedings where the second respondent should be represented, but is ineligible for public funding. Further, applying 5.4.2* [of the guidance, which provides that 'An application may be refused...if there are other persons...who can reasonably be expected to bring or fund the case...'], *funding is refused because the second respondent should reasonably fund the case.*
>
> *Funding remains refused on the information provided and for the reasons above*."

Permission to challenge the decision by way of judicial review was sought by the brother. At the paper stage, Holman J directed that the matter be considered at a 'rolled-up' hearing attended by the LSC. In his reasons, included the following

comment:

> "*Clearly, the preamble to, and relevant parts of, the order of Charles J made on 3 April 201*[2] *are indeed 'a device' as Charles J knew perfectly well (see his quoted comments* [which I have quoted above]) *but Charles J is the lead judge of the Court of Protection and a very senior and experienced judge also of the Administrative Court. The question is not whether it is 'a device', but whether it is a lawful and permissible device...*"

Holman J considered the question by detailed reference to the then-LSC's funding code and guidance. The core submission advanced by Counsel for the brother (who had previously appeared for the mother, but appeared pro bono on his behalf) was that

> "*…the mother cannot reasonably be expected to bring or fund the case. She appears to have no other capital than the equity in her home and only a very modest income. Miss Bretherton submits that somebody with an equity of only about £165,000 in their home cannot reasonably be expected to sell their home in order to fund litigation of this kind. She says that, having regard to the very modest income of the mother, it is unrealistic to imagine that she can raise funds by mortgaging the home or her share in it.*
>
> *The particular submission that Miss Bretherton emphasises on the facts of this case is that the equity which financially disentitles the mother to public funding is the equity in the very house in which she and the brother wish to house the patient. So, submits Miss Bretherton, there is really a circularity in the reasoning and approach of the Legal Services Commission in this case. They effectively say that some of the equity in the house can be realised if necessary to fund legal representation, and yet that is the very house that the mother has now caused to be adapted for the patient and in which she would like him to live.*
>
> *More generally, Miss Bretherton submits that the financial eligibility straitjacket which applies to the mother herself is a different and more arbitrary test than the test in paragraph 5.4.2 of whether or not she 'can reasonably be expected to bring or fund the case'. Miss Bretherton submits that the financial eligibility criteria are general and all-embracing and do not allow case-specific consideration. On the other hand, she submits that in deciding whether or not on the facts of this case there is another person, viz the mother, who can reasonably be expected to bring or fund the case, the Legal Services Commission needed to give very case-specific consideration. If they had done so, they would have appreciated that the equity is in the very home in which the mother seeks to house the patient and so it would be not reasonable to take that equity into account.*"

Holman J, however, whilst indicating that he was profoundly sympathetic to the family as a whole, noted that "*the fact is, as Miss Bretherton accepts, that the mother is simply financially ineligible for funding, not by a small amount but really by quite a significant amount, namely the difference between the cut-off point of £100,000 and her actual equity of £165,000. However brutal it may seem, it seems to me that the essential rationale and policy behind the financial eligibility criteria is that a person whose means are outside the scope of the criteria can reasonably be expected to fund their own case, at any rate unless and until their funds have been exhausted*."

Further, Holman J continued, it seemed to him not possible to say that "*although the mother is outside the financial eligibility criteria, she nevertheless cannot 'reasonably be expected to bring or fund the case.' It is possible to envisage a range of scenarios. It happens that the patient has a brother, namely this 19-year-old student claimant, but the facts could easily have been that there was no brother; alternatively, that there was a brother but that he*

was a relatively high-earning person; alternatively, that there was a brother but he himself was still a young teenager whom it would be fanciful to put forward as a respondent in circumstances such as this. It just happens that on the facts of this case there is a brother who is adult, being now 19, but has no means at all, being a student. It does in the end seem to me that it is truly a device that he is brought in as a respondent with the view to obtaining funding. I do not at all suggest that he does not have a sincere and legitimate interest in decision-making in relation to his brother. I do not at all suggest that it is not appropriate that he be a party to these proceedings. I certainly do not suggest that he would not be a very welcome participant at the final hearing from whom the court would be eager to hear. But, in my view, he cannot surmount the hurdle that there is another person who can reasonably be expected to bring or fund the case, namely his mother. Her interest is at least as great as his, and the fact is that she does have the capital at her disposal."

Comment

As noted at the outset, the approach of the LAA is governed by materially identical provisions in this regard to those adopted by the LSC. See, in particular, Regulation 39(c) of the Merits Regulations (providing that a necessary criterion for funding is that "*there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings*") and paragraph 9.14 of the Lord Chancellor's Guidance on Civil Legal Aid (providing that "[i]*n general the Legal Aid Agency will only grant legal representation if the applicant wishes to put forward a new and significant argument which would not otherwise be advanced. Generally there should not be more parties separately represented before the Court than there are either cases to put or desired outcomes (Merits Regulation 39 (e))*.")

We understand that permission has been sought from the Court of Appeal to appeal Holman J's decision; a decision is awaited. Whatever one may consider about the philosophical merits of restricting public funding in these circumstances and thereby – in reality – depriving the family of the ability to obtain legal representation before the Court of Protection, one might also question the net saving to the public purse in the underlying Court of Protection proceedings given the well-known additional difficulties (and expense) caused where family members are unable to obtain public funding and must perforce appear in person.

Public law proceedings involving children – the lessons for the CoP

Re B-S (Children) [2013] EWCA Civ 1146

Practice and procedure – other

Summary

Regular readers of the newsletter will know that we regularly draw to your attention decisions from the Family Division/the appellate courts relating to children for the light that they can shed by way of analogy upon practice and procedure in the Court of Protection.

The facts of the present case – concerned with an appeal against a refusal of leave to a mother to oppose the making of adoption orders for her children – are irrelevant for present purposes (as they were, in large part) for the Court of Appeal. Rather, the case is of importance for pulling together a number of threads from some of this recent jurisprudence to make a series of points that are, we think, of direct relevance to those practising in the Court of Protection. This is, in part, because they are expressed in characteristically forceful style by Sir James Munby, President both of the Family Division and of the Court of Protection.

In his judgment, Sir James Munby P placed emphasis upon the two points of particular relevance to proceedings before the Court of Protection:

1. The nature of the judicial task in a case where the choice is to be made between a number of options, where one (or more) of those options is more draconian than others, Sir James Munby P specifically endorsing (at paragraph 43) the dicta of McFarlane LJ in *Re G (A Child)* [2013] EWCA Civ 965 at paragraphs 49-50:

   "*In most child care cases a choice will fall*

to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.

The linear approach … is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare."

Sir James Munby P continued (at paragraph 44):

"*We emphasise the words "global, holistic evaluation". This point is crucial. The judicial task is to evaluate* <u>*all*</u> *the options, undertaking a global, holistic and (see Re G para 51) multi-faceted evaluation of the child's welfare which takes into account* <u>*all*</u> *the negatives and the positives,* <u>*all*</u> *the pros and cons, of* <u>*each*</u> *option. To quote McFarlane LJ again (para 54):*

> *'What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options.'*

45. McFarlane LJ added this important observation (para 53) which we respectfully endorse:

> *'a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the very detail of that option which renders it 'draconian' cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in Re B on the duty of the court actively to evaluate proportionality in every case.'"*

2. The nature of the task of the appellate court in light of the decision of the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911. Sir James Munby P noted that:

    a. The decision leaves undisturbed the approach in case management appeals in public law family proceedings set out by the Court of Appeal in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250: see *Re B* paragraph 45 (Lord Wilson).

    b. *Re B* does not affect the traditional approach to appeals from fact-finding determinations in such proceedings: *Re A (Children)* [2013] EWCA Civ 1026 at paragraph 34;

c. The effect of *Re B* was succinctly summarised by Black LJ in *Re P (A Child)* [2013] EWCA Civ 963:

> "*Because of the obligation of the trial judge not to determine the matter in a way which is incompatible with article 8 ECHR, the review by the appellate court must focus not just on the judge's exercise of his discretion in making a care order but also on his compliance or otherwise with that obligation*"

d. In *Re B* itself, Lord Neuberger had said this (para 93):

> "*There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable.*"

e. Lord Neuberger went on to say that the appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (v) to (vii);

f. The question of whether the same approach – was the judge wrong? – applies in the case of appeals in private law cases was considered by the Court of Appeal in *Re A (Children)* [2013] EWCA Civ 1026 where McFarlane LJ said this (paragraph 43):

> "*Re B concerned decisions under the CA 1989 and the Adoption and Children Act 2002 making public law orders relating to children which plainly engaged the right to family life protection enshrined in ECHR, Article 8. It may well be that not all orders under CA 1989 relating to children will be of sufficient import to engage Art 8 (for example an order which merely defines the time of day and/or place for contact), but the impact of Art 8 is by no means confined to public law orders. There will be a range of private law children orders which engage Art 8 and which must now be approached on appeal in the manner established by the majority of the Supreme Court in Re B. It is not necessary for the purposes of this judgment to establish where the outer limit of this 'range' may be, and I expressly do not intend to do so, but an order refusing all direct contact between parent and child must plainly be on the Re B side of the boundary.*"

g. Sir James Munby P, on behalf of the Court of Appeal, "*agree*[d] *with the analyses of Black LJ and McFarlane LJ in the judgments to which we have just referred. Like them, we decline any attempt to establish the boundaries of the Re B approach*" (paragraph 83).

Comment

The Court of Protection remains a court which, to some extent, is still creating its own distinctive culture. It draws upon a range of very different strands of thinking and (sometimes unreflective) practices reflecting the backgrounds of those appearing before it, whose expertise can range from community care to conflicts of laws. It is therefore not simply because the Court is asked to make a range of very different decisions, requiring very different case management approaches, that the approaches that it adopts can vary dramatically: that variation can often be the result, as much, if not more, of the background of the judge and the practitioners involved in the case. We would like to think that this variation will diminish over time, not least because of the initiatives undertaken by Sir James Munby to bring about increased reporting of judgments and also to take forward the work of the Rules Review

Committee to amend the COPR.

At least in proceedings concerning P's welfare, however, we continue to think that valuable guidance can be found in decisions taken in the context of public law child care proceedings. Both will – frequently – involve considerable state interference with the rights of P (and of others) under Article 8 ECHR, and the consequent requirement to scrutinise that interference to ensure that it is necessary and proportionate. Both will also frequently involve the need to examine the factual basis of allegations made against family members relating to their care or treatment of the individual the subject matter of the proceedings.

We know that the mapping from public law proceedings involving children onto proceedings before the Court of Protection cannot be complete – there is, for instance, no equivalent in the MCA 2005 to the threshold criteria that must be satisfied when a local authority seeks a care or supervision order (see *LBB v JM, BK and CM* [2010] COPLR Con Vol 779 at paragraph 7 per Hedley J). Nor is there any necessary presumption when determining the best interests of an incapacitated adult that they should reside at home with their family *(K v LBX & Ors* [2012] EWCA Civ 79).

Nonetheless, we would respectfully suggest that decisions such as those summarised in *Re B-S (Children)* are ones that do not merely make interesting reading for practitioners before the Court of Protection, but are ones that must actively be brought to the attention of the court so as to secure the same intense focus on the issues and on the ECHR rights in play at both first instance and appellate level as is deployed in cases involving children.

Supreme Court clarification of definition of 'habitual residence' regarding children of potentially wider application to incapacitated adults

Re A (Children) [2013] UKSC 60

Mental capacity – residence

Summary and comment

We make short note of this case, relating to whether the High Court of England and Wales has jurisdiction to order the 'return' to this country of a small child who has never lived or even been here, on the basis either that he is habitually resident here or that he has British nationality, because of the discussion of the approach to be adopted to the determination of habitual residence. This approach is of relevance both in respect of the international jurisdiction of the Court of Protection and also, potentially, to considerations of the determination of ordinary residence in the context of adults without the capacity to decide upon questions of residence.

At paragraph 56, after a detailed discussion of the authorities relating to habitual residence, Lady Hale (for the majority), held thus:

> *"Drawing the threads together, therefore:*
>
> *i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*
>
> *ii) It was the purpose of the* [Family Law Act 1986] *to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation* [Regulation 2201/2003] *must also be interpreted consistently with those Conventions.*
>
> *iii) The test adopted by the European Court is "the place which reflects*

some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

iv) *It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.*

v) *In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.*

vi) *The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.*

vii) *The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.*

viii) *As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of Proceedings brought by A, it is possible that a child may have no country of habitual residence at a particular point in time."*

It is anticipated that the approach to be adopted to the construction of the phrase 'habitual residence' for purposes of Schedule 3 to the MCA 2005 is to be the subject of a judgment in short order, and we do not touch upon that question further here.

For wider purposes, we might suggest that *Re A* makes even clearer than does the decision of Beatson J in *R(Cornwall Council) v SoS for Health & Ors* [2012] EWHC 3379 (Admin) that *Barnet LBC v Shah* [1983] AC 309 is not a decision that is applicable to the determination of ordinary residence of adults without capacity to decide questions of residence.

The key concepts in Lord Scarman's definition in *Shah* were that the residence must be "voluntarily" adopted and that it must be for "settled purposes." *Cornwall* was a case concerned with the ordinary residence of an incapacitated adult, and hence with the two 'tests' set down in *R v Waltham Forest LBC*, *ex p. Vale*. Those two tests (which were not, in fact, stated to be such by Taylor J, but have been adopted in subsequent guidance), provide either for (1) the position where a person is so severely handicapped as to be totally dependent upon a parent or guardian, such that they are in the same position as a small child and her ordinary residence is that of her parents or guardian "because that is her base;" or (2) an approach which considers all the facts of a person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Shah*, but without requiring the person themselves to have adopted the residence voluntarily.

In *Cornwall*, Beatson J noted in relation to *Shah* (at paragraph 68) that a "*test which accords a central role to the intention of the person whose 'ordinary residence' is to be determined cannot be applied without adaptation when considering the position of a person who does not have the capacity to decide where to live*."

In *Re A*, Lady Hale noted at paragraph 38 that "*the reference* [in *Shah*] *to adopting an abode 'voluntarily and for settled purposes' is not readily applicable to a child, who usually has little choice*

about where he lives and no settled purpose, other than survival, in living there. If this test is adopted, the focus inevitably shifts from the actual situation of the child to the intentions of his parents."

Whilst Lady Hale's dicta are, strictly, obiter, we would suggest that they are applicable with equal force to considerations of ordinary residence of adults without the capacity to decide where they wish to live. We would further, and respectfully, suggest that to the extent that they require an intense focus on the factual situation of the adult, they are undoubtedly correct. They therefore, we would also suggest, reinforce our earlier suggestion that it was unfortunate that in *Cornwall* "*Beatson J did not pick up the gauntlet laid down by Cornwall and did not consider in any detail how Vale now reads in light of the passage of the MCA 2005. Whilst "test 1" in Vale undoubtedly serves a pragmatic purpose, viewed in the abstract it does not sit very easily with the principle of autonomy enshrined in the MCA. In its direct equation of the position of an incapacitated adult with that of a small child, it also stands at odds with the clear thrust of COP case-law, which is to the effect that the two can and should be treated as conceptually distinct… "Test 2," by contrast, does not give rise to the same problems*." It may be that in due course the gauntlet is picked up again by another local authority or service user, in which case *Re A* would no doubt be prayed in aid.

Changes to test for eligibility for fee remission

With effect from 7 October 2013, the Courts and Tribunals Fee Remissions Order 2013 (SI 2013/2302) comes into force. This Order introduces a new, standardised fee remissions system for courts and tribunals, including, materially, the Court of Protection (by virtue of paragraph 5 of the 2013 Order and amendments, including the introduction of a new Schedule 2 to, the Court of Protection Fees Order 2007). In summary:

1. Eligibility for remission or part remission of a fee will be based on two new tests - a disposable capital test and a gross monthly income test. Parties who satisfy the disposable capital test will receive a full fee remission, pay a contribution to the fee or have to pay the fee in full;

2. The gross monthly income test applies a series of thresholds to single people or couples, with an allowance for the number of dependent children they have. Parties with a gross monthly income below a certain threshold will receive a full fee remission. Parties will be required to pay a contribution of £5 towards their fee for every £10 of gross monthly income they earn over the relevant threshold. Parties with income in excess of £4,000 above the relevant threshold will not be eligible for any remission or part remission of a fee;

3. The disposable capital and gross monthly income of a partner is to be treated as disposable capital and gross monthly income of the party. However, where the partner of the party has a contrary interest to the party in the matter to which the fee relates, the disposable capital and gross monthly income of that partner is not treated as the disposable capital and gross monthly income of the party;

4. Where proceedings are brought concerning the property and affairs of 'P', for the purpose of determining whether a party is entitled to a remission or part remission of a fee:

    a. the disposable capital and gross monthly income of the person bringing those proceedings is not treated as the disposable capital and gross monthly income of the party;

    b. the disposable capital and gross monthly income of 'P' is to be treated as the disposable capital of the party; and

    c. the disposable capital and gross monthly income of the partner of 'P', if any, is not treated as the disposable capital and gross monthly income of the party.

5. Where proceedings are brought concerning the personal welfare of 'P', for the purpose of

determining whether a party is entitled to a remission or part remission of a fee the disposable capital and gross monthly income of a partner, if any, is not treated as the disposable capital and gross monthly income of the party, where that partner is 'P' who is the subject of those proceedings in which the fee is payable;

6. Where proceedings concern both the property and affairs of 'P' and their personal welfare, their disposable capital and gross monthly income shall be treated in accordance with the rules governing property and affairs proceedings.

The MCA/MHA Interface in practice

Clare, I.C.H. et al, 'Understanding the interface between the Mental Capacity Act's Deprivation of Liberty Safeguards (MCA-DOLS) and the Mental Health Act (MHA)'

This study was commissioned by the DoH to make recommendations that might contribute to the development of policy and practice. It was carried out from November 2010 to November 2011 in England and reported in July 2013. Amongst its conclusions were the following:

- In psychiatric hospitals, the MHA was seen as appropriate for those receiving 'active treatment' (medication, ECT, psychological interventions) and MCA-DoLS for those receiving 'care' (support with personal care and/or everyday tasks) while awaiting discharge to residential accommodation;
- In general hospitals, clinicians were reluctant to consider the MHA even when it appeared appropriate for the treatment of mental disorder;
- Restraint, patient challenges, and the family's wish for their return home, were used rather crudely as DOL indicators;
- Best interests assessors did not always recognise that, in the context of psychiatric treatment, patient opposition and subsequent staff restrictions could constitute 'objection' for which the MHA might be required;
- There was little evidence of consideration being given to less restrictive alternatives, eg environmental modifications, to limit restrictions on freedom of movement;
- MCA-DoLS forms were unhelpful, repetitive, with slightly misleading wording and did not ensure the decision-making process was always transparent and challengeable;
- Few BIAs were directly recording the information gained from those who might have long-standing knowledge of the person;
- The MCA/MHA interface was not well-understood;
- Almost no-one under MCA-DoLS initiated a review him or herself.

The researchers made four recommendations:

1. Strengthen attention to decision-making capacity in psychiatric as well as general hospitals: MCA principles should apply to all patients, detained under the MHA or otherwise; consideration should be given to extending IMCA role to informal incapacitated patients in psychiatric hospitals;
2. Revise the standard Forms;
3. Revise and update the MCA-DoLS Code of Practice and clarify the status of guidance issued by the DoH;
4. Review and improve data collection and monitoring procedures.

What do Part 8 reviews under the DoLS regime actually do?

The Cambridge team's findings about the rarity of P initiating reviews is also borne out by the outcome of an FOI request made by Lucy Series to the Health and Social Care Information Centre. The result of this request can be found on her excellent Small Places blog. In summary, in 2012-13 less than 30% of DoLS authorisations involved a Part 8 review. Out of this small proportion:

- 48% were triggered by the managing authority;
- 46% by the supervisory body;
- 4.4% by the RPR; and
- Only 0.6% by the detained resident him or herself.

The fact that only 5% of authorisations were challenged by someone other than the body doing the authorising or the body being authorised is a matter of some concern. The outcome of those challenges is also unknown and collection of that data would be useful. A comparison with the Mental Health Act 1983 is revealing. Taking 2011-12 as the comparator, only 5.2% of the 6546 DoLS authorisations were challenged by the RPR or P: whereas 52.9% of the 48,631 MHA detentions were challenged.

Improving DoLS practice – one regional group's experience

In light of the two articles above, it is good to be able to bring to your attention – with thanks to Lorraine Currie of Shropshire County Council – the work of the West Midlands Regional DoLS Leads Group (work which we know is carried out in similar fashion elsewhere, and which we would be happy to report upon in the interests of spreading good practice). The group meets every two months, and is supported in its work by Browne Jacobson solicitors. The key conclusions of a baseline survey conducted in 2012, looking at the roles of DoLS Leads, BIAs and those granting authorisations under the DOLS regime, were that:

- There was great variety across the region in many aspects of DoLS work. No-one had a purely dedicated DoLS lead; most leads were also responsible for MCA or some aspect of Safeguarding;
- The level of the DoLS Lead varied but was generally a management role. All but one Lead had strategic and operational responsibility and the majority sit within safeguarding. 69% of leads are also authorisers of DoLS and 85%% of Leads act for SB in setting times and or conditions;
- Only 4 respondents had substantive BIA's and the use of agency BIA's varied greatly from 2.5% to 100%;
- The length of time taken for best interests assessments varied from 7 hours to 5 days producing a **very** rough average of 13.5 hours;
- There was great variety in the number of authorisers per supervisory body, ranging from only one to fourteen. There was no consistent training standard for authorisers;
- The model for signing off authorisations broadly fell into 3 groups; either a panel, a 1:1 or an individual sign off;
- The greatest consistency found was in the role of the Lead and the least consistency found was the model and method of signing authorisations.

Regional forms have now been developed (and continue to be refined) to build upon those provided by the Department of Health for use during the authorisation process, as well as regular training and case-law updates. The Group has also drawn up a series of useful 'good news' DOLS case studies. We are happy to put our readers in touch with Lorraine so she can provide these studies, as well as more detail of the group generally.

Community Care newsletter

The new issue of the Community Care Newsletter is now available, covering all developments in community care law between July and September 2013. It also introduces a new series with in-depth analysis of key aspects of the Care Bill, and takes a closer look at two developing areas of judicial review: reliance on EC treaty rights by those who otherwise have no recourse to public funds, and s.47 assessments and care planning for prisoners nearing release. To subscribe, please email marketing@39essex.com.

Court of Protection Conferences

Shameless plugs for:

(1) Alex and Tor, who will be speaking at Jordans' Court of Protection Practice and Procedure 2013 Conference on 14 October;

(2) Tor, who will be amongst the speakers at Langley's Fifth Annual Review of the Mental Capacity Act 2005 in York on 17 October 2013. Full details of the conference are available here;

(3) Neil, who will be addressing issues of conveyance and restraint at the Langley's conference in York on 17 October and at the 'Taking Stock' conference in Manchester on 18 October, whose details can be found here; and

(4) Jonathan Auburn, the co-editor of the Community Care Newsletter, who is chairing the Butterworths Deprivation of Safeguards Conference on 20 November (early bird booking available prior to 9 October).

Our next Newsletter will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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Michelle's broad range of experience in the Court of Protection encompasses deprivation of liberty, residence and contact, forced marriage, serious medical treatment, capacity to consent to marriage and capacity to consent to sexual relations as well as applications for financial deputyship. She is recommended as "responsive and approachable" and a "formidable presence" in the Court of Protection in Chambers and Partners 2013. **To view full CV click here.**