Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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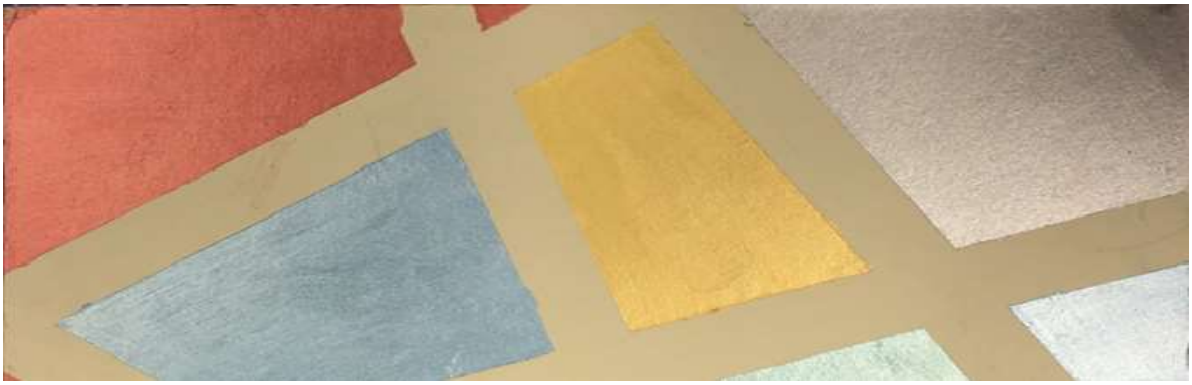

Welcome to the February 2020 Mental Capacity Report, which is, even by our standards, a bumper one. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a tribute to Mr E; fluctuating capacity; improperly resisting a deputy appointment; DoLS, BIAs and RPRs, and finding the right balance with constrained resources;

(2) In the Property and Affairs Report: the OPG, investigations and costs; e-filing for professional deputies, and a guest article about the National Will Register;

(3) In the Practice and Procedure Report: the Vice-President issues guidance on serious medical treatment; an important judgment on contingent declarations; the permission threshold; and disclosure to a non-party;

(4) In the Wider Context Report: brain death and the courts; deprivation of liberty and young people;

(5) In the Scotland Report: supplemental reports from the Independent Review of Learning Disability and Autism; the Scott review consults; and relevant cases and guidance.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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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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Serious Medical Treatment – Practice Guidance

The Vice-President of the Court of Protection, Hayden J, has published guidance on serious medical treatment applications in the Court of Protection. It covers (1) situations in which consideration must be given as to whether an application should be made and (2) the court's expectations in relation to the making and progress of an application. It is expressly designed to operate until such time as it is superseded by the revised Code of Practice to the Mental Capacity Act.

Not only inimical… but potentially fatal: medical treatment cases and delay

Sherwood Forest Hospitals NHS Foundation Trust & Anor v H [2020] EWCOP 5 (Hayden J)

Best interests – medical treatment – Practice and procedure (Court of Protection)

Summary

This latest example of delay in bringing and then resolving an application relating to medical treatment was "*not only inimical but* […] *potentially fatal*" to the person in question. It concerns a 71 year old woman, Mrs H, living with her daughter, Miss T. Mrs H suffered from squamous cell carcinoma ('SCC'), which had manifested on the left cheek. The recommended treatment is surgical excision which will require a general anaesthetic and free skin flap to cover the affected area. Mrs H had first became aware that all was not well with her, in mid to late 2018. She sought the advice of her General Practitioner in October 2018 and she made a referral for treatment to the Sherwood Forest Hospitals Trust. Mrs H had had episodes of mental ill health, including, most relevantly, that:

> *7. In 2014 Mrs H was admitted under the Mental Health Act, to two successive mental health units. She continued treatment under section 2 and section 3 of that Act, until 24th December 2014. It was at that stage that she was diagnosed with Bipolar Disorder and treated with olanzapine and valproate. I have been told, convincingly, that whilst she was in hospital, she effectively deceived the medical establishment into believing she*

> *was taking her medication when in fact she was not. The discharge summary in the medical records describes paranoid and persecutory feelings. It is plain that this period of detention in hospital had, in itself, a very negative effect on Mrs H and, it may in part, explain why, upon receiving her diagnosis, she refused effectively to engage with it.*
>
> *8. Mrs H is described by virtually all who have encountered her but, most particularly by her daughter, as "*proud and stubborn"*. It is obvious that she can be very combative when confronted with beliefs which do not accord with her own. It is an important feature of the case that initially, when the diagnosis was conveyed to Mrs H, she appeared to accept it; but my impression from the papers is that that was a deception, not dissimilar to her pretence that she had been taking her medication. She expressed that she would consent to surgery, she engaged with the options for reconstruction and, she expressed interest in the cosmetic result. But that was as far as it went. She did not attend the appointments made to carry out the surgery and, it seems likely that her mental health deteriorated. She entirely rejected the diagnosis of cancer and she expressed herself to be of the strong view that a different doctor had told her the lesion on her face would resolve with the application of cream.*

Importantly, Hayden J emphasised that:

> *9.* […]*. It does not, to my mind, follow automatically that having articulated an alternative diagnosis, which could not in fact be rooted in the evidence and, in refusing to contemplate cancer, one can extrapolate from that that she lacked the capacity to weigh up and evaluate the options. As Mr Pollock, the consultant plastic surgeon who gave evidence before me, observed, people react to such diagnoses in a wide variety of ways.*

In May 2019, Mrs H was assessed as lacking the capacity to make decisions in relation to her medical treatment, but it was not until 20th December 2019 that an application was made to this Court actively to address her carcinoma. As Hayden J noted:

> *10. I do not doubt that all those involved in her care have been concerned to do the right thing for her, but it requires to be confronted that the delay in this case may mean that a life is lost that could well have been saved. That is quite simply a tragedy. It is also profoundly troubling.*
>
> […]
>
> *13. One of the reasons that treatment was not progressed more effectively was that the treating clinicians were perplexed as to whether it was appropriate and if so in what circumstances for Mrs H effectively to be forced, physically and by coercion if necessary, to attend for her treatment and, if so, how that might be achieved. The reality, in my assessment of the chronology, is that this issue had been identified very clearly by April or, at the latest, May of 2019, and certainly following the capacity assessment on 30th May 2019. I have now, in a number of judgments, emphasised that whilst avoidance of delay is not incorporated into the framework of the Mental Capacity Act in specific terms, it is to be read into that Act as a facet of Article 6 and Article 8. It is self-evident and, indeed, striking, that time here was of the*

> *essence and delay was likely to be inimical to Mrs H's welfare.*
>
> […]
>
> *32. The Mental Capacity Act creates what can both conveniently and accurately be described as a presumption of capacity and, where it is absent, imposes upon those best placed to do so, an obligation to deploy all reasonable options available to them in order to promote a return to capacity. A reasonable period before making an application might have been a week, two weeks, three weeks, but it was certainly not 6 months.*

The position was then compounded by the fact that that there was a delay of almost a month until it could be heard by the court, as it was filed at the end of the court term – during that period, the growth on Mrs H's cheek had grew dramatically. In the circumstances, Hayden J encouraged reflection on behalf of the Official Solicitor as to how her appointment could be expedited in such cases; he also read into the judgment (so it now forms part of the case-law), the guidance he had issued on 17 January on medical treatment applications. He reiterated (at paragraphs 16 and 17 of this judgment) the core points, namely that

> *16. […] is important, firstly to consider whether steps can be taken to resolve, if possible, the relevant issues without the need for proceedings but thereafter it has to be recognised that delay will invariably be inconsistent with P's welfare and, if resolution cannot be achieved, having particular regard to P's own timescales, then proceedings should be issued.*
>
> *17. If, at the conclusion of the decision making process, there remain concerns that the way forward is finely balanced, or if there is a difference of medical opinion, or a lack of agreement, or a potential complication of some kind, or if there is opposition, then it is highly probable, in those circumstances, that an application to the Court of Protection is appropriate and it is important that consideration **must** (I emphasise) **always** be given to whether an application to the Court of Protection is required.*

On the facts of the case, Hayden J found, with the assistance of Miss T's:

> *12.* […] *simple and unembroidered account of how her mother talks to herself and "hears voices", as Miss T puts it, she was able to help me unify the capacity assessments with her direct lay observations and arrive, with very little difficulty, at the conclusion that this is a woman who is simply unable to absorb and accept the diagnosis she has been given. T tells me that her mother's rambling monologues, throughout the night, are frequently a verbalisation of her emotional struggle to accept the diagnosis. In my judgment, it follows from all this that Mrs H is unable to weigh and evaluate the treatment options. That includes not only the potential for curative treatment but the palliative options too.*

As to her best interests, there were a number of options, of which the only viable one was surgical excision, even that not necessarily being viable. Hayden J noted that:

> *22.* […] *Mrs H has been sent an appointment card telling her to attend for treatment in a few days' time. She has not, for the reasons I have referred to, taken on board the scope and ambit of*

> *the diagnosis, but what is clear is that she finds this awful growth unsightly and, I sense, rather demeaning. She is also tired, which her daughter told me is often a precursor to deterioration of her mental health more generally. The growth has now very significantly, for all the reasons I set out, impacted on Mrs H's quality of life, which is desperately diminished. This combination of her tiredness, the unsightliness of her growth and the trust she has been able to place in Mr Pollock, has enabled a shift in her position. She now welcomes the treatment. That is not to say that she understands it, she is now prepared to engage with it, to remove the discomfort. It reflects her aspiration to be more comfortable. Sadly, it has to be recognised, as Mr Pollock did, that there is a real risk that intervention at this stage may now be too late.*

Having explained the key role of Mr Pollock, who had played an important role in drawing up the plan for her treatment with her daughter, Hayden J noted that:

> *35.* […] *whilst it was initially contemplated that Mrs H should be sedated and physically coerced into treatment, her acquiescence to the treatment is now likely to make that unnecessary. I emphasise that sedation remains the Trusts' fall-back position. It also requires to be highlighted that whilst Mrs H is physically acquiescent, she is not agreeing in any capacitous way. And so, her daughter and Mr Pollock have devised a plan, which is now reflected in the Care Plan, which is, in my judgement, both unusual as well as intensely sensitive.*
>
> *36. When I first read the papers, I was concerned that Mrs H might be inveigled into serious treatment that she did not understand, in circumstances where there is no longer any plan to try and explain it to her. But as I have been able, through counsels' assistance, to drill down more deeply into the evidence, I have accepted that this is the appropriate and kindly way forward and one that respects, in different ways, Mrs H's dignity, her autonomy and the very grave circumstances that she finds herself in. The plan, I have concluded, is in Mrs H's best interests.*
>
> *37. It is, and it requires to be recognised as, a different and more subtle form of coercion, but it is also, in my judgement, both proportionate and justified. I am particularly confident in endorsing it having heard the evidence of those who will be involved.*

Comment

Deciding the point at which the Court of Protection should be involved is an exercise which is depressingly easy to identify in retrospect. In this case, it is unclear whether and when the team looking after Mrs H first thought that they might need to get the assistance of the court, but this case illustrates dramatically how important it is that doctors and other professionals are supported within their organisations to understand the points at which they need to consider an application (and, in turn, are then supported to bring that application).

On one view, of course, had Mr Pollock become involved in Mrs H's case at a much earlier stage than at the end of 2019, it might have been possible for the situation to have been resolved without the need for the involvement of the court, on the basis that those responsible for her

could proceed on the basis of ss.5 (and 6, given the potential for restraint) MCA 2005. However, even with his earlier involvement, and with the support that he gave, Hayden J was no doubt right to consider that the (subtle) coercion that was to be exercised, together with the contingency planning for sedation, required approval by the court in any event.

Contingencies, capacity and Caesarean sections

GSTT & SLAM v R [2020] EWCOP 4 (Hayden J)

Mental capacity – fluctuating capacity – medical treatment

Summary

In this case, Hayden J has come back to the extremely thorny question of what the court is meant to do where it is confronted with the position that the person before it currently has capacity to make the relevant decision(s), but has clear evidence that under some circumstances they may not to do. A number of recent judgments (in particular that of Francis J in *United Lincolnshire NHS Hospitals Trust v CD* [2019] EWCOP 24) have grappled with this question, but Hayden J's judgment is by the fullest consideration of the position.

Hayden J had been required to determine at very short notice, an application concerning R who, on the day he determined the case, was 39 weeks and six days into her pregnancy. She had a diagnosis of Bipolar Affective Disorder which was characterised by psychotic episodes. R was detained in a psychiatric ward which fell within the jurisdiction of South London and Maudsley NHS Trust; GSTT was the Trust responsible for R's obstetric care. Given the urgency of the application, Hayden J had given his decision on the spot, on the basis of certain key facts:

> *2.* […] *All the treating clinicians agreed: R had capacity to make decisions as to her ante-natal and obstetric care; there was a substantial risk of a deterioration in R's mental health, such that she would likely lose capacity during labour; there was a risk to her physical health, in that she could require an urgent Caesarean section ('C-section') for the safe delivery of her baby but might resist.*

Procedurally, the position was problematic, because Hayden J had been in the "entirely invidious position" of having to determine applications which have an obviously draconian complexion to them, in circumstances which were far from ideal. There was not time to appoint the Official Solicitor to represent R, although the Official Solicitor was able to act as Advocate to the Court, a role "*which involves very different obligations and is not to be conflated with the role of the Official Solicitor as litigation friend.*" However,

> *6.* […[*self-evidently, a decision had to be made. I was satisfied that the application was well founded and that the declarations contended for met R's best interests. I do however deprecate the delay in bringing the application. The delay was avoidable but perhaps not so starkly so as first appeared. It became clear to the applicants, only ten days before the August hearing, that R had stopped taking her anti-psychotic medication. This manifestly required a re-evaluation of the risk and the need to reassess the birth plan.*

Hayden J made declarations under s.15 MCA and pursuant to the inherent jurisdiction of the High Court to the effect that R currently had capacity to make decisions regarding her obstetric care and the delivery of her baby, and that in the event that she came to lack that capacity, it would in her best interests for care and treatment to be delivered in accordance with the care plan before the court including, if required, to deprive her of her liberty.

However, Hayden J had been concerned at the time as whether the declarations that he had made fell properly within the scope of s.15 MCA 2005 or fell to be made under the inherent jurisdiction of the High Court. He therefore required further written submissions from the applicant Trusts and the Official Solicitor as Advocate to the Court:

> *11.* […] *in order that I could properly identify the framework of the applicable law with greater clarity. It is axiomatic that if anticipatory declarations are to be made relating to the capacitous and which have the effect of authorising intervention and/or deprivation of liberty at some future point where there is unlikely to be recourse to a court (following a subsequent loss of capacity) that should be rooted very securely in law.*

In fact, however, R:

> *12.* […] *did not give birth until 8th September 2019. She was cooperative throughout the labour and her healthy child was born by spontaneous vertex vaginal birth. There was, as it transpired and as R had always asserted would be the case, despite the cogent medical concerns, no need for a caesarean. This was her sixth child and such records as were available indicated that C section had not been necessary in the past. I have been told that the police attended and a Police Protection Order (PPO) was issued followed by Local Authority applications for an Emergency Protection Order (EPO) and an Interim Care Order (ICO).*
>
> *13. Of course, these developments render my earlier concerns somewhat academic. Nonetheless, I granted these draconian orders and they require, properly to be justified in law. Moreover, they should, in my judgement, be clarified properly for future cases.*

The judgment is necessarily complex, but can be reduced to the following key points in terms of jurisdiction.

First: it is never proper for the court to make a decision under s.16 in respect of a person who currently has capacity. Not only did Hayden J consider that explicit wording of s.16(1) specifically and unambiguously curtails the ambit of the section, empowering the court to exercise a jurisdiction under s.16 in respect of a person who does not lack capacity but, who may lose on some future contingency, would be infringing the cardinal principle of s.1(2) MCA 2005 i.e. that a person is not to be treated as unable to make a decision, unless all practical steps have been taken to help him to do so without success. Logically, such steps could not have been taken with an individual who remained capacitous at the time of the application;

Second: conversely, there is no such limitation in s.15(1)(c), so that the court is able to declare whether an act yet to be done (in respect of a person who currently has capacity to make the

decision) will be lawful or not. As Hayden J noted, there is:

> *35* […] *the recognition within the Act that capacity might be 'fluctuating' and, further, that various strategies may be deployed to enable an incapacitous individual to achieve capacity in a particular sphere of decision taking, where properly and appropriately assisted. This may require the salient issues to be distilled into a format which resonate more comfortably with P's own experiences in life and his personal characteristics. It may, in different circumstances, involve a change, perhaps even temporarily, to P's medical regimen. In another context it may involve the appointment of an intermediary e.g. to assist in achieving capacity to litigate. All this recognises that 'capacity' is not a static concept. It follows that, inevitably, this Court will find itself involved in situations in which an individual may have capacity to take decisions on some issues but not on others and facing circumstances where P may be able to take decisions on one day that he is unable to on another. Manifestly, it is neither practical nor desirable for the Court to resolve questions of fluctuating capacity on a day to day basis. It may, depending on the individual facts, have to make orders which anticipate a likely loss of capacity if it is going to be able to protect P efficiently.*

> *36. Any declaration relating to an act* ***'yet to be done'*** *must, it seems to me, contemplate a factual scenario occurring at some future point. It does not strain the wording of this provision, in any way, to extrapolate that it is apt to apply to circumstances which are foreseeable as well as to those which are current. There is no need at all to diverge from the plain language of the section. In making a declaration that is contingent upon a person losing capacity in the future, the Court is doing no more than emphasising that the anticipated relief will be lawful when and only when P becomes incapacitous. It is at that stage that the full protective regime of the MCA is activated, not before.*

Third: the power to make declarations of lawfulness under s.15(1)(c) does not extend to authorisation of deprivation of liberty, because the MCA itself limits the circumstances under which it can be used for these purposes. Drawing upon the previous decision of Baker J (as he then was) in *An NHS Trust v Dr A* [2013] EWHC 2422 (COP), Hayden J held that it would, however, be lawful to use the inherent jurisdiction to authorise a deprivation of liberty in such circumstances, because the wording of the MCA would otherwise leave a gap:

> *44.* […] *Having concluded that Section 15 (1) (c) is apt to authorise contingent declarations, it would be rendered nugatory if there were no mechanism to authorise the contemplated intervention as being lawful. This is, to my mind, a paradigmatic situation for recourse to the inherent jurisdiction.*

On the facts of the case itself, Hayden J noted that:

> *56. The mother in the case before me was reported as having told medical staff that a caesarean section would be 'the last thing she would want'. People use this phrase loosely, frequently it means it is something they would never want. It can also be interpreted very literally as being*

an option only to be contemplated 'last' of all. I do not consider that it would be morally or intellectually honest of me to give it the latter construction. I think that would be to distort the essence of the evidence and the impression of the mother's wishes that the medical staff were interpreting and which generated this application. It is, I think, important to acknowledge, as others have done, that judges in the past may have strained to conclude that women, in these difficult circumstances, lacked decision making capacity in order, for the highest of motives, to protect the life or health of both the mother and her unborn child. To give the mother's articulated position this very limited interpretation would, on careful reflection, be sophistry, designed to enable me to protect the mother and her unborn child without confronting what I consider to be the true evidential picture.

57. The particular challenge presented by the facts of this case and those before Cobb and Francis JJ's is that unlike her capacitous coeval, the mother, upon losing capacity, would lose the opportunity to express a changed decision. The birth process is, self-evidently, highly dynamic. It will frequently require obstetric re-evaluation. With considerable diffidence, I suspect that many birth plans are changed, when confronted with the painful realities of a complicated labour. Many expectant mothers who may have vociferously disavowed epidurals re-evaluate this choice in labour. This is true of the whole gamut of obstetric options, including both induction and caesarean section. Accordingly, the strength and consistency of previously expressed views must be considered with intense subtlety and sensitivity in this highly uncertain and emotionally charged obstetric context. Thus, it seems to me, that I must balance my instinctive inclination to protect the autonomy of a woman's control over the invasion of her own body, with my obligation to try to ensure that her options on losing capacity are not diminished. It may be that this is not capable of resolution in principle. As always in this sphere, much will depend on the circumstances of the individual case. What, I speculate, would the medical staff be expected to do if, the Court having granted a declaration as to the unlawfulness of intervention, they found themselves confronted with a desperate but incapcitous woman screaming for unspecified medical assistance during the birth process? Certainly, there would not be time to contact a judge. Moreover, in those circumstances, I find it hard to see how the judge's evaluation would be likely to add anything to the assessments of the nursing and medical team.

[...]

63. [...] *The caselaw has emphasised the right of a capacitous woman, in these circumstances, to behave in a way which many might regard as unreasonable or "morally repugnant", to use Butler-Sloss LJ's phrase. This includes the right to jeopardise the life and welfare of her foetus. When the Court has the responsibility for taking the decision, I do not consider it has the same latitude. It should not sanction that which it objectively considers to be contrary to P's best interests. The statute prohibits this by its specific insistence on 'reasonable belief' as to where P's best interests truly lie. It is important that respect for P's autonomy remains in focus but it will rarely be the case, in my judgement, that*

> *P's best interests will be promoted by permitting the death of, or brain injury to, an otherwise viable and healthy foetus. In this case it may be that R's instincts and intuitive understanding of her own body (which it must be emphasised were entirely correct) led to her strenuous insistence on a natural birth. Notwithstanding the paucity of information available, I note that there is nothing at all to suggest that R was motivated by anything other than an honest belief that this was best for both her and her baby. It is to be distinguished, for example, from those circumstances where intervention is resisted on religious or ethical grounds. In the circumstances therefore, it seems reasonable to conclude that R would wish for a safe birth and a healthy baby.*

Hayden J tested his reasoning by considering whether R:

> *65* […] *by parity of analysis, should be regarded as being in essentially the same position as an individual who had prepared an Advance Decision in the correct manner. Had R done so, could this application have been sustained? I say, at once, that I consider that an Advance Decision, properly constructed, with the appropriate safeguards in place would, in my judgement, be binding on the Court. I do not however, consider that R is in an analogous position. In preparing and drafting a carefully worded Advanced Decision, which is compliant with the statutory safeguards, P will, of necessity, have been required to identify the clear circumstances in which the refusal to comply is made. Neither, in my view, is the requirement for a signature in the presence of a witness to be regarded as a mere legal formality. It is part of a process in which a competent and capacitous adult can safely be regarded as having made prospective instructions on issues of the utmost gravity. Self-evidently, a statement, as made here, that a caesarean section is 'the last thing I would want' would not be compliant with the provisions. This is not because it is expressed in lay terms, it is because it is not sufficiently choate. A woman might choose, for example, not to have a caesarean even though her own life is at risk but elect to do so if the life or health of her baby is compromised. Also, and unequivocally, the capacitous adult who has prepared a statutory compliant Advanced Decision, has consciously waived the right to change her mind upon loss of capacity. R cannot be regarded, on the available evidence, as being in that position.*

Hayden J made two further observations of wider importance.

First, he re-emphasised the crucial importance of clear and timely planning, particularly in cases involving obstetric care and caesarean section, referring to the guidance given by Keehan J in *NHS Trust & Ors v FG* [2014] EWCOP 30. As Hayden J noted:

> *16. Careful planning and the avoidance of delay, where that is not purposeful, is intrinsic to every case in the Court of Protection, without exception. The focus however is, as Keehan J has emphasised, particularly acute in cases such as this. The need for an informed birth plan, identifying the appropriate support required, reviewed by the Court in a way which permits it properly to be scrutinised and facilitative of representation for P is essential. So too, is the need for a fully transparent*

> *process, given the fundamental rights and freedoms that are engaged here. As Keehan J highlights, these rudimentary requirements are a facet of the Article 6 rights of all involved. Moreover, failure to plan in a careful and properly informed manner may jeopardise the health, even the lives of the mother and the unborn baby. Thus, it follows, to my mind, inexorably, the court will need to be involved in a way which anticipates rather than being merely reactive to crisis or emergency.*
>
> *17. None of this can be permitted to occlude the reality that the court is being invited to make orders of a profoundly intrusive nature which also contemplate a deprivation of liberty. In this case the application arises in the face of opposition by a woman who, all agree, was capacitous at the time of the application and unrepresented. It is a profound understatement to say that such a situation should give any court real concern for the autonomy of the individual at the centre of the process.*

Second, Hayden J noted that he was not being asked to authorise medical intervention in relation to a capacitous adult:

> *33.* […] *I am being invited to determine whether, if the adult in question loses capacity, a medical intervention can be authorised which is contrary to her expressed wishes, whilst capacitous. In virtually every application that comes before this Court, relating to medical treatment, the answer to the question posed here would be a resounding 'no'. There is now a raft of case law, including many of my own judgments, which illustrate the efforts the Court of Protection will go to in order to identify what the likely wishes of P would be, in circumstances where P has lost the capacity for the relevant decision making (see e.g: Cumbria NHS Clinical Commissioning Group v Ms S & Ors [2016] EWCOP 32; Briggs v Briggs [2016] EWCOP 53; Salford Royal NHS Foundation Trust v Mrs P [2017] EWCOP 23; PL v Sutton Commissioning Group [2017] EWCOP 22). Whilst the identified wishes of P will not in and of themselves be determinative, they will always be given substantial weight and are highly likely to be reflected in the order or declaration the Court makes. This careful approach, forged by the case law of the last few years, is adopted by the Royal College of Physicians and the British Medical Association in their guidance 'Clinically – assisted nutrition and hydration (CANH and Adults who lack the capacity to consent'*

Comment

Hayden J did not shy away from what he had been asked to do, or what he did. Even if, as so often, the worst that had been anticipated did not come to pass, it was right for the court to have been asked to consider the position in advance – even if, in reality, it was only able to do so in a very problematic fashion because of the delay in issuing the proceedings. It is to be hoped that the guidance Hayden J issued in January 2020 may start to trigger the processes required to bring proceedings at much earlier stages – and, in particular, to reinforce the message that going to the Court of Protection is not necessarily a failure (and hence to be avoided), but rather a recognition of the gravity of the intervention that is being contemplated (and hence a necessary step to protect the rights

of the person). In this context, this paragraph from the judgment has a particular resonance:

> *48. The case law, to which I have referred, emphasises the 'exceptional' circumstances of the particular cases. However, in the context of the applications that come before Tier 3 (i.e. High Court) judges of the Court of Protection, many cases may properly be described as exceptional. Certainly, the families of those involved would consider them to be so. The cases frequently present issues of medical, moral, legal complexity. The MCA emphasises the importance of identifying P's capacity to take individual decisions. The jurisdiction is highly case or fact specific. Against this backdrop it is easy to see that the concept of 'exceptional' is vulnerable to being corroded i.e. interpreted as having wider application than that which the Court might intend. The right of all individuals to respect for their bodily integrity is a fundamental one. It is every bit the right of the incapacitous as well as the capacitous.*

Amongst other parts of a judgment which will no doubt be the subject of considerable commentary from those concerned with the Court of Protection, the MCA, reproductive rights, and the balancing of rights (to pick but a few), it may just be worth noting that Hayden J appears to have contemplated that it would be possible for a woman to make an advance decision to refuse a Caesarean section. This is logical (if it is analysed as being a 'treatment'), reinforces the need to think about advance decisions in the context of perinatal psychiatry, but poses some very stark questions as to the consequences.

What is the permission threshold?

Re D (A young man) [2020] EWCOP 1 (Mostyn J)

Practice and procedure (Court of Protection) – other

Summary

In this case, Mostyn J had to consider a question that had previously been the subject of only very limited judicial consideration, namely the test for permission under s.50 MCA 2005. The case concerned a young man, D, aged 20, with autism. He had been looked after by his father and his stepmother, C, since the age of 3.

D's mother, who was subject to a civil restraint order, applied for permission to make a substantive application concerning the nature and quantum of her contact with D. Mostyn J granted her leave under the terms of the civil restraint order to make the application for permission to make the application itself.

Under the terms of ss.50(1) and (2) MCA 2005, the mother needed permission to make a substantive application as she did not fall into one of the categories where permission is not required set out in section 50(1). Section 50(3) provides:

> *In deciding whether to grant permission the court must, in particular, have regard to –*
> *(a) the applicant's connection with the person to whom the application relates,*
> *(b) the reasons for the application,*
> *(c) the benefit to the person to whom the application relates of a proposed order or directions, and*
> *(d) whether the benefit can be achieved in any other way.*

Mostyn J noted that:

> *4. A permission requirement is a not uncommon feature of our legal procedure. For example, permission is needed to make an application for judicial review. Permission is needed to mount an appeal. Permission is needed to make a claim under Part III of the Matrimonial and Family Proceedings Act 1984. In the field of judicial review, the permission requirement is not merely there to weed out applications which are abusive or nonsensical: to gain permission the claimant has to demonstrate a good arguable case. Permission to appeal will only be granted where the court is satisfied that the appellant has shown a real prospect of success or some other good reason why an appeal should be heard. Under Part III of the 1984 Act permission will only be granted if the applicant demonstrates solid grounds for making the substantive application: see Agbaje v Akinnoye-Agbaje [2010] UKSC 13 at [33] per Lord Collins. This is said to set the threshold higher than the judicial review threshold of a good arguable case.*
>
> *5. There is no authority under section 50 giving guidance as to what the threshold is in proceedings under the 2005 Act. In my judgment the appropriate threshold is the same as that applicable in the field of judicial review. The applicant must demonstrate that there is a good arguable case for her to be allowed to apply for review of the present contact arrangements.*

The case had had a very lengthy and unhappy history, contact arrangements between D (at that stage a child) and his mother having been fixed some seven years previously. Having rehearsed the history, the possible scope of proceedings before the Court of Protection and (in his view) the irrelevance of the fact that D had turned 18, Mostyn J held that he applied:

> *13* […] *the same standards to this application as I would if I were hearing an oral inter partes application for permission to seek judicial review. I cannot say that I am satisfied that the mother has shown a good arguable case that a substantive application would succeed if permission were granted. Fundamentally, I am not satisfied that circumstances have changed to any material extent since the contact regime was fixed seven years ago and confirmed by me two years ago. I cannot discern any material benefit that would accrue to D if this permission application were granted. On the contrary, I can see the potential for much stress and unhappiness not only for D but also for his family members if the application were to be allowed to proceed.*

Mostyn J therefore refused the mother's application for permission.

Comment

Being pedantic, Mostyn J was not correct to say that there was no authority on s.50. In 2010, Macur J had in *NK v v VW* [2012] COPLR 105 had refused permission on the basis that she considered that "*section 50(3) and the associated Rules require the Court to prevent not only the frivolous and abusive applications but those which have no realistic prospect of success or bear any sense of proportional response to the problem that is envisaged by NK in this case*." Fortunately, not

least for procedural enthusiasts, that approach is consistent with the more detailed analysis now given by Mostyn J.

Habitual residence and alleged kidnapping

TD and BS v KD and QD [2019] EWCOP 56 (Cobb J)

International jurisdiction of the Court of Protection – other

Summary

QD was a man in his 60's who suffered from dementia connected with an atypical form of Parkinson's disease. Until September 2019, he was living with his second wife, KD, in Spain and had been so for several years. In September 2019, he flew to this country with his son and daughter from his first marriage, TD and BS, without KD's knowledge or agreement. TD and BS then sought a range of welfare orders in the Court of Protection including, in particular, that he reside in a care home in England, that he not return to Spain, and that he have only supervised contact with his wife, KD.

The matter was listed before Cobb for the determination of a preliminary issue, namely whether the Court of Protection had jurisdiction to determine the application or whether the case should be stayed pending transfer to Spain.

TD and BS argued that while QD was habitually resident in Spain until September 2019, he was now habitually resident in England. As a feature of this argument, TD and BS contended that the removal of QD from Spain was not wrongful but was justified under the common law doctrine of necessity, alternatively urgency. Alternatively, if the Court found that QD was habitually resident in Spain, then the Court should invoke the inherent jurisdiction so as to make substantive orders in relation to QD as a vulnerable adult in relation to his care, contact with others, and residence.

QD (by his litigation friend, the Official Solicitor) and KD argued that QD was at all material times habitually resident in Spain and that the Court of Protection's powers were therefore limited to making protective orders pending transfer of the proceedings to the Spanish Court.

After setting out the relevant provisions of Schedule 3 to the Mental Capacity Act and case law in relation to habitual residence, Cobb J concluded on the facts that QD was habitually resident in Spain. In reaching his conclusion, Cobb J was particularly influenced by the following factors identified at paragraphs 28-30 of his judgment:

- When he had capacity, QD chose to live in Spain and this appears to have been his permanent home;
- QD had lived in Spain for main years (he first moved there in 2012 and became a legal resident in Spain in 2014);
- QD had more than one property in Spain;
- QD received health care in Spain;
- QD was integrated into life and a community in Spain where he appeared to have a social life;
- It was conceded by TD and BS that prior to September 2019, QD was habitually resident in Spain;

- QD's wife continued to live in Spain and sought to regularize the care arrangements for QD in Spain by initiating proceedings for legal guardianship in Spain some weeks before QD was relocated to England
- QD's move to this country was achieved by stealth.
- There was no urgent need to make substantive orders to avert an immediate threat to life or safety or an immediate need to for further or other protection.

Cobb J also rejected the use of the inherent jurisdiction as a means of making substantive orders in relation to QD as he considered that to do so would be "*to subvert the predictable and clear framework of the statute in an unprincipled way*" (para 31). In the circumstances, Cobb J exercised the limited jurisdiction available to him pursuant to Schedule 3, para 7(1)(d) to make a protective measures order which provided that QD was to remain at and be cared for at a care home in England and that the authorisation of his deprivation of liberty would be continued until such time as the national authorities in Spain determined what should happen next.

Comment

Disputes of jurisdiction in the Court of Protection are not often reported and this case provides a useful summary of the principles to be applied in determining the court's jurisdiction of in cases where there is an international aspect. It is also an interesting and useful addition to the body of case law on the exercise of the inherent jurisdiction post-MCA.

Disclosure to a non-party – the correct approach

Re Z [2019] EWCOP 55 (Morgan J)

Practice and procedure (Court of Protection) – other

Summary

Morgan J had made a detailed substantive order on the papers in mixed health and welfare and property and affairs proceedings concerning Z. In that order:

- The court made a declaration as to Z's capacity following a consideration of the evidence.
- The order recorded a number of declarations (as to contact and LPAs) to be by the consent of the parties.
- The balance of the order was expressed to be by the consent of the parties.

JK, a son of Z who was not a party to the proceedings, subsequently made an application for the disclosure to him of certain documents which have been filed by the other parties in the course of the proceedings. The application was made pursuant to rule 5.9 of the Court of Protection Rules 2017 and the inherent jurisdiction.

Morgan J held that the inherent jurisdiction of the court "*allows the court to give effect to the constitutional principle of open justice and relates to certain documents in certain circumstances*." It was accepted by JK that rule 5.9 exists in order to give effect to the same principle of open justice. By way of reminder, rule 5.9

differentiates between different types of documents:

- Rule 5.9(1) gives a person who is not a party to the proceedings a right to inspect or obtain from the court records a copy of any judgment or order given or made in public.
- Rule 5.9(2) gives the Court a discretion whether to authorise such a person (on application to the court) to:
    - inspect any other documents in the court records; or
    - obtain a copy of any such documents, or extracts from such documents.

The documents sought by JK were:

1. The expert medical reports filed in the original proceedings together with the instructions and material upon which those reports were based;
2. Copies of all witness statements filed, together with exhibits (if the latter are part of the court file);
3. Copies of any skeleton arguments filed;
4. Any documents held on the court record which were relevant to the settlement reached with CD.

In determining this application Morgan J held that the following points were salient:

- While JK was not joined as party to the proceedings, he was bound by the declarations regarding Z's capacity in the same way that the parties were. He therefore had the right to apply for reconsideration of the order. However without disclosure of the documents had no access to the documents that were before the court when it made the order.
- JK was notified of the proceedings and could have either at the outset or at any later time, become a party to the proceedings. He did not do so. But had he done so, it is likely he would have been joined and the documents disclosed to him.
- The solicitors for AB had on a number of occasions, and in a number of ways, offered to engage with JK to give him information about the proceedings. JK however had not responded to these offers.
- JK relied on the open justice principle which is designed to assist public scrutiny of cases which ought to be heard in public, however, the original proceedings were not dealt with in public and were never going to be dealt with in public. Further, JK did not apply for an order opening up the documents which he sought to public scrutiny but acceptedthat any documents which he was permitted to see must remain confidential.

With respect to the legal framework, Morgan J held that:

- Rule 5.9(1) had no application as JK was not seeking (nor was there) an order or judgment made in public. JK was given a copy of the substantive order made in private.
- The analysis as to what formed part of the Court record was set out in the previous Supreme Court authority of *Dring v Cape*

Intermediate Holdings Ltd [2019] UKSC 38. The judge held that "*it would not extend to many of the documents which are sought by JK. In particular, it would not extend to the expert medical reports, the witness statements for the trial or the skeleton arguments*."

Much of the argument and analysis was taken up by consideration as to whether, in proceedings which were held in private, the principle of open justice was in play at all. The court held, after an analysis of the case law, that were the substantive order was made without a hearing in open court, but after the court considered certain documents on the papers, the principle of open justice was engaged in relation to matters which involved a judicial decision. As regards matters which were agreed between the parties and which did not involve a judicial decision, the principle of open justice was not engaged save that there remains a power for the court to permit access to documents filed with the court if there are strong grounds for holding that such access is necessary in the interests of justice. What this meant on the facts of this case was that:

- There was an element of judicial decision making involved in the declarations about capacity and the declarations by consent.
- There was no judicial decision as to who would have succeeded if the disputed matters were to be determined at a trial. Accordingly, in relation to the substantial body of evidence which related to that dispute, the open justice principle was not engaged but there was a power to allow JK to have access to that material if there were strong grounds for holding that it is in the interests of justice to allow him to have access.

Ultimately, the judge was not persuaded that any of the documents should be given to JK and the application was dismissed. The reasons for reaching that decision are entirely fact specific and so are not set out here.

Comment

This is a fascinating and detailed consideration of the issues at play in a disclosure application from a person who is not a party to proceedings. The authors are not aware of this having been the focus of a previous judgment.

Importantly, Morgan J was clear (and undoubtedly right) that the decision he was making about disclosure was not a best interest decision, but the best interests of Z fell to be considered when conducting the balancing exercise as to whether to disclose documents.

When to name the treating team

Manchester University NHS Foundation Trust v Namiq (RRO) [2020] EWHC 181 (Fam) (Family Division (Lieven J))

Media – court reporting

Summary

This is the judgment made in relation to the application for a reporting restriction order (RRO) in the Midrar Nadiq case, noted in the Wider Context report.

Lieven J had directed that the proceedings (usually heard in private pursuant to rule 27.10 of the Family Procedure Rules 2010) should be heard in open court given the subject matter

(namely the withdrawal of ventilation from a baby). By the time of the final hearing:

(i) The Guardian and the court had agreed that the baby who was the subject matter of the proceedings, Midrar should be named, along with his family members.

(ii) It was agreed that the hospital should be named.

The only issue between the parties was whether the names of the treating clinicians (who numbered in the hundreds) should be anonymised, or whether they should be made public. The applicant Trust sought an order resisting publication of their names which was opposed by the parents and the Press Association.

The parties' positions can be summarised as follows:

(i) The Trust were concerned about being at the centre of a media storm, with all the potential disruption to staff, patients and their families that comes with this. In addition they submitted that if named, staff would be discouraged from expressing honestly and sincerely held views, and potential experts would be dissuaded from becoming involved in these controversial cases.

(ii) The Father's position was that openness is important for public confidence, and that it aids accountability.

(iii) The Press Association argued that the Trust's submissions were insufficient to override the Article 10 EHCR rights at play. It further submitted that finding it traumatic being named in a press report was not a good ground to grant anonymity.

Lieven J carried out a balancing exercise between on the one hand open justice, transparency of the court process, the public interest in the freedom of the press to report without restriction, and the need for the public to understand what is happening in difficult and sensitive cases, against on the other, the competing interests of the treating professionals and the protection of their private lives, allowing treating professionals doing an important and difficult job to do so without their work being jeopardized, and the public interest in ensuing that appropriately qualified people do not avoid these cases for fear of hostile comment.

Lieven J concluded that on the facts of this case:

(i) The public interest in open justice was very largely protected by holding the proceedings in public and the judgment in public.

(ii) Relevant to open justice was the fact that the hospital and the child have been named. There was therefore no question of the public not being informed about what is going on.

(iii) In such circumstances it was difficult to see why either open justice or the public interest is harmed other than by a minimal degree by anonymisation of the treating professionals. Particularly as this was not a case in which any substantiated allegations of wrong doing were being made against the treating professionals.

(iv) Importantly, that while there had been no hostile comment in the press or social

> media at the time of judgment, her Ladyship noted that these type of cases about very ill young children raised strong views and there was a well-documented history of hostile and distressing comments about treating staff in other cases.

On this basis the Judge granted the RRO to protect the identity of the treating staff.

Comment

Of particular interest in this judgment is her Ladyship's express disagreement with the judgment of the (ex) President, Sir James Munby, in *A v* Ward [2010] EWHC 16 (Fam)as to where the balance lay. She stated as follows:

> *In my view there is an important distinction between professionals who attend court as experts (or judges and lawyers), and as such have a free choice as to whether they become involved in litigation, and treating clinicians. The latter's primary job is to treat the patient, not to give evidence. They come to court not out of any choice, but because they have been carrying out the treatment and the court needs to hear their evidence. This means they have not in any sense waived their right to all aspects of their private life remaining private. In my view there is a strong public interest in allowing them to get on with their jobs without being publicly named. I do not agree with the President that such clinicians simply have to accept whatever the internet and social media may choose to throw at them. I note that the President's comments were made before the well publicised cases of Gard and Evans, and perhaps at a time where the risks from hostile social media comment were somewhat less, or at least perceived to be less. There may well be cases where the factual matrix makes it appropriate not to grant anonymity and each case will obviously turn on its own facts. But in my view the balance in this case falls on the side of granting the order.*

Following the extraordinary public scenes arising from the Gard and Evans cases, there has been an acceptance by many on the bench that the impact on front line clinicians who become involved in such cases can be extreme. It is significant that the public interest in protecting such clinicians has been given significant weight in this application. Even if cases before the Court of Protection are not always as emotive to the public, the logic of this case could apply equally in a situation where a particular case fall into a similar category.

Short note: costs and 'even-handedness'

In *Re W (A Child)* [2020] EWCA Civ 77, the Court of Appeal departed from the general 'no order as to costs' rule in relation to application to costs in respect of children (which is the same as in welfare proceedings). That general rule also applies in relation to appeals, as Baroness Hale confirmed in *Re S* [2015] UKSC 20, in which she also confirmed that "*costs orders should only be made in unusual circumstances*," for example, as identified by Wilson J (as he then was) in *London Borough of Sutton v Davis (Costs) (No 2)* [1994] 2 FLR 569 where "*the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable*." In the instant case, the departure was justified because there was:

> *10.* [….] *a failure to be even-handed on the part of the Local Authority in their presentation of the case to the judge at*

first instance and thereafter a failure to recognise (save to a very limited extent) that the judgment as drafted could not justify the order that was made. In those circumstances and in the unusual circumstances of this case, I would order the Local Authority to make a contribution towards the costs of the appellant.

Court of Protection fees refund

The Ministry of Justice has introduced a refund scheme relating to court fees, including the Court of Protection. For the Court of Protection, the scheme relates to those who paid court fees between 1 April 2016 and 31 March 2018 for applications and appeals:

			Date you paid the fee			
			22 Apr 2014 to 31 Mar 2015	1 Apr 2015 to 31 Mar 2016	1 Apr 2016 to 31 Mar 2017	1 Apr 2017 to 31 Mar 2018
Misquoted Fee code	Correct Fee Code	Fee description	Maximum refund amount			
Court of Protection Fees						
FEE0253	FEE0525	Application	No refund	£22	£14	£35
FEE0524	FEE0239	Appeal	No refund	£2	£82	£169
n/a	FEE0302	Hearing	No refund			£11

In addition, if you paid a hearing fee between 1 April 2017 and 31 March 2018, you may also be eligible for a refund.

Misquoted Fee code	Correct Fee Code	Circumstance	Maximum refund amount
Court of Protection Fees			
FEECODE n/a	zero	You paid a hearing fee of £500 for a hearing which did not fully dispose of the case or appeal. For instance a hearing to consider an interlocutory application where no final order, declaration or decision was made in respect of the case or appeal. You should have paid no fee.	£500

For more details, see here. and the guidance document here.

Queries regarding the scheme should be directed to the helpdesk as follows:

Telephone: 0300 1233077

Email: Civil_Refunds@justice.gov.uk.

Association News

Court of Protection Bar Association

DOLS Debate

There will be a debate about the definition of deprivation of liberty chaired by District Judge Anselm Eldergill at Doughty Street Chambers at 17:00 on 4 March 2020, at which Alex Ruck Keene will be speaking along with Ulele Burnham. To reserve a place please contact Claire van Overdijk (cvo@outertemple.com).

AGM and annual lecture

The CPBA Annual General Meeting and Annual Lecture will be on 24 March 2020 at 17:30 and will be hosted by 39 Essex Chambers. The Annual Lecture will be delivered by Sir James Munby.

Spring conference

The CPBA Spring Conference will be on 29 April 2020 (time to be confirmed) and will be hosted by 39 Essex Chambers.

All three of these events are member only. To join, see here. Further details for reserving a place at the debates will be announced shortly.

Court of Protection Practitioners Association

Withdrawal of clinically assisted nutrition and hydration: a look behind the media headlines

London CoPPA are holding a training and networking event to discuss the legal and medical complexities surrounding the

decision to withdraw clinically assisted nutrition and hydration. The event will be on Tuesday 18 February 2020 at 5:30. For more details, and to book, see here.

Please note CoPPA has indicated that, given the emotive nature of the topic, any non-members who wish to attend must apply in advance and admission on the night will be at the discretion of the Association.

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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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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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). 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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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

LSA Mental Health conference

Adrian will be chairing and Jill speaking at the LSA Mental Health conference in Glasgow on 13 February. For more details , and to book, see here.

The law and brain death

Katie will be chairing and Tor speaking at a seminar and discussion taking a critical look at cases concerning brain death in the High Court and Court of Protection. It will take place on 26 February in London. For more details, and to book, see here.

SOLAR conference

Adrian will be speaking on "AWI: Don't wait for legislation – the imperatives apply now!" at the annual conference of the Society of Local Authority Lawyers and Administrators in Scotland, being held on 12 and 13 March in Glasgow. For more details, and to book see here.

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see here.

Other conferences and events of interest

Mental Diversity Law Conference

The call for papers is now open for the Third UK and Ireland Mental Diversity Law Conference, to be held at the University of Nottingham on 23 and 24 June. For more details, see here.

Peter Edwards Law courses

Peter Edwards Law have announced their new programme of courses, covering a wide range of topics across the mental capacity and mental health field. More details, 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 2020. 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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