Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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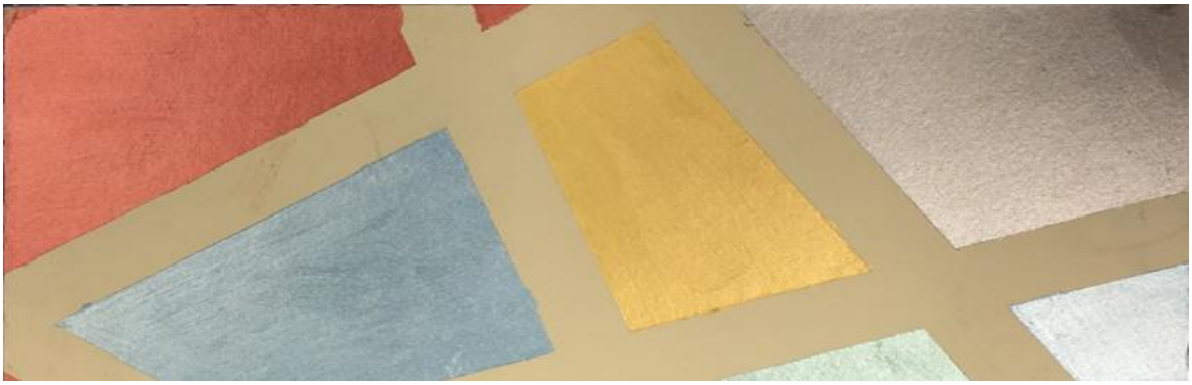

Welcome to the February 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a personal view on the Mental Capacity (Amendment) Bill from Tor, damages where the MCA has gone awry and the Supreme Court on the MHA in the community;

(2) In the Property and Affairs Report: neglect and attorneys, a speedy (and sensitive) statutory will and attorneys as personal representatives;

(3) In the Practice and Procedure Report: a challenging decision on the inherent jurisdiction, CoP statistics and guidance on anonymisation;

(4) In the Wider Context Report: the Code of Practice is being revised, guidance on CANH and the Mental Capacity Action Day looms;

(5) In the Scotland Report: a welcome change to guidance in relation to voter registration, and the death of the former Director of the Mental Welfare Commission.

Last, but very much not least, her fellow editors invite you to join in congratulating Tor on her appointment as Queen's Counsel.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

Editors
Alex Ruck Keene
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Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

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Where does the inherent jurisdiction end?

A Local Authority v BF [2018] EWCA Civ 2962
Court of Appeal (Civil Division) (Baker LJ)

COP jurisdiction and powers – interface with inherent jurisdiction

Summary

This case was an application for permission to appeal from an interim judgment of Hayden J concerning the difficult question of the nature and reach of the inherent jurisdiction and the extent to which unwise decisions made by capacitous adults can and should be overridden by the courts.

BF was a 97 year old man who sufferd from diabetes, osteoarthritis and as blind in both eyes. At the time of the appeal he was residing in residential care against his wishes, rather than at home with his son KF. The history of the case is long and involved, but in short BF lived in a bungalow with his son KF following the death of his wife. KF suffered with drug and alcohol addiction and was noted to intimidate visiting care staff such that all ultimately refused to provide BF with care at home. Over the course of 2 years of proceedings initiated by the local authority, BF and KF had moved out of and back into BF's property while extensive renovations were carried out to return it to habitability after it fell into squalor.

The appeal arose out of events in late 2018 when, having returned home to live with KF in his renovated bungalow, BF once more contacted the local authority and was discovered in abject squalor, partially clothed and having neither eaten nor drunk for a number of days. BF was removed by the local authority into respite care, who were concerned that he had lost capacity to make decisions about his residence. An ex parte order was granted by Francis J, restraining BF from returning home and requiring him to live in residential care provided by the local authority pending further order of the court. In October of 2018 BF agreed to abide by the court's order; he maintained that he was content not to return home, not to live with KF, and to submit to a capacity assessment. The local authority in due course prepared a notice terminating KF's licence to reside at BF's property.

A capacity report by a consultant psychiatrist provided in November 2018 confirmed that BF *had* the requisite capacity to make decisions on where he should live including whether KF should live at the property. The matter was returned urgently to court before Hayden J as the urgent applications judge. Hayden J heard evidence and submissions on capacity and enabled BF to participate in proceedings by

telephone. BF reiterated that he wished to return home to his bungalow to live with KF. The local authority accepted the evidence that BJ had capacity in the material domains, and applied to lift the injunction. However, Hayden J declined the application and extended the injunction until further order, binding BF not to live or reside in his bungalow, not to live with his son KF and to reside at a care home specified by the local authority. Hayden J held that:

> *23. …It was submitted that once an individual had capacity the inherent jurisdiction had no reach. The Court of Appeal [in Re DL] roundly and unequivocally rejected that and did not attempt to circumscribe the scope/ambit of the inherent jurisdiction. Whether it extends to the kind of protection that BF needs is moot…It strikes me as an important application of the law to the facts of this case. It requires an analysis of the scope of the law to impose welfare decisions on vulnerable adults who otherwise have capacity.*
>
> *24. I am driven to adjourn this application so I can receive full argument on this point. All parties, not just BF and the local authority, are entitled to nothing less. In the meantime, and on an interim basis, BF should remain where he is. I know he is eager to go home and I do not discount the possibility that that he might be able to as a result of my final decision. At the moment and in the present circumstances, I am satisfied that the inherent jurisdiction reaches that far."*

This decision was appealed by both the local authority and BF who maintained *inter alia* that the said order was in breach of BF's Article 5 rights.

Baker LJ rehearsed the law on the survival of the inherent jurisdiction since the coming into force of the Mental Capacity Act 2005, summarising the position (at paragraph 23) thus:

> *(a) The inherent jurisdiction may be deployed for the protection of vulnerable adults.*
>
> *(b) In some cases, a vulnerable adult may not be incapacitated within the meaning of the 2005 Act, but may nevertheless be protected under the inherent jurisdiction.*
>
> *(c) In some of those cases, capacitous individuals may be of unsound mind within the meaning of Article 5(1)(e) of the Convention.*
>
> *(d) In exercising its powers under the inherent jurisdiction in those circumstances, the court is bound by ECHR and the case law under the Convention, and must only impose orders that are necessary and proportionate and at all times have proper regard to the personal autonomy of the individual.*
>
> *(e) In certain circumstances, it may be appropriate for a court to take or maintain interim protective measures while carrying out all necessary investigations.*

Baker LJ upheld Hayden J's decision and refused the appeal on the basis that:

1. BF was a vulnerable adult by virtue of his age, blindness and the trauma of having lived in squalid and dangerous conditions his relationship with his son appeared to

have *"elements of the insidious, persuasive undue influence"* which would bring it within the jurisdiction of the inherent jurisdiction as per *Re SA*; BF was unquestionably in need of protection for a variety of reasons (para 32);

2. expert evidence of his capacity notwithstanding, there was prima facie evidence of an unsound mind by reason of his infirmity and the other "*extraneous circumstances*" identified, and "*manifestly*," the test of "unsound mind" is different from the test of capacity under the Mental Capacity Act;

3. in an emergency situation someone may be deprived of their liberty in the absence of medical evidence of mental disorder without infringing Article 5; and

4. overall, that:

> *in circumstances where someone is found not to be of unsound mind, they cannot, of course, be detained in circumstances which amount to a deprivation of a liberty, but a move home in these circumstances is something which requires very careful planning and support. This is a crucial component of the protection afforded by the inherent jurisdiction and, in my judgment, entirely consistent with BF's overall human rights* (paragraph 35)

He further held that decision of this nature should not be made summarily and that Hayden J was thus entirely justified in adjourning the matter for some weeks pending further argument.

Comment

On one view, this was a helpful confirmation[1] that deprivation of liberty in this context cannot take place in the absence of unsoundness of mind[2] (a term which has caused upset in the context of the Mental Capacity (Amendment) Bill but derives from Article 5(1)(e)).

However, many might find it surprising that it would be possible for a court to direct (even if only temporarily) that an individual with capacity be prevented from returning to their own home, be prevented from living with a person they chose to, and be required to live at a place selected for them by someone else in circumstances amounting to a deprivation of their liberty.

At that point, one might ask, why bother with the (sometimes complicated) exercise of assessing capacity? Why not simply proceed on the basis of the necessity and proportionality of securing the protection of a vulnerable person (and, where a deprivation of liberty might result, providing evidence of "mental disorder," a very expansive term).

The case might therefore usefully stand as an example to test how one feels about removing mental capacity from the equation (as we have been urged to by the CRPD Committee). And/or it may stand as a reminder of why we might want to give some statutory steer to judges exercising this wide inherent jurisdiction so that they (and society) can be clear as to how it should be

[1] Although not, strictly, a precedent as solely a decision on an application for permission to appeal.

[2] There are other grounds upon which it could be justified in the exhaustive list contained in Article 5(1), but none of them could apply here.

deployed. By way of example of such a steer, we could do worse than look at the Vulnerable Adults Act that recently came into force in Singapore.

The case also stands as a clear reminder of the inquisitorial nature of the jurisdiction exercised by the courts in this arena. Perhaps unusually, both the local authority and the person before Hayden J were arguing for the same outcome – a finding of capacity and the grant of relief to enable the person to return home, but Hayden J took (and was found to be have been entitled to take) an entirely different course, at least on an interim basis. We will await the final judgment from Hayden J with interest.

Court of Protection statistics

The statistics for July-September 2018 show a continued increasing trend in applications made in relation to deprivation of liberty but a decrease in the number of orders made. There were 1,126 applications relating to deprivation of liberty made in the most recent quarter, up 5% on the number made in July to September 2017. Those applications were: 125 for Section 16 orders, 293 21A applications and 708 COPDOL11 applications (down from 728 in the previous quarter and 769 in the first quarter of 2018). Orders made decreased by 7% over the same period, from 639 in July 2018 to 610 in October 2018.

Interestingly, the sharp increase in registration of LPAs has slowed over the last 18 months. One wonders whether there has been a 'Denzil Lush' effect following the widely-publicised concerns the former Senior Judge expressed upon his retirement as to the potential for abuse of property and affairs LPAs.

Anonymisation guidance

The President has expressly approved checklists contained in the report of Dr Julia Brophy on the anonymisation of judgments. They deal with two aspects of anonymisation and the avoidance of identification of children in judgments placed in the public arena: (a) personal and geographical indicators in judgments, and (b) the treatment of sexually explicit descriptions of the sexual abuse of children. The approval is for purpose of family proceedings, but will be equally relevant in Court of Protection proceedings.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). 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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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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 recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

Edge DoLS assessor conference

Alex is speaking at the Edge DoLS assessor conference on 8 March, alongside other speakers including Lord Justice Baker and Graham Enderby. For more details, and to book, see here.

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see here.

Advertising conferences and training events

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

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

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