Mental Capacity Law Newsletter December 2014: Issue 52

Compendium: Screen-Friendly

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Introduction

Welcome to the December Mental Capacity Law Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: Mostyn J takes on the Supreme Court over Article 5; the vexed OFSTED Guidance; the *Re X* process; guardianship and *Cheshire West*;

(2) In the Property and Affairs Newsletter: decisions on planning for survivorship of attorneys, inheritance tax planning, retainers and the survival of the common law tests for testamentary and gift-making capacity;

(3) In the Practice and Procedure Newsletter: an important case on habitual residence; a *cri de coeur* about case management; and what to do where a litigation friend is no longer in funds;

(4) In the Capacity outside the COP Newsletter: prosecutions under s.44 MCA 2005; the battle of the UN Committees as to deprivation of liberty; the Law Commission's report on kidnapping and false imprisonment and legislative change post-Winterbourne View

(5) In the Scotland Newsletter: an update on the position relating to powers of attorney, an important case on whether a local authority complaints procedure excludes the possibility of judicial view and Lady Hale in Glasgow.

As matters stand, our commitments mean that it is unlikely we will be able to bring you a Newsletter in January. If no Newsletter appears, a 'watching brief' on important developments will be maintained by Alex on his website. In the meantime, happy holidays to all!

Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

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JS Mill strikes back – Mostyn J takes on the Supreme Court

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Article 5 – Deprivation of Liberty

Summary

Mr Justice Mostyn is nothing if not brave. In a decision handed down on 18 November 2014, he took on the Supreme Court in *Cheshire West* and demanded that it "reconsider" the application of Article 5 ECHR in the context of deprivation of liberty at home.

The case concerned a 52 year old woman, "Katherine," cared for in own home. As a result of a subarachnoid haemorrhage sustained during a medical operation many years previously, she had cognitive and mental health problems, epilepsy and physical disability. At the time that the matter came before Mostyn J, she was cared for in her own home with a package of 24/7 care funded jointly by Rochdale MBC and the local CCG. Mr Justice Mostyn described her situation thus:

> *"Physically, Katherine is just ambulant with the use of a wheeled Zimmer frame. Mentally, she is trapped in the past. She believes it is 1996 and that she is living at her old home with her three small children (who are now all adult). Her delusions are very powerful and she has a tendency to try to wander off in order to find her small children. Her present home is held under a tenancy from a Housing Association. The arrangement entails the presence of carers 24/7 [arranged by an independent contractor]. They attend to her every need in an effort to make her life as normal as possible. If she tries to wander off she will be brought back."*

Before Mr Justice Mostyn both the local authority and KW (by her litigation friend Celia Walsh) agreed that the decision of the majority in *Cheshire West* compelled the conclusion that she was deprived of her liberty (the local authority being said to 'constrain to concur' with this conclusion).

Mostyn J decided to the contrary, holding (at paragraph 7) that he:

> "[found] *it impossible to conceive that the best interests arrangement for Katherine, in her own home, provided by an independent contractor, but devised and paid for by Rochdale and CCG, amounts to a deprivation of liberty within Article 5. If her family had money and had devised and paid for the very same arrangement this could not be a situation of deprivation of liberty. But because they are devised and paid for by organs of the state they are said so to be, and the whole panoply of authorisation and review required by Article 5 (and its explications) is brought into play. In my opinion this is arbitrary, arguably irrational, and a league away from the intentions of the framers of the Convention*."

In order to reach this conclusion, Mostyn J embarked upon his own analysis of the meaning of Article 5 ECHR and of the concept of liberty, holding that the first question he had to ask was what "'*liberty' was for Katherine*." This was, he acknowledged, a "big question" (paragraph 14). He considered what J.S. Mill had to say upon the subject, noting that he considered that it "*inconceivable*" that Mill would have found that the provision of care to Katherine in her own home involved an encroachment on her liberty – and that he would have taken the same view of each the of three cases that were before the Supreme Court in *Cheshire West*.

In addressing the question of how the Supreme Court addressed this issue, Mostyn J stated he considered (and noted in this that Counsel before him agreed) that Lord Kerr was the only one of the Supreme Court to grapple with the question), and that the answer that Lord Kerr gave (at paragraph 76 of his concurring judgment) was that it was the state or condition of being free from external constraint. Mostyn J further latched onto the discussion at paragraphs 76-79 of Lord Kerr's concurring opinion of the comparison to be made between the extent of the individual's "actual freedom" with that of someone of that person's age and station whose freedom is not limited.

The fundamental – philosophical – disagreement Mostyn J had with the judgment of the Supreme Court is laid bare at paragraph 17:

> "*It is clear that the driving theme of the majority opinions is a denunciation of any form of discrimination against the disabled. With that sentiment I naturally wholeheartedly agree. Discrimination is found where like cases are not treated alike. However, when making Lord Kerr's comparison you do not have two like cases. You are comparing, on the one hand, a case where an 18 year old does not need protection and, on the other, a case where the 18 year old does. They are fundamentally dissimilar. The dissimilarity justifies differential treatment in the nature of protective measures. For me, it is simply impossible to see how such protective measures can linguistically be characterised as a "deprivation of liberty". The protected person is, as Mill says, merely "in a state to require being taken care of by others, [and] must be protected against their own actions as well as against external injury". And nothing more than that. In fact it seems to me to be an implementation of the right to security found in Article 5.*" (emphasis in original)

Mostyn J made very clear he agreed with the opinions of the minority in the Supreme Court (and those lower courts that were in line with them), but – properly – recognised that he was bound by the majority. He, however, distinguished Katherine's situation on the following bases:

1. "Freedom to leave" in the objective test of confinement did not mean "*wandering out of the front door*" but leaving in the sense of permanently removing oneself to live where and with whom one likes (paragraph 20, relying upon the dicta of Munby J in *JE v DE and Surrey County Council* [2006] EWHC 3459 (Fam) [2007] 2 FLR 1150 per Munby J at para 115, which Mostyn J considered to have been "*implicitly approved*" in the Supreme Court at para 40);

2. Freedom to leave therefore must mean that the person has the physical capacity to leave. In a passage that will no doubt be pored over carefully in due course, Mostyn J noted that:

   > "*Katherine's ambulatory functions are very poor and are deteriorating. Soon she may not have the motor skills to walk even with her frame. If she becomes house-bound or bed-ridden it must follow that her deprivation of liberty just dissolves. It is often said that one stress-tests a proposition with some more extreme facts. Imagine a man in hospital in a coma. Imagine that such a man has no relations demanding to take him away. Literally, he is not 'free to leave'. Literally, he is under continuous supervision. Is he in a situation of deprivation of liberty? Surely not. So if Katherine cannot realistically leave in the sense described above then it must follow that the second part of the acid test is not satisfied*" (paragraph 22)

3. Katherine's situation could be distinguished from MIG's (even though both were being cared for at home) because:

   > *"By contrast MIG was a young woman with full motor functions, notwithstanding her problems with her sight and hearing. She had the physical capacity to leave in the sense described. She had sufficient mental capacity to make the decision to leave, in the sense described. If she tried she would be stopped. Therefore, it can be seen that in her case both parts of the acid test was satisfied."* (paragraph 23)

4. As a factual finding, Katherine was:

> *"not in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom"* (paragraph 25)

Mostyn J emphasised that he was not holding that a person could never

> *"be deprived of his liberty by confinement in his or her own home. In the field of criminal law this happens all the time. Bail conditions, or the terms of a release from prison on licence, routinely provide for this. However, I am of the view that for the plenitude of cases such as this, where a person, often elderly, who is both physically and mentally disabled to a severe extent, is being looked after in her own home, and where the arrangements happen to be made, and paid for, by a local authority, rather than by the person's own family and paid for from her own funds, or from funds provided by members of her family[1], Article 5 is simply not engaged*" (paragraph 26, footnote in the original)

Mostyn J then held that the "matter" (by which we presume he means the application of Article 5 in this context) "*should be reconsidered by the Supreme Court*." Mostyn J held that he considered that a "leapfrog" appeal to the Supreme Court was technically possible (if the Council agreed), but made alternative provision for extending time to seek permission to appeal from the Court of Appeal. As the Council did not agree to a leapfrog, the matter will be going to the Court of Appeal (no date yet having been fixed of which we are aware).

Comment

This is – to put it mildly – a striking decision, which will, unfortunately, do nothing in the short run to assist those who are trying to provide guidance to front-line social work and clinical staff as to how properly to discharge their functions.

The decision lays bare the philosophical debate as to the meaning of "liberty," and it is clear that Mostyn J considers that J.S. Mill would have been astonished to find that any of P, MIG or MEG were deprived of their liberty. Further, there are also entirely proper grounds upon which to be concerned as to the resource impact of the decision. In a fascinating speech given in October 2014 by Lady Hale discussing (inter alia) the decision, she noted that it had "alarming" practical consequences, because "*a great many elderly and mentally disabled people, wherever they are living, must have the benefit of safeguards and reviews, to ensure that their living arrangements are indeed in their best interests*."[2] There may be arguments that need ultimately to be resolved through the democratic process as to the allocation of resources to such safeguards.

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[1] "*There is also the problematic question of whether the State is involved in a private arrangement if benefits, such as attendance allowance, are paid to help with the care of the protected person*."

[2] See also the speech by Lady Hale to the Mental Health Tribunal Members Association given a few days earlier and the discussion of the two speeches by Adrian in the Scottish section of this Newsletter.

However, from a legal perspective, the decision is deeply problematic because it flies in the face of the decision of the majority in the Supreme Court.

Mostyn J's conception of freedom to leave is fundamentally predicated upon a concept of liberty that is dependent upon a person's ability to exercise that right, either themselves or by another. A person who is severely physically disabled – and therefore house-bound – could not, on Mostyn J's analysis, be considered to be deprived of their liberty. It is, however, extremely difficult to square that analysis with the conclusion of Lady Hale (with whom Lord Kerr agreed) that liberty must mean the same for all, regardless of whether they are mentally or physically disabled (see the discussion at paragraphs 33-36 of the judgment in *Cheshire West*).

Further, it seems to us that Mostyn J was on thin ice in holding that the Supreme Court had held that "freedom to leave" defined solely in the "macro" terms said to have been identified by Munby J in *JE v DE*. In the same speech given by Lady Hale noted above, and in the course of discussing the situations of P, MIG and MEG, she noted that:

> "*they were under the complete control of the people looking after them and were certainly not free to go, either for a short time or to go and live somewhere else*" (emphasis added).

Whilst, of course, Lady Hale was not speaking in a judicial capacity, at the very least it suggests that she does not consider that the majority held that freedom to leave was only relevant in the 'macro' sense.

Taking a step back, and even applying Mostyn J's analysis of the 'ordinary' person able to take advantage of their liberty, we would suggest that an 'ordinary' person who was unable to come and go from the place that they live as they see fit would undoubtedly consider themselves to be deprived of an important right. We note in this regard that the Grand Chamber of the European Court of Human Rights placed very considerable emphasis in *Stanev* on the fact that Mr Stanev was not able to leave the care home for such purposes as visiting the nearby village "*whenever he wished*" (i.e. not merely for purposes of permanently relocation) in finding that he was deprived of his liberty (see in particular paragraphs 124-128). This is also entirely consistent with the approach adopted in *KC v Poland* discussed below.

Finally, we would suggest that it would be a very striking consequence (and one on its face entirely incompatible with the decision of the Supreme Court) if – as a matter of principle – any arrangements made by a local authority or CCG to care for an individual in their own home could not amount to a deprivation of that individual's liberty if that individual was not physically able to leave that home because of their own disabilities. It only requires a moment's translation of those arrangements to another setting that was not, formally, their own home but was (say) a supported living placement (or indeed, a private care home) which the adult regarded as 'home' to make clear the impossibility of squaring this decision with that of the Supreme Court.

Whilst it is, of course, for all those reading this Newsletter to seek their own legal advice as to whether to follow Mostyn J's decision, we would, at a minimum, suggest that any cases where a decision is taken not

to apply to the Court of Protection on the basis of the judgment are clearly identified so that rapid remedial action can be taken if and when the Court of Appeal reverse it.

On a personal note, we would also just hope that any appeal can be resolved speedily so that social care and health care staff can simply get on with trying to do the job that the majority of them wish to do, namely to seek to make arrangements for some of the most vulnerable in society that are actually predicated upon considerations of what is in their best interests.

The vexed Guidance about children's homes – more developments

Barnsley MBC v GS & Ors [2014] EWCOP 46 (Holman J)

Article 5 – Deprivation of Liberty

Summary

This case is the sequel to the *Liverpool v SG* case in which Holman J held that there the Court of Protection has the power to make an order which authorises that a person who is not a child (ie who has attained the age of 18) may be deprived of his liberty in premises which are a children's home as defined in section 1(2) of the Care Standards Act 2000 and are subject to the Children's Homes Regulations 2001 (as amended). In that case, Holman J had indicated that he had doubts about the accuracy of paragraph 4 of the Guidance issued jointly by the President and OFSTED on 12 February 2014 entitled "Deprivation of Liberty – Guidance for Providers of Children's Homes and Residential Special Schools." He did not, though, have to express a definitive view.

In the *Liverpool* case, further, Holman J did not have cause to consider the National Minimum Standards National Minimum Standards for Children's Homes issued by the Department of Education in April 2011. They featured heavily here (as did submissions from the Secretary of State, who initially argued that the *Liverpool* case was wrongly decided, before a last-minute reversal of position). Having had detailed reference to the NMS, Holman J has held that paragraphs 4, 6 and 13 of the Guidance are incorrect:

> "*23. In agreement with the submissions of each of the Secretary of State for Education, the local authority in this case and the Official Solicitor, I very respectfully do not agree with the reasoning in paragraph 6 of the guidance. There is nothing in either the legislation, or the regulations, or the NMS which has the effect that a children's home, which is not an approved secure children's home, is 'unable' to deprive a person of his liberty. To the contrary, regulation 17A* [of the Children's Homes Regulations 2001] *contemplates that, when there is no alternative method of preventing injury to any person (including the person who is restrained) or serious damage to the property of any person, restraint may be used, provided it is proportionate and no more force than is necessary is used.*
>
> *24. The NMS 3.19 and 12.7 themselves state that 'No children's home/school ... restricts the liberty of any child as a matter of routine…' Whilst never a matter of routine, those very standards clearly contemplate that a home or school may have to restrict liberty as a matter of non-routine. Such restraint may involve a deprivation of liberty as now understood and, in my view, the unqualified proposition in paragraph 4 of the*

> *guidance that there is no purpose to be served in seeking an order of the Court of Protection goes too far. So, accordingly, does the proposition in paragraph 6 and the summary in paragraph 13 of the guidance. In my view, there can indeed be circumstances in which the Court of Protection may authorise a children's home or residential special school to impose restraint which amounts to a deprivation of liberty, and the guidance is mistaken in suggesting that the effect of the NMS is necessarily to prevent the court from doing so."*

Holman J expressly declined to decide whether, in the instant case, the COP should make an order having the effect of depriving a 20 year old resident in a registered children's home of his liberty, remitting the question back to the District Judge with conduct of the case to consider. He did, though, invite the SoS to consider contacting Sir James Munby P ("*renowned for his approachability*") to raise her concerns about any aspects of the Guidance.

Comment

This is a welcome decision because it clears up a substantial area of concern and confusion caused – no doubt inadvertently – by the Guidance. We hope that steps will be taken in short order to revise it. We also note that the draft Children's Homes (England) Regulations 2015, regulation 22 will confirm that a court order (other than a secure accommodation order) can authorise a child's deprivation of liberty in that care setting.

The Re X process

As most of you will know, a new process came into effect on 17 November 2014 on a pilot basis to implement the judgments in *Re X and others (Deprivation of Liberty)* [2014] EWCOP 25 and [2014] EWCOP 37.

That process is built upon:

1. A new form;

2. A new Practice Direction, the material provisions of which can be found at paragraphs 27 and following of Practice Direction 10A (Deprivation of Liberty); and

3. A model form of order which will be made – on the papers – if all the necessary criteria are satisfied: in other words, in broad terms, all the factors point to the situation being a "state" deprivation of liberty that is incontrovertibly in P's best interests requiring authorisation because they are unable to give the requisite consent.

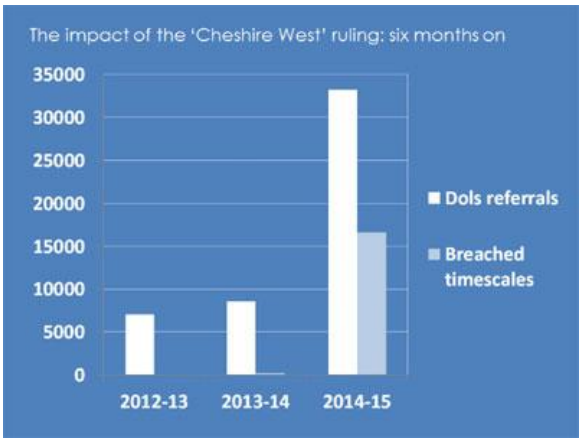
All of these are available here (note that the new form is also available at the same location in Word form; this is an unofficial version, prepared by the Court of Protection team here, which is functional but not absolutely perfect; we are grateful to James Batey of HMCTS for his permission to allow us to 'reverse-engineer' and disseminate this).

We have also prepared a guidance note amplifying some of the key parts of the process.

As we went to press, we learned that permission to appeal had been granted to the appellants (two of the 'P's before the President and the Law Society), with the appeal listed to be heard before the end of February if possible.

Nine-fold hike in DoLS caseloads

Data obtained by Community Care under freedom of information requests of local authorities confirms the surge of DoLS activity following the Supreme Court's decision. Average monthly applications have risen from 1000 (2013-4) to 9000. From 1 April to 30 September 2014 there were 53,900 applications made to 130 (of the 152) supervisory bodies in England. It is estimated that statutory timescales are being breached in around half of cases.



Welsh DoLS Review

In April and May 2014, the Welsh inspectorates for health and social care surveyed all local authorities and NHS boards, reviewed 84 DoLS applications, and received feedback from individuals and carers. Ten recommendations were made in their report published at the end of October.

Amongst the interesting findings were the following:

- Very low IMCA referral rate, with the majority of referrals being prompted by BIAs.
- Supervisory body and managing authority functions were not always clearly defined and separated within local authorities.
- Knowledge of, and confidence in the use of, MCA and DoLS was limited in the majority of care homes that were visited. There was also a lack of understanding and awareness amongst hospital

staff, although this was beginning to change, and some perceived DoLS as having negative connotations, with an application reflecting badly on the organisation.

- BIA role was generally perceived as an "add on" by managers and professionals, with no particular status unlike that of AMHPs, with BIAs often having to negotiate with their manager to be released to undertake their assessments.

- Each BIA assessment was estimated to take between 10 and 15 hours.

- Carers spoke very highly of their experience, despite being initially put off by the terminology. They felt supported and reassured that their friend or relative was being protected and kept safe. Short authorisations created a lot of uncertainty for the family.

Updated DOLS guidance

Further guidance from different sources as to both substantive and procedural matters has been issued. In particular, we draw your attention to:

1. ADASS's November Advice Note for local authorities as to DOLS; and

2. The Intensive Care Society's guidance as to deprivation of liberty in intensive care settings.

We also understand that the Department of Health is shortly to be issuing guidance in relation to hospices, and the Chief Coroner is to be issuing guidance as to the application of DOLS. This guidance will appear on the *Cheshire West* page of Alex's website as and when it is published.

Guardianship and *Cheshire West*

NL v Hampshire County Council (Mental health: All) [2014] UKUT 475 (AAC) (Upper Tribunal Judge Jacobs)

Article 5 – Deprivation of Liberty

Summary

The Upper Tribunal has now pronounced upon the application of the decision in *Cheshire West* in the context of guardianship.
Mr L, who had mild to moderate learning disabilities, was made subject to the guardianship of his local authority. Both parties before the First Tier Tribunal ('FTT') had agreed that he met the statutory criteria for guardianship. They also agreed that the Tribunal should proceed on the basis that he was deprived of his liberty and that he did not consent to such deprivation. It is also important to note (although this is implicit rather than explicit in the judgment) that Mr L had capacity to take the material decisions.

The issue put to the FTT was whether, in those circumstances, it should exercise its discretionary power under s.72(4) MHA 1983 to discharge Mr L from guardianship. It decided not to do so, applying the decision in *GA v Betsi Cadwaladr University Health Board* [2013] UKUT (AAC) 0280 (AAC), in which the Upper Tribunal made clear the very narrow scope of the discretionary power. The FTT identified the source of Mr L's dissatisfaction to be the way that the care plan was being implemented rather than with the guardianship itself. The FTT refused to exercise its discretionary power to discharge.

Mr L appealed (with the permission of the FTT) to the Upper Tribunal. The central argument advanced on his behalf was that the 'force' that caused the deprivation of his liberty was the guardianship. The local authority contended that the material cause was the care plan and the arrangements to which he was subject under that plan. It is also important to note – because it does not appear from the face of the judgment and the judgment does not otherwise make sense – that the local authority were not imposing the care arrangements. If, therefore, the local authority was correct and the material cause of any deprivation of Mr L's liberty would have been the care plan, then on this premise, there would in fact have been no deprivation of his liberty. It is perhaps worth noting that – given that Mr L had capacity in the material domains, given that he did not consent to the arrangements in the care plan, there would have been no lawful basis upon which it could have been imposed: it would only been possible to impose a care and treatment plan amounting to such a deprivation of liberty by way of detaining him under the MHA 1983.

Judge Jacobs' discussion of the interrelationship between guardianship and deprivation of liberty is sufficiently important to merit reproduction in full:

> *"G. Guardianship and deprivation of liberty*
>
> *4. There are three components to a deprivation of liberty. They were conveniently set out by Baroness Hale in Surrey County Council v P at [37]:*
>
> > *a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of consent; and (c) the attribution of responsibility to the state.*
>
> *Component (a) is not limited to physical confinement. It requires more than this, as Lord Neuberger identified at [63]:*
>
> > *I consider that the Strasbourg court decisions do indicate that the twin features of continuous supervision and control and lack of freedom to leave are the essential ingredients of deprivation of liberty (in addition to the area and period of confinement).*
>
> *Mr Pezzani relied in particular on a passage from Baroness Hale's judgment at [46]. She was making the point that the test was the same for everyone, whether or not they were disabled. In doing so, she gave a description of what could be a deprivation of liberty:*
>
> > *If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person.*

5. Like the First-tier Tribunal, I will deal with the case on the basis that Mr L was deprived of his liberty. The question is: what was the cause of the deprivation? Was it, as Mr Pezzani argued, the guardianship? Or was it, as Mr Patel argued, the care plan? I accept Mr Patel's argument.

6. It is possible for guardianship to be set up in a way that does involve a deprivation, but guardianship of itself does not necessarily involve a deprivation of liberty. Mr Pezzani accepted that and that is what the Code of Practice says. Guardianship provides a minimal legal framework of control within which other care can be provided. The features of guardianship are set out by section 8(1). They allow the guardian to control only three aspects of the patient's life:

- *where the patient lives;*
- *attendance for treatment and training; and*
- *access for medical or other attention.*

Those are the statutory limits on the powers of a guardian as such. I find it difficult to imagine a case that could realistically arise in which those basic powers could be used in a way that would satisfy the conditions for deprivation of liberty.

7. Guardianship does not exist for its own sake. It exists for the purpose of providing a basic framework of compulsion within which care can be provided, as paragraph 26.2 of the Code of Practice explains. That is why an application for guardianship should be accompanied by a comprehensive care plan, as advised by paragraph 26.19 of the Code. It is in the details of that plan that the potential for restriction, supervision and control sufficient to amount to a deprivation of liberty lies. That is what the tribunal found and I can find no flaw in the tribunal's conclusion. It was a realistic analysis and, I consider, the only realistic analysis.

8. I accept that it is necessary to take account of what the caselaw calls the whole situation. I also accept that guardianship and a care plan go together, but a care plan need not involve a deprivation of liberty. It would be a distortion of the limited effect of guardianship in this case, and I suspect generally, to see it as the cause of a deprivation of liberty that arises from the contents of the care plan.

9. I therefore dismiss this appeal on the ground that the guardianship did not give rise to a deprivation of liberty and the tribunal was not obliged to exercise its discretion to discharge the patient. It exercised its discretion rationally, relying on relevant considerations only. For what it is worth, I consider that it came to the correct conclusion."

Comment

This decision is of no little importance for its conclusion that, as a matter of general principle, the use of guardianship will not, itself, give rise to a deprivation of liberty. Given the emphasis of the majority in *Cheshire West* upon the requirement not merely that a person is not free to leave but also that they are subject there to continuous supervision and control, we would suggest that Judge Jacobs was plainly correct to find that the ability of a guardian to direct where a patient lives will be insufficient in and of itself to give rise to a deprivation of liberty even if a guardian can deprive a person of the freedom to leave a particular place (a point which we note – in fact – Judge Jacobs appears not to have decided as opposed to have assumed).

It is, however, equally important to emphasise – as did Judge Jacobs – that guardianship can only work where it is accompanied by a detailed care plan which – if it amounts to a deprivation of liberty to which the person cannot consent – can be the subject of authorisation either under Schedule A1 or by way of an order under s.16(2)(a) MCA 2005.

It is, further important to emphasise that guardianship should not be used as a mechanism to determine genuine disputes about residence in the case of a person lacking the material decision-making capacity: *C v Blackburn with Darwen Council* [2011] EWHC 3321 (COP) (a decision that is plainly wrong post-*Cheshire West* as regards the question of whether C was deprived of his liberty, but otherwise remains entirely correct).

The decision in *NL* makes this point all the clearer. Although the outcome of the case was that Mr L was, in fact, not considered to be deprived of his liberty, the outcome could easily have been very different had the local authority imposed the care plan and the arrangements therein. It could only have done so, as a matter of logic, had Mr L lacked the requisite capacity and the deprivation of liberty been authorised under Schedule A1 or a court order. If Mr L had been deprived of his liberty as a result of the combination of the residence requirement imposed by the guardian (which the Court of Protection could not consider) and the care plan (which the FTT could not consider), then it is far from obvious precisely how Mr L could be afforded the effective remedy to challenge that deprivation of liberty required by Article 5(4) ECHR.

Thank you to Counsel for the local authority, Parishil Patel, for clarifying certain elements of the factual matrix without which this judgment would be unclear.

Winterwerp and care homes – further guidance from Strasbourg

KC v Poland [2014] ECHR 1322 (European Court of Human Rights, Fourth Section)

Article 5 – Deprivation of Liberty

Summary

KC was 72, widowed, and under the apparent care of a social guardian, having previously been declared to be partially incapacitated. Following an application by social services to place her against her will in a social care home, the District Court visited her in her apartment where she lived alone. She made it clear that she did not want to go and told those present to get out.

Subsequently, the District Court found that no members of her family could take care of her on a permanent basis and social workers would not spend the whole day with one person or take care of them permanently. Accordingly the Court placed her in the care home on account of chronic schizophrenia and a disorder of the central nervous system. She had neglected the basic principles of hygiene and nutrition which might have led to infections or undernourishment but did not pose a direct danger to her own, or other peoples', health or life. The psychiatrist found that she needed to be under the constant care of a third person and said:

> "*Through her behaviour she poses a risk to her life, i.e. in certain circumstances leaving her without constant care significantly raises the probability of risk to her life. It is not however a direct risk, but it results rather from the applicant's neglect of basic hygiene principles, place of residence and nutrition. [The applicant is therefore exposed to] a risk of malnutrition, [and] infections.*"

Both KC and her daughter challenged the compulsory placement. At one stage a psychiatrist confirmed that she could be placed in a family home provided the family was able to assure 24-hour care. The Government submitted that there was no necessity to admit her to the care home but there were no other means of providing her with the necessary help given that her daughter had refused to take care of her and there was no one else to take on the responsibility.

Article 5(1)(e)

All parties accepted that KC was deprived of her liberty, even though she could ask to leave the care home on her own during the day:

> "*53. In the present case, although the applicant has been declared only partially incapacitated and although the Government submitted that she could ask to leave the social care home on her own during the day, they did not contest that she had been deprived of her liberty. She was compulsory* [sic] *placed in the social care home, against her will, on the basis of a court decision. Therefore, the responsibility of the authorities for the situation complained of is engaged (see Kędzior v. Poland, no. 45026/07, § 59, 16 October 2012).*
>
> *54. In the light of the foregoing, the Court concludes that the applicant has been 'deprived of her liberty', within the meaning of Article 5 § 1 of the Convention, from 10 September 2008 to this day."*

The Court confirmed that the *Winterwerp* criteria applied to determine whether her detention was lawful. She had been objectively found by a psychiatrist to have a "mental disorder" which, in the initial phase, warranted her care confinement:

> "*69. As regards the second criterion, namely the need to justify the placement by the severity of the disorder, the Court is ready to accept that in the initial phase of the applicant's confinement the domestic courts had reasonable grounds to believe that the applicant's placement in a social care home which would warrant her care on permanent basis was necessary. It is true that none of the psychiatric opinions prepared in the applicant's case mentioned that the applicant posed a direct threat to the life or health of herself or third persons. The opinion of 8 May 2008 mentions only an indirect risk to the applicant's life resulting from her neglect of basic hygiene principles, and of her place of residence and nutrition (see paragraph 11 above). In the opinion dated 6 April 2009, prepared after the applicant's placement in the home, the psychiatrist found no need for the applicant to be admitted to and treated in hospital. Likewise, no direct danger to the applicant's own or a third person's health or life was found (see paragraph 25 above). However, it was established that she had neglected herself and her apartment and failed to observe the basic principles of hygiene and nutrition. It was also confirmed that she needed constant care to be able to function normally. In its decision of 19 June 2008 the District Court stressed the need to provide the applicant with permanent assistance lack of which posed a danger to her life. Having examined the circumstances of the case the District Court found that there were no members of family or third persons who could take care of the applicant on permanent basis. In particular, the applicant's daughter expressly refused to do it. Also the assistance by social care employees, by its nature provided on temporary basis only, had not been sufficient to secure the*

> *applicant's basic needs (see paragraph 11 above). The District Court concluded that the applicant's placement in a social care home was the only solution to assure her necessary care and assistance. Taking into consideration the applicant's state of health and all the circumstances addressed by the courts at the time of the applicant's placement in the social care home, the Court accepts that the domestic court's decision to confine the applicant in a social care home was properly justified by the severity of disorder. It follows that also the second criterion laid down in the Winterwerp case was fulfilled in the present case."*

However, the third criterion, namely the persistence of mental disorder to justify the validity of continued confinement, had not been satisfied which resulted in a violation of Article 5(1):

> "*70 … the Court notes certain deficiencies in the assessment of whether the disorders persisted throughout the whole relevant period. Although the applicant was under the supervision of a psychiatrist, the aim of such supervision was not to provide an assessment at regular intervals of whether she still needed to be kept in the social care home for the purposes of Article 5 § 1 (e). Indeed, no provision was made for such an assessment under the relevant legislation … The domestic provisions do not provide for a periodic compulsory examination for the purpose of assessing whether an applicant needs to remain in a social care home. The applicant has been kept in confinement for over six years now and it has not been shown that the authorities undertake any steps which would allow assessment whether her continuous confinement in the social care home is indeed indispensable. After being admitted to the social care home, the applicant was examined by a psychiatrist for the purpose of the proceedings which her daughter had instituted to have the decision on her mother's compulsory placement in the social care home varied. However this examination was effected on 6 April 2009 and it was the most recent psychiatric opinion given in the applicant's case available to the Court (see paragraph 25 above). The Court concludes that the persistence of the disorder warranting the validity of the applicant's continued confinement has not been sufficiently shown by the domestic authorities."*

Article 5(4)

The Court repeated the *Megyeri* principles and found that there was no violation because (1) the placement was ordered by the court; (2) in domestic law there was no obligation to carry out a systematic periodic review of the lawfulness of, and continuous need for, the deprivation of liberty of persons on the grounds of their state of mental health; but (3) those deprived in psychiatric hospitals or social care homes could at any time request a review of the detention's lawfulness and the need to remain in the closed facility. And such a request could put in motion judicial proceedings in which the person detained would be heard and an examination by a specialist doctor would normally be ordered.

Comment

This decision is of particular interest for three reasons. The first concerns freedom to leave. The Government accepted that she was deprived of liberty even though she could ask to leave the care home on her own during the day. It is clear that she had to ask for permission to do so and, when KC asked for the court order to be varied to allow her to leave for one hour a day to go to the shop and to allow her to stay in her room all day, this request was declined by the court on the basis that it was provided for by the internal regulations of each care home. The Government's position was also that she had never requested permission to leave on her own for a short period of time (para 51).

The second point of interest is the confirmation, if it was needed, that the *Winterwerp* criteria (mental disorder, warranting detention, validity of continued confinement) govern the substantive legality of a deprivation of liberty in social care. The judgment would tend to suggest that psychiatric opinion is required at the outset of detention and periodically thereafter. This may well need to be explored further in due course in the context of annual reviews under the *Re X* procedure. We also note the court's acceptance that her disorder warranted confinement because she needed control and supervision and there was no alternative option available in the community. Whilst this may be pragmatic, it undermines arguments that might otherwise be made in support of independent living.

Finally, the accepted conformity of Polish law with Article 5(4) is of interest. KC, her relatives, and the care home director, could at any time request the court to change its decision to keep her in the care home. Being only "partially incapacitated" meant she was entitled to act on her own before the courts. Such a request would open the judicial proceedings and a specialist doctor would normally examine her to assess whether the grounds for her continued stay in the home still existed. Moreover, a judge had the right to enter the care home at any time to check the lawfulness of the placement and whether people needed to continue to stay there, the conditions of their placement, as well as whether their rights were being respected. This breadth of safeguards was clearly adequate to head off an Article 5(4) challenge and, interestingly, go somewhat beyond that provided for in our domestic system.

Short Note: Survivorship of attorneys

Short Note

If an LPA appoints 2 or more attorneys jointly (not severally), when one dies the authority of the other ceases. How can a donor achieve the situation where in those circumstances the surviving attorney can carry on?

In *Re Miles* [2014] EWCOP 40, the solicitor advising the donor included in the LPA a provision whereby the surviving donor was reappointed to act alone. Senior Judge Lush held that provision was invalid as s.10(4) MCA 2005 did not allow it. He, therefore, severed it and the LPA was registered without it.

Senior Judge Lush suggested a different approach. At paragraph 29 he said:

> *"In my view, the safest way of achieving the effect of joint attorneyship with survivorship would be for the donor to execute two LPAs: the first appointing the attorneys to act jointly, and the second appointing them to act jointly and severally with a condition that the second LPA will come into operation when the first LPA fails for any reason. The second LPA could also provide for the appointment of one or more replacement attorneys, if that is what the donor wishes."*

Short Note: IHT planning and incapacity

In *Re PC* [2014] EWCOP 41, a case in which Senior Judge Lush revoked an LPA, he emphasised the need for the court's approval where an attorney (or deputy) proposes gifts for the purpose of IHT planning, commenting thus at paragraph 26:

> "*I must comment briefly on the use of an LPA for Inheritance Tax planning purposes. Section 12 of the Mental Capacity Act 2005 confers on attorneys a limited authority to make gifts of a reasonable amount on customary occasions. If attorneys wish to make more extensive for Inheritance Tax planning purposes, such as setting up monthly standing orders of £250 to themselves, they should apply to the Court of Protection for an order pursuant to section 23(4) of the Act.*"

Short Note: Capacity and the solicitor's retainer

Blankley v Central Manchester and Manchester University Children's Hospitals NHS Trust [2014] EWHC 168 (QB), a case decided earlier this year, concerned personal injury litigation pursuant to a CFA. C started proceedings through a litigation friend because she lacked capacity. She regained capacity and entered into a CFA. She lost capacity again and her deputy continued the proceedings as litigation friend.

C was successful and D had to pay her costs. D argued that when C lost capacity for the second time, the retainer (then a CFA) was frustrated and as there was no new retainer with C, C could claim no further costs and her solicitors stood to lose out on their fees.

This, rather unattractive, argument found favour at first instance but Phillips J allowed C's appeal, holding that the retainer did not automatically terminate. The effect of the loss of capacity was simply that the solicitor's' authority to act ceased and on the appointment of the deputy, the latter as C's agent could continue to instruct the solicitors pursuant to the CFA.

D appealed to the Court of Appeal. The appeal has been heard. We understands that the Court of Appeal announced at the conclusion of the argument on D's appeal that the appeal would be dismissed; the judgment has been reserved.

Short Note: Calibrating remedies to mischief

In *The Public Guardian v Marvin* [2014] EWCOP 47, P had appointed his son as attorney for finance and affairs and health and welfare.

The Public Guardian became concerned because the attorney had delegated his finance and affairs role to P's partner and P's home was no longer registered in P's name, and brought an application for revocation of both powers of attorney.

As regards P's property and affairs, the attorney, Marvin, accepted that he had acted beyond his authority pleading ignorance of the rules and guidance. He was remorseful and agreed that his attorneyship for finance and affairs should end but asked that he be appointed joint deputy with a panel deputy.

Senior Judge noted that there had been no misappropriation of P's funds, no suggestion that the attorney had abused P in any way, and no suggestion that he was taking advantage of his father by undue influence.

Senior Judge Lush agreed to the unusual joint appointment, accepting that that was in P's best interests and that with the added supervision that a deputyship entails and ready access to advice from the panel deputy, there would be no concerns in relation to P's finances.

In making this joint appointment, Senior Judge Lush noted that:

> *"44. An order appointing Marvin to act jointly with a professional deputy is also, as far as is reasonably possible, compatible with:*
>
> *(a) section 1(6) of the Mental Capacity Act 2005, which states that "before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action";*
>
> *(b) the Parliamentary Assembly of the Council of Europe's resolution 1859, made on 25 January 2012, on protecting human rights and dignity by respecting the previously expressed wishes of patients; and*
>
> *(c) Article 12.4 of the United Nations Convention on the Rights of Persons with Disabilities, which requires that 'measures relating to the exercise of legal capacity respect the rights, will and preferences of the*

person, are free of conflict of interest and undue influence, [and] are proportional and tailored to the person's circumstances.'

Senior Judge Lush was, though, at pains to stress that the decision was unusual and fact-specific, and that it should not be regarded as setting a precedent for other cases in which the court finds itself having to revoke the appointment of an attorney under an LPA.

Senior Judge Lush also accepted that the attorneyship for health and welfare should continue, again taking into account that the attorney's failings had been through ignorance, there had been no abuse of position and that advice was available to him.

We note, finally, that although there was some excitable press coverage about the fact that P was at one stage dressed by P's wife (i.e. the attorney's mother) in a onesie with a padlock to prevent him shredding his incontinence pads and ingesting the contents, this was a matter that Senior Judge Lush found could not serve as a basis to criticise the attorney because it was done on medical advice and at a time when a similar situation had been held by the Court of Appeal in *Cheshire West* not to amount to a deprivation of liberty.

Two tests or one? Capacity to make a will and to make a gift

With thanks to Constance McDonnell and Martyn Frost for bringing these to our attention, two recent cases have considered (again) the question of whether the common law or the MCA 2005 applies to the tests of capacity to make a will and a gift.

In the first, *Re Walker* (unreported, 20 November 2014), Nicholas Strauss QC (sitting as a Deputy High Court Judge), had to consider a sad case pitting the deceased's children against the deceased's new partner. The result was that the court upheld the deceased's last will that made the deceased's new partner the main beneficiary.

In the judgment, the deputy judge grappled with the issue whether the MCA 2005 capacity test applied to the validity of wills. He decided it did not but that in any event, even if it did, the result would have been the same.

Differing from some other first instance judges, he applied the *Banks v Goodfellow* common law test as to the extent of capacity required for a valid will made after the coming into effect of the MCA 2005, holding also that the common law as to the burden of proof applied rather than the statutory requirement that a person is assumed capable until the contrary is proven. Again, with regard to the latter, he held that the burden of proof was not decisive in the case and it would rarely be so.

He held that in some circumstances, application of the MCA 2005, namely as to the requirement in section 3(1)(a) MCA 2005 that a person to have capacity must be able to understand the information relevant to the decision and under s.3(4) that the person must be able to understand the reasonably foreseeable consequences of the decision, could make a will invalid that the common law would uphold.

The Deputy Judge cited *Simon v Byford* [2014] EWCA Civ 1554 as authority for the proposition that inability to understand "collateral" consequences of a will does not affect the validity of a will at common law.

It was part of the Deputy Judge's reasoning in deciding that the Act did not apply to testamentary capacity that the legislature could hardly have intended to make the law as to capacity to make wills more restrictive.

In the second case, *Re Smith* [2014] EWHC 3926 (Ch), Stephen Morris QC sitting as a deputy judge of the High Court considered the validity of an inter vivos gift made by deceased. The gift was challenged on the grounds of incapacity and undue influence. The challenge failed on capacity but succeeded on undue influence.

As in *Re Walker*, the court felt it necessary to grapple with the issue whether the MCA capacity test applied. The court held it did not, but again held that the decision would have been the same had it done so (at least alongside as expounding the common law test as set out in *Re Beaney*).

We note that the authorities cited mainly concerned the question of capacity and wills, and the decision of District Judge Eldergill in the Court of Protection case of *A County Council v MS and RS* [2014] EHWC B14 (COP) appears not to have been cited to the judge. In that case, District Judge Eldergill had held that in the majority of cases involving gifts, the statutory test of capacity in the MCA 2005 will differ little (if at all) from the common law approach set out in *Re Beaney*.

As regards the burden of proof, it followed that the common law test prevailed (that is to say there is a presumption of validity but once a suspicion of incapacity is raised, the burden of proving capacity shifts to the person seeking to uphold the gift).

In the result, the judge held that, even though the defendant had been debarred from adducing evidence, the evidence adduced raised no real suspicion of incapacity and that, even if it did, the totality of the evidence did not establish that the deceased did not have capacity when she made the gift.

Comment

It is unfortunate that courts are still having to spend time deciding the issue of the extent to which the MCA applies to gifts (whether in wills or inter vivos), the burden of proof, whether the tests are different and if so how.

This is especially so where, as in these cases, the exposition is usually of academic interest only. There are, though, undoubtedly circumstances in which the exposition will not be of academic interest (see further in this regard the discussion here).

We therefore hope that a suitable case does get to the Court of Appeal sooner rather than later so that this question can be resolved once and for all.

Habitual residence – the latest word

An English Local Authority v (1) SW, by her litigation friend, the Official Solicitor (2) A Scottish Local Authority (3) RP and LC [2014] EWCOP 43 (Moylan J)

COP jurisdiction and powers – International

Summary

The issue in this case, decided some time ago, but only recently made available on Bailii, was where an incapacitated adult (SW) was habitually resident for the purposes of determining whether the English court had jurisdiction to deal with applications under the MCA 2005.

The English Local Authority and the Scottish Local Authority submitted that SW was habitually resident in Scotland. The Official Solicitor submitted that she was habitually resident in England.

SW was a 36 year old woman who was born and lived in Scotland until 2009. In 2006 she had sustained hypoxic brain injury following a hypoglycaemic attack. She was in a rehabilitation unit in Scotland and subject to a compulsory treatment order until 2009. In 2009 a rehabilitation facility in England was identified. SW was keen to move to the facility and contacted the facility herself to see if there was a vacancy. In July 2009 SW moved from the hospital in Scotland to a hospital in England under a compulsory treatment order. She then immediately moved to the rehabilitation facility under a community treatment order. It was clear from the evidence that SW wanted to move to the facility in England even though she was moved using a series of compulsory orders.

In 2010 SW had moved from the rehabilitation facility to specialist supported accommodation. From that time SW lived in a one bedroom flat with support. SW was in a relationship with someone who lived in one of the other supported living flats. At some point after 2010 SW had started to express a desire to move from her current accommodation. SW had stated very clearly that she wanted to move. More recently she had said she did not want to live in Scotland. When SW was asked by her solicitor in March 2013 where home was she replied "I would have to say here these days". In January 2014 she told her solicitor that she wanted to move from where she was living as soon as possible but did not wish to move back to Scotland.

SW's care was jointly funded by Scottish public authorities. She also continued to have an allocated social worker from Scotland.

The English COP proceedings were started because there appeared to be a real prospect that SW's mother and stepfather would remove her from her home in England and take her back to Scotland in circumstances where it was said that there was a significant prospect that her health would be put at risk because they could not adequately care for her. The application proceeded (without the issue of habitual residence having been decided) on the basis that even if SW was not habitually resident in England, the

court had jurisdiction under the MCA 2005, schedule 3, para 7(1)(c) because SW was present in England and the matter was urgent.

The judge held that it was clear from the evidence that SW lacked the capacity to decide where to live and the true nature of her care needs. She did not appreciate the level of support and assistance which she needed.

The judgment set out the legal framework in detail.

The Local Authorities focused on the 'integration test' and submitted that SW was not sufficiently integrated in England on the basis that her placements in England had been determined for her to varying degrees and the fact that she did not like living in her current placement.

The judge agreed with counsel for the OS that the local authorities had adopted too narrow a focus when addressing the circumstances of the case.

Importantly, Moylan J held that the definition of 'habitual residence' under the MCA 2005 should be the same as that applied in other family law instruments including Brussels IIa (Council Regulation (EC) No 2201/2013). If a different approach were taken as between adults and children, he considered, habitual residence would not even be applied consistently within Brussels IIa. It was plain that different factors would or may have differing degrees of relevance but the overarching test should be the same.

Furthermore, Moylan J held, the determination of habitual residence should be kept as free as possible from analytical complexities or constructs. It was a question of fact.

Moylan J noted that the Supreme Court in *A v A (Children: Habitual Residence)* [2014] 1 FLR 111 and Re LC (Childen) [2014] UKSC 1 had referred to the test or question as being whether there was some sufficient degree of integration in a social and family environment. Moylan J did not accept that was intended to narrow the court's focus to that issue alone as an issue of fact. It was not a free-standing, determinative factor and in particular not to the exclusion of all other factors. As the CJEU held in Proceedings brought by A [2010] Fam 42 the national court must conduct an 'overall assessment' in the light of the factors set out in paragraphs 38 – 41 of its judgment.

In Mercredi v Chaffe [2012] Fam 22 the Court of Justice stated that the place of habitual residence "must be established taking account of all the circumstances of fact specific to each individual case".

Integration, as an issue of fact, could be an emotive and loaded word. It was not difficult to think of examples of an adult who was not integrated at all in a family environment and only tenuously integrated in a social environment but who is undoubtedly habitually resident in the country where they are living.

"Degree of integration," as with centre of interests, Moylan J held, was an overarching summary or question rather than the sole or even necessarily the primary factor in the determination of habitual

residence. The broad assessment which was required properly to determine whether the quality of residence was such that it had become habitual in that it has the necessary degree of stability in order to distinguish it from mere presence or temporary or intermittent residence. This meant a sufficient, or some, degree of integration, not as a limited factual assessment but as a question to be answered by reference to the factors referred to by the CJEU and the Supreme Court.

Given that SW had been living in England since 2009 and had been living in her own flat since December 2010 there would need to be some compelling countervailing factors in order for it to be held that she was not habitually resident in England.

Counsel for the OS had set out a series of facts as pointing to SW being habitually resident in England (see paragraph 61 of the judgment) and those facts taken together with her long residence in England were not counterbalanced by the fact that she had been moved to England pursuant to a compulsory treatment order, her place of residence had been largely determined for her and the fact that she did not like her current placement.

By virtue of its duration, Moylan J found, SW's residence had acquired effective stability in the sense used by the Court of Justice. Many people would rather not be living where they are and might wish to be living elsewhere. However, at least after a person has been loving in one place for a significant period of time it will be difficult not to come to the conclusion that they are sufficiently integrated into their environment for them to be habitually resident there. To conclude otherwise would place too much weight on an assessment of SW's state of mind and the extent to which she feels settled.

Moylan J therefore held that SW was habitually resident in England and the court had jurisdiction to deal with applications under the MCA 2005.

Comment

This judgment helpfully sets out in detail all the recent case law on the issue of habitual residence but also forcefully reiterates that it is primarily a question of fact to be assessed in the round and on the particular circumstances of the case before the court.

The judgment is also of importance for its very clear statement that the tests for habitual residence should be aligned as between adults lacking capacity and children, and as between the Hague Conventions (at least those in the family sphere) and the EU legislation covering the same terrain.

It would be interesting to ask as a counter-factual in this case whether it would have made any difference had the relevant Scots authorities sought to time-limit SW's placement in England. Whilst on the facts of this case it would appear clear that SW's habitual residence must have changed, would the same have applied had she been placed in England for a long-term, but nonetheless finite, rehabilitation placement? It is possible that this question will be looked at later this month in the context of another cross-border case upon which we hope to report in our next issue.

The time has come to think again

Cases A and B (Court of Protection: Delay and Costs) [2014] EWCOP 48 (Peter Jackson J)

Practice and procedure – Other

Summary

This brief judgment from Peter Jackson J highlights concerns about the cost and duration of Court of Protection proceedings, based on two anonymised cases, the detailed facts of which are not given but in which both the Official Solicitor acted as litigation friend for the "P"s concerned.

Case A lasted for 18 months and Case B for five years, each incurring overall costs at a rate of around £9,000 per month. The judge identifies two particular problems which lead to cases taking too long and costing too much: '*the search for the ideal solution, leading to imperfect but decent outcomes being rejected*' and '*a developing practice...of addressing every conceivable legal or factual issue, rather than concentrating on the issues that really need to be resolved*'.

The judge also noted that:

> "*16. There is also a tendency for professional co-operation to be dissipated in litigation. This was epitomised in Case A, where the litigation friend's submission focussed heavily on alleged shortcomings by the local authority, even to the extent that it was accompanied by a dense document entitled "Chronology of Faults". But despite this, the author had no alternative solution to offer. The role of the litigation friend in representing P's interests is not merely a passive one, discharged by critiquing other peoples' efforts. Where he considers it in his client's interest, he is entitled to research and present any realistic alternatives.*"

The judge concludes:

> "*18. The main responsibility for this situation and its solution must lie with the court, which has the power to control its proceedings. The purpose of this judgment is to express the view that the case management provisions in the Court of Protection Rules have proved inadequate on their own to secure the necessary changes in practice. While cases about children and cases about incapacitated adults have differences, their similarities are also obvious. There is a clear procedural analogy to be drawn between many welfare proceedings in the Court of Protection and proceedings under the Children Act. As a result of the Public Law Outline, robust case management, use of experts only where necessary, judicial continuity, and a statutory time-limit, the length of care cases has halved in two years. ...*
>
> *19. I therefore believe that the time has come to introduce the same disciplines in the Court of Protection as now apply in the Family Court.'*

Comment

No doubt further consideration will be given (above all by the Ad Hoc Rules Committee, sitting at the

moment) to the proposal advanced by the judge as the number of Court of Protection cases continues to increase.

We would echo the need for greater focus and discipline in welfare cases, but we would wish any steps towards the implementation of (in particular) the PLO in the COP only to be taken after careful consideration of whether the COP has the resources to enable the necessary degree of judicial continuity. The resources are only just available to ensure that the family courts are able to match the demands placed upon practitioners under the PLO; at present, we very much doubt whether they are properly present to allow the COP to match any equivalent demands.

Funding and the Official Solicitor

Bradbury & Ors v Paterson & Ors [2014] EWHC 3992 (QB) (Foskett J)

Practice and procedure – Other

Summary[3]

The application raised a novel point about what the Court should do when the Official Solicitor concludes that he can no longer continue to act as litigation friend for a protected party in civil litigation because the anticipated source of funding for the Official Solicitor's costs ceases to be available.

The first defendant, Ian Paterson, was a surgeon. The claimants alleged that he had acted negligently in respect of surgery for breast cancer. It was said that towards the end of 2013, Mr Paterson had become increasingly unwell and solicitors acting for him obtained a psychiatric report which concluded that he lacked capacity to litigate.

The Medical Defence Union ("MDU") had originally agreed to fund the cost of Mr Paterson's litigation but had subsequently revised their decision and informed the Official Solicitor and other parties that it would no longer fund the litigation (or presumably indemnify Mr Paterson in respect of any of the claims).

As a result of the changed funding situation, the Official Solicitor applied to the court pursuant to CPR r.21.7 for an order that he be discharged as Mr Paterson's litigation friend in each of the five claims and at the same time the solicitors who had been acting for Mr Paterson applied to come off the record pursuant to CPR r. 42.3.

McGowan J granted both applications at a hearing at which neither the claimants nor the 2nd and 3rd Defendants were present or to which any written representations were addressed. The effect of the applications was that the proceedings had to be stayed as the litigation could not proceed where P was without a litigation friend.

[3] Note: Alex was and remains involved in this ongoing litigation as Junior Counsel for the Official Solicitor; he was not involved in the drafting of this case summary/comment.

An application was made for the court to set aside or vary the order of McGowan J.

It was argued on behalf of the claimants that the CPR did not allow the Official Solicitor to come off the record, leaving the protected party without a litigation friend.

The judge did not accept the argument of the claimants, preferring instead the submissions made on behalf of the Official Solicitor that:

> *"*27. […]. *Subject only to the requirement (in CPR 21.7(2)) that the litigation friend provides evidence in support of his application for an order terminating his appointment,* […] *there is no further requirement in CPR 21.7 requiring, for example, that he identifies a substitute. Indeed [*Counsel for the Official Solicitor] *submits that CPR 21.7(1)(b) would be otiose if there were such a requirement" (paragraph 27)*
>
> *28. It does seem to me that Miss Morris' submission on the construction of the rules is correct. She supplements that submission by contending that it is clear that any litigation friend must (a) consent at the outset to his appointment (see paragraph 23 above) and (b) continue to consent throughout the duration of that appointment. She says that, apart from anything else, a litigation friend who is unwilling to continue to act is, by definition, a person who is most unlikely to continue to satisfy the criteria set out in CPR 21.4(3) (which applies also to those appointed by court order: CPR 21.6(5)) of being a person who can "fairly and competently conduct the proceedings on behalf of the … protected party" and "has no interest adverse to that of … the protected party." A litigation friend who is being required to act on an unwilling basis will, she submits, almost by definition have an interest adverse to the protected party because his primary interest will be in bringing the litigation to an end as speedily as possible regardless of whether this is in the interests of the protected party. She also says, looking at matters more widely than the position of the Official Solicitor, that the reading of CPR 21.7(1) for which Mr de Navarro contends would "have a chilling effect on the ability of litigation friends to accept invitations to act." She suggests that this would be particularly so where a case involves public funding where the criteria for such funding change on a regular basis and where, in any event, reassessment by the Legal Aid Agency of those who are publicly funded "but are on the cusp of having sufficient means not to be eligible" for such funding not infrequently leads to revaluation and the withdrawal of funding. She suggests that no litigation friend who needed to instruct lawyers to act for him would be prepared to act unless he had a cast iron guarantee that the costs of doing so would be met whilst acting as a litigation friend".*
>
> […]
>
> *30.* […] *I do not think that there is any warrant for the conclusion that the consent of any person to act as a litigation friend is irrevocable, certainly under the regime provided for by the CPR."*

The judge considered the funding arrangements of the Official Solicitor (which will be familiar to those reading the Newsletter) namely that he requires funding to be provided in order for him to instruct solicitors and that money will either come from the public purse where a person is eligible, from that person's own funds or from a third party (such as an insurer).

In this case, following the removal of funding from the MDU there were no readily apparent sources of funding. The judge noted that the Official Solicitor had made an approach to Mr Paterson's two attorneys

appointed under a lasting power of attorney (believed by the Official Solicitor to be for property and affairs), but they have indicated that they were not proposing to fund the litigation.

The judge held that McGowan J "*was entirely justified (and almost certainly obliged) to make the orders asked of her relating to the cessation of the involvement of the Official Solicitor and* [solicitors acting for Mr Paterson]".

The judge then went on to wrestle with the unfortunate consequences of such a decision, namely the stay of the proceedings, holding that "*some way must be found of injecting new life into the proceedings to enable the claims to be considered properly*." The judge set down a number of directions designed to find ways of ensuring that the civil proceedings could continue and the Official Solicitor be put in funds to allow him to accept a further invitation to act as litigation friend, indicating that, in extremis, "*the High Court would, in my view, have the power under its general case management provisions and/or the inherent jurisdiction of the court to direct that one or more of the parties to the litigation should fund the Official Solicitor's costs of instructing lawyers for Mr Paterson, the initial outlay to be recoverable as part of the costs of the litigation in due course*" (paragraph 46(c)).

Comment

This case provides useful clarification that:

1. where a funding source is no longer in place, a litigation friend (whether the Official Solicitor or another) is entitled to seek to withdraw and such an application should be granted;

2. that whilst civil proceedings cannot proceed in the absence of a litigation friend for the protected party, the court will be creative and pragmatic in attempting to move the litigation forward. The proposition advanced at paragraph 46(c) is, we suspect, likely to be one that is examined further in due course, either in this case or another; and

3. The Official Solicitor, whilst "litigation friend of last resort" cannot be compelled to act absent proper funding for the costs of instructing legal representatives (or, in the cases in which he acts as 'in-house' solicitor, for those legal costs).

The case is also, we suggest, of equal application in the Court of Protection given the material identical wording of CPR r.21.7 and COPR r.144.

Toolkit for vulnerable witnesses and parties

The Advocates' Gateway has published a toolkit for advocates interacting with vulnerable witnesses and parties in the Family Courts. Many of the same issues will arise in relation to cases in the Court of Protection and under the inherent jurisdiction, where parties may have mental disorders or learning disabilities. The toolkit's aim is to '*support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair.'* The toolkit is essential reading for

all lawyers involved in the Court of Protection: '*all advocates have a responsibility to assist the court to identify and appropriately respond to the vulnerability of parties and other witnesses'.*

Fee accounts

The Fee Account system is up and running in the Court of Protection (and the High Court). Firms that have to pay court fees on a frequent basis may wish to sign up to the scheme which will enable faster and more efficient payment methods to be used instead of cheques. To register or for further details, email FeeAccountPayments@hmcts.gsi.gov.uk.

MCA Prosecutions Doubled

Figures obtained by Dave Sheppard from the Crown Prosecution Service and reported by Community Care identify that 349 charges of ill-treatment or wilful neglect under s.44 MCA reached a first magistrates' court hearing in England and Wales in 2013-4, compared to 168 the year before. Six charges were also brought against those with lasting power of attorney, compared to just one in 2012-3. A reduction was seen in the number of prosecutions under the equivalent Mental Health Act offences, from 57 to 47.

These figures do not reveal the conversion rate from charge to conviction. Moreover, the offences may well become somewhat surplus to requirements as the Criminal Justice and Courts Bill 2014 is set to criminalise those workers and providers who ill-treat or wilfully neglect adults under their care. This is regardless of whether the victim suffers from mental disorder or incapacity. This reform therefore plugs a major current gap in the criminal law with regard to vulnerable adults.

Deprivation of liberty – the battle of the UN Committees

We reported in our last Newsletter upon the statement issued by the UN Committee on the Rights of Persons with Disabilities on Article 14 of the CRPD. It was suggested to us in response that this might be a pre-emptive strike in advance of the UN Human Rights Committee comment on deprivation of liberty. This appears to have been borne out by the General Comment recently issued by that latter body on Article 9 (the right to liberty enshrined in the International Covenant on Civil and Political Rights).

The Committee on the Rights of Persons made it clear that they consider that detention on the basis of grounds of actual or perceived disability is incompatible with Article 14 of the CRPD.

The Human Rights Committee take a rather different view (and one likely to be much more palatable to signatories of the ECHR):

> *19. States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. The Committee emphasizes the harm inherent in any deprivation of liberty, and also the particular harms that may result in situations of involuntary hospitalization. States parties should make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement. The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law. The procedures should ensure respect for the views of the individual, and should ensure that any representative genuinely represents and defends the wishes and interests of the individual. States parties must offer to institutionalized persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention. Deprivation of liberty must be reevaluated at appropriate intervals with regard to its continuing necessity. The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant."*

We await with interest to see how the game of "Committee Top Trumps" is played out in due course…

Law Commission project on kidnapping and false imprisonment

The Law Commission published on 20 November an extremely interesting report and recommendations relating to the reform of the law relating to kidnapping and false imprisonment.

The Law Commission considered whether to recommend the creation of a distinct offence to protect adults lacking capacity to decide whether to move in company with another, but ultimately decided not to because:

1. The Commission considered that such a recommendation should follow a consultation on how the law should protect those who may lack capacity; and

2. (as readers will know) the Law Commission is undertaking a project specifically on the issue of deprivation of liberty of those lacking capacity (and the protections under the Mental Capacity Act 2005)

We would also draw readers' attention to the discussion of the common law relating to false imprisonment (which overlaps with, but is not identical to, the concept of deprivation of liberty for purposes of Article 5 ECHR). In a particularly interesting passage, which may well be examined in any appeal from the decision of Mostyn in the *Rochdale* case, the Law Commission reminds us that:

> "*4.34 False imprisonment is committed even if the victim is unaware of the fact his freedom of movement has been restricted (as where, for instance, V is locked in a room for a period whilst he is asleep). Such pure false imprisonment liability is recognition of the symbolic harm which was done by infringing V's liberty, albeit without V's knowledge. This demonstrates that the law recognises the harm involved in such a restriction itself, irrespective of V's perception of it. The case for criminalising such behaviour is enhanced by the clear wrong done on the part of D since depriving V of liberty demonstrates a denial by D of V's autonomy. In other words this shows D's acute lack of respect for V's freedom of choice to go where he or she pleases, whether or not V is aware of it.*
>
> *4.35 A case of false imprisonment in which V remains unaware of the restriction on his freedom of movement therefore involves:*
>
> *(1) Restriction on V's freedom of movement.*
>
> *(2) Denial of V's autonomy.*"

Winterbourne View – Time for Change

On 26 November 2014, a report on the future of services for people with learning disabilities was launched by Sir Stephen Bubb, CEO of the Association of Chief Executives of Voluntary Organisations. This report, commissioned by the CEO of NHS England, sought to explore how a new national framework of support

might be delivered locally, in order to allow the growth of community provision required to move people out of inappropriate institutional care.

In his report Sir Stephen sets out a roadmap for action. The top-line recommendations are:

- To urgently close inappropriate in-patient care institutions;
- A Charter of Rights for people with learning disabilities and/or autism and their families;
- To give people with learning disabilities and their families a 'right to challenge' decisions and the right to request a personal budget;
- A requirement for local decision-makers to follow a mandatory framework that sets out who is responsible, for which services and how they will be held to account, including improved data collection and publication;
- Improved training and education for NHS, local government and provider staff;
- To start a social investment fund to build capacity in community-based services, to enable them to provide alternative support and empowering people with learning disabilities by giving them the rights they deserve in determining their care.

In response, the Government has committed to publish a green paper on options for legislative change early in 2015.

Whilst on their face these recommendations would appear entirely sensible, we would perhaps draw interested readers' attention to the comments here suggesting that very much more radical action is needed.

Powers of Attorney: Inner House to decide

In our May Newsletter we first reported information provided to us by Alison Hempsey of TC Young regarding a hearing on 29th April 2014 before Sheriff Baird in Glasgow Sheriff Court in which clients for whom she acted were appointed joint financial guardians to *NW*. Their application was contested by a bank which held a purported continuing power of attorney by *NW* in its favour. Sheriff Baird held that he would have appointed the applicants even if the purported continuing power of attorney was valid, but held that it was not, because it failed to comply with the essential requirements of section 15(3)(b) and (ba) of the Adults with Incapacity (Scotland) Act 2000 ("2000 Act"). In order for a power of attorney to qualify as a continuing power of attorney, and thus be operable following any impairment of capacity, section 15(3)(b) requires that it must incorporate "a statement which clearly expresses the granter's intention that the power be a continuing power". Under section 15(3)(ba): "Where the continuing power of attorney is exerciseable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates" it must state: "that the granter has considered how such a determination may be made". Under section 18 of the 2000 Act, a power of attorney granted after commencement of the Act which does not comply with section 15 (or, if a welfare power of attorney, section 16) has no effect during relevant incapacity.

It rapidly became apparent that Sheriff Baird's decision in *NW* affected not only other continuing powers of attorney in the standard style of the bank in that case, but a very large number of continuing and welfare powers of attorney, including those based on "samples" then appearing on the website of the Office of the Public Guardian.

We have followed the development of this matter through ensuing editions of this Newsletter. See the June, August and October issues for more detail. Briefly, the bank in *NW* lodged and then withdrew an appeal. An application was made by the Public Guardian for certain directions: Sheriff Baird refused to warrant it, and that refusal was not appealed. The question of validity was raised in various subsequent proceedings, including in at least one criminal prosecution. It was raised in *B and G v F* (Forfar Sheriff Court, 7th August 2014, decision on scotcourts website) where Sheriff Murray came to the opposite conclusion to Sheriff Baird in *NW*, upon a document (and in the circumstances) before Sheriff Murray in that case, the document being substantially similar to the document in *NW* and Sheriff Murray explicitly disagreeing with Sheriff Baird on some points. We have reproduced relevant parts, anonymised, of the power of attorney documents in both *NW* and *B and G v F* (which we originally described as *B and F v B*) in our October Newsletter. *NW* has now been reported at 2014 SLT (Sh Ct) 83.

In the course of our coverage we have expressed views on some relevant considerations. We have pointed out that it is open to sheriffs to come to different conclusions upon similar facts, and to take different views of the law. In terms of section 14 of the 2000 Act, decisions of the sheriff are appealable to the Sheriff Principal, and thence, with leave of the Sheriff Principal, to the Court of Session. Under present arrangements, which may shortly be altered, it is open to Sheriffs Principal to come to different conclusions, their decisions being binding only upon sheriffs in their own sheriffdoms (and a Sheriff Principal may overrule a precedent by one of his own predecessors – as once occurred in a case in which Adrian was acting). An appeal decision by the Court of Session, which would be taken by a division of the

Inner House, is binding upon all Sheriffs Principal and all sheriffs. However, though we stand to be corrected by any reader who advises us otherwise, we believe that there has not yet been any appeal to the Court of Session under the 2000 Act.

The 2000 Act confers jurisdiction upon the Court of Session in certain matters under Part 5, but not under other Parts of that Act. That does not mean, however, that the jurisdiction of the Court of Session cannot be accessed in any circumstances in relation to matters arising under other Parts of the 2000 Act, including Part 2 which deals with powers of attorney.

Section 27 of the Court of Session Act 1988 ("1988 Act") allows a Special Case to be presented to the Inner House of the Court of Session "where any parties interested, whether personally or in some fiduciary or official capacity, in the decision of a question of law are agreed upon the facts, and are in dispute only on the law applicable to those facts". The Public Guardian has found herself, in her official capacity, in dispute with another party (presumed to be an attorney acting in that attorney's fiduciary capacity) regarding the validity as a continuing power of attorney of a document understood to be not dissimilar to those considered by Sheriff Baird and Sheriff Murray in the cases mentioned above. The parties are agreed upon the facts, and are in dispute only on the question of validity. It is understood that they have presented, or are about to present, a Special Case to the Inner House in accordance with section 27 of the 1988 Act. Section 27 requires respective Counsel to sign a case setting out the facts upon which they are agreed and the question of law arising from those facts. Parties may ask the court either for its Opinion, or for its Judgment, on that question of law. Subsidiary provisions are to be found in section 27 and in Court of Session Rule of Court 78. From such information as is available to us, it would appear that the Special Case regarding the purported continuing power of attorney in that case is likely to meet requirements and to proceed. Court of Session practitioners inform us that in the normal course of events one could expect the Special Case to be heard before the summer recess in 2015. It may be that upon representations by the parties, and in respect that the Public Guardian is an officer of court, the court administration may – if able – be willing to fix a hearing earlier than might otherwise have been the case. Of course, it will be necessary to await the conclusion of such hearing for any indication from the court as to the likely timescale thereafter before the Opinion or Judgment of the court becomes available.

It has to be remembered that even in *B and G v F*, Sheriff Murray was critical of the drafting of the document before him. However, even with great care over drafting, practitioners may nevertheless face a dilemma – even taking full account of the views of Sheriff Baird – where an intending granter of a continuing or welfare power of attorney has, for whatever reason, only limited powers of comprehension such that he or she could validly grant such a document if couched in simple language and accompanied by explanations in simple language, but not a document of greater complexity. This could engage the fundamental obligation to facilitate autonomy and self-determination, in conflict with any strict construction of sections 15 and 16 of the 2000 Act. It is notable that Ministerial Recommendation (2009)11 of the Council of Europe on "Principles concerning Powers of Attorney and Advance Directives for Incapacity" strongly emphasises the relevance and importance of principles of autonomy and self-determination. It is thus to be anticipated that the decision of the Court of Session upon the anticipated Special Case will be helpful not only in relation to the validity of large numbers of historical and thus existing power of attorney documents, but as a guide to future practice. It is perhaps not unreasonable to

hope that the opportunity will be taken to obtain clarification of related matters concerning powers of attorney upon which the law seems to some degree to be uncertain.

The text of the recent statement by the Public Guardian is as follows: "The Public Guardian is aware that the recent opinions expressed by Sheriff Baird and Sheriff Murray raise conflicting views on the validity of certain continuing powers of attorney. A Special Case is due to be lodged shortly in the Inner House of the Court of Session in relation to another power of attorney where similar issues have arisen. The Public Guardian, who will be a party to that action, does not expect to comment further while that case is pending." We shall of course continue to follow and report upon developments relevant to this issue.

Adrian D Ward

Judicial review or complaints procedure?

In *McCue v Glasgow City Council*, 2014 SLT 891, Lord Jones held that Glasgow City Council's Social Work Services complaints procedure (set out as an appendix to his Judgment) is an alternative remedy which excludes the court's statutory jurisdiction, and therefore renders an application for judicial review incompetent. That applies whether or not the complaints procedure is a statutory remedy, though in fact in the opinion of Lord Jones the Council's complaints procedure is a statutory remedy.

Andrew McCue has Downs Syndrome. His capacity is impaired. Mrs McCue, his mother, is his guardian. He is in need of community care services. The Council, the relevant local authority under the Social Work (Scotland) Act 1968, assessed his needs in accordance with section 12A of that Act. Mrs McCue was dissatisfied with the outcome of the assessment, and sought to have the Council's decisions following upon that assessment judicially reviewed.

The report helpfully lists all relevant authorities, including those relevant to the question of when the supervisory jurisdiction of the Court of Session is excluded through availability of an alternative remedy, and also the provisions and guidance under which complaints procedures, such as those of Glasgow Council, were established. Having held that such procedures, whether statutory or not, excluded the supervisory jurisdiction, it was not necessary for Lord Jones to address the question of whether Glasgow City Council's complaints procedure is a statutory remedy, but he nevertheless did so in deference to the arguments advanced by Counsel on that point, and held that it was. It would appear from a reading of his decision as a whole that even if he had been wrong on that point, and that any alternative remedy required to be derived from statute, it is unnecessary for the relevant statute expressly to exclude the supervisory jurisdiction of the court.

Because section 7(10) of the Scottish Public Services Ombudsman Act 2002 provides that the Ombudsman must not investigate matters in respect of which a complaint can be made to a local authority, unless the Ombudsman is satisfied that such procedure has been invoked and exhausted or that (in the particular circumstances) it is not reasonable to expect it to be invoked or exhausted, resort to the Ombudsman was not – as matters stood before the court – an alternative remedy barring judicial review.

The Council had submitted that the Petition should be dismissed because it was academic. Lord Jones held that if it had been necessary to determine that question, he would have held that it was not academic. On the pleadings as adjusted, the Council's decision was a "final decision" which, though subject to ongoing review, was operative and determined the provision to be made for Mr McCue until such time as the review is carried out.

While this decision is of general relevance on the point of competency of judicial review where a complaints procedure has not been exhausted, it will be of particular relevance where – as here – a person who may be in need of community care services under the 1968 Act has an intellectual disability resulting in impairment of capacity.

Adrian D Ward

Lady Hale in Glasgow

The Royal Faculty of Procurators in Glasgow has recently been enhancing its reputation for developing a useful, and at times adventurous and challenging, programme of events. The Faculty's links with the late Lord Rodger go back to when he won the Faculty's prize while a student at Glasgow University. Following his untimely death the Faculty established the annual "Lord Rodger Memorial Lecture", and it is impressive but not really surprising that Lady Hale, Deputy President of the Supreme Court, accepted an invitation to deliver the first lecture in the Tron Church Building, immediately opposite the Faculty's premises, on 31st October 2014. She entitled her lecture "Psychiatry and the law: an enduring interest for Lord Rodger". She traced their respective interests in mental health law, in the case of Lord Rodger right back to the fact that his father was an eminent psychiatrist, and continuing through the membership of Lord Rodger himself as a member of the Mental Welfare Commission. In Lady Hale's own case, she narrated how "as a baby law lecturer" she found herself teaching mental health law to social workers at a time when there was no suitable textbook: "*So I wrote one. And that got me my first judicial appointment as a legal member of Mental Health Review Tribunals*".

Lady Hale followed Lord Rodger's contribution to mental health law through case histories in which he was involved and then speculated as to how he might have stood on some cases recently before the Supreme Court. She also commented that it would be intriguing to wonder what he would have thought of the United Nations Convention on the Rights of Persons with Disabilities. That gave her the opportunity to hint at her own views: "*The United Kingdom ratified this Convention without reservation in 2009, despite the obvious difficulty of reconciling some of its provisions with much of our mental health law both north and south of the border*". Having referred in particular to Articles 4.4 and 12.2 of the Convention, she observed that: "*Taken at face value, it is difficult to see how these provisions can be reconciled with any of the case histories I am about to describe*".

She proceeded with a review of cases, both enlightening and entertaining, commencing with *Galbraith v HM Advocate*, 2002 JC 1, through to recent decisions of the Supreme Court following Lord Rodger's death, notably *Cheshire West*. On one point her lecture, both as delivered and as now available here, interestingly differed from what she actually said in *Cheshire West*. In *Cheshire West* she defined the "acid test" as "whether the individual in question is subject to continuous supervision and control and is not free to

leave." In Glasgow she said: "The acid test was whether they were under the complete control and supervision of the staff and not free to leave." The latter is perhaps closer to the reference in *HL v UK* (2004) 40 EHRR 761 to staff exercising "complete and effective control over care and movement for a significant period". However, viewing her decision in *Cheshire West* as a whole (and, in particular paragraph 54, where she also used the term "complete" rather than "continuous") she may not have considered these differences to be material.

By way of footnote, there may be some Scottish interest in a lecture given by Lady Hale a fortnight earlier, on 17th October 2014, to the (English) Mental Health Tribunal Members' Association, to be found here. She gave a helpful account of *Cheshire* West and its impact. She described the "acid test" in precisely the same terms as in Glasgow. She narrated how – as is proposed in Scotland – Mental Health Act procedures are in England and Wales kept separate from operation of their deprivation of liberty safeguards regime but commented – addressing Tribunals -: *"It is difficult to see why your Chamber is not the obvious place. You have the expertise in dealing with mental health and disability issues, you know something about health and social care, you are much cheaper and more accessible than the courts, you could learn how to deal with all the issues or leave those which were unsuitable (in practice, probably only property issues) to the courts …."* and other reasons including that specialist judges could be recruited to their ranks

Adrian D Ward

Scottish Law Commission Report on Adults with Incapacity

In last month's Newsletter, we carried an article on the Scottish Law Commission's Report on Adults with Incapacity. The Scottish Law Commission has been in contact with us to highlight two points that the Commission wishes to emphasise in relation to the commentary upon the Report. We are very grateful to the Law Commission for taking the time to comment, and we are happy to reproduce their comments thus:

> "*Firstly, it is said in the article that we have justified the involvement of welfare guardians and attorneys in the suggested community process on the basis of a particular passage in Stanev v Bulgaria. In fact, in the Report at paragraphs 3.56 to 60, we discuss this passage and the responses we received to questions we posed about it. We say 'we do not think it would be sensible to base recommendations on this isolated passage from the European Court'. The reference used in the article is paragraph 6.42, where we observe that, were 'valid replacement' to develop as a doctrine, it would presumably prevent the subjective element of DoL being satisfied. But we go on to say in 6.43 that the reasoning is 'not sufficiently developed' to obviate the need to satisfy Article 5(4), and we proceed to explain how we have tried to do that in our scheme.*
> *Secondly, the article suggests that we have created the potential 'to renew restriction arrangements indefinitely'. In fact, the Bill provides that any authorisation, whether by the Sheriff or an attorney or guardian, lasts for a period of one year, which duration also applies after any renewal (sections 52E(13) and 52(G)). This is explained at paragraphs 6.44 and 45 of the Report.*"

We are aware that the Report has – rightly – generated considerable amount of debate and discussion both in Scotland and south of the Border. We welcome views upon the approach adopted by the Commission to solving these difficult questions (to which we understand that the Scottish Government will be responding, as normally expected, by 1 January) and will undoubtedly be publishing more on this topic in future issues of the Newsletter.

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Conferences at which editors/contributors are speaking

Intensive Care Society State of the Art Meeting

Alex will be speaking on deprivation of liberty safeguarding at the Intensive Care Society's State of the Art Meeting on 10 December 2014. Details are available here.

Talk to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Wigtown on 10 December.

Capacity and consent: complex issues

Jill will be speaking at the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see here.

Royal Faculty of Procurators

Adrian will be speaking at a half-day private conference for the Royal Faculty of Procurators in Glasgow on 11th February, at a one-hour lunchtime adult incapacity session on 25th February and with Alex on 13th May 2015.

IBC Planning for the International Older Client Event

Adrian will be speaking at the IBC Planning for the International Older Client event in London on 12th March 2015.

Advertising conferences and training events

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

Chambers Details

Our next Newsletter will be out in early February. 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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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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