Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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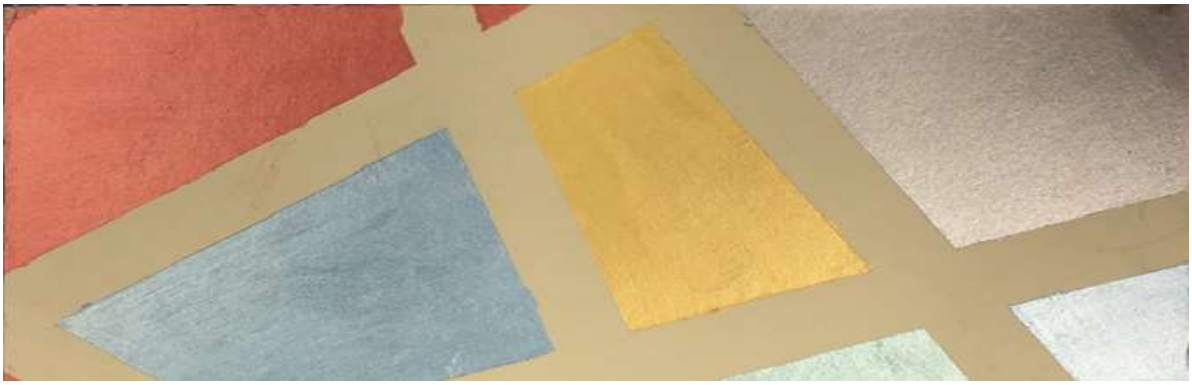

Welcome to the July 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: LPS delayed to April 2022; alcohol dependence and other capacity conundrums; stem cell donation and altruism, and when to come to court in medical treatment cases;

(2) In the Property and Affairs Report: updated OPG guidance on making LPAs under light-touch lockdown and a face-off between potential professional deputies;

(3) In the Practice and Procedure Report: a basic guide to the CoP; litigation capacity and litigation friends and observations about intermediaries and lay advocates;

(4) In the Wider Context Report: capacity and the Mental Health Tribunal, a change of approach to s.117 aftercare and lessons learned from a close encounter with triage;

(5) In the Scotland Report: the Scott Review summary of responses to its initial survey and a response from the Chair to the critique in our last issue.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 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.

Contents

Basic guide to the Court of Protection

A team comprising Tor, Sarah Castle (the Official Solicitor), Jakki Cowley (an IMCA), and Alex have produced a basic guide to the Court of Protection for lay people who may be going to court, or may be attending court. The guide, building on earlier guide by Tor, is accompanied by a glossary of the terms that are regularly used. Jakki has also written a more personal guide called "You're going to a welfare hearing at the Court of Protection – what does this mean for you?." These documents are not official documents, but we hope that they may be of help in ensuring that those who attend court know what it does, and how it does it. All of the documents can be found here, along with an easy read guide focusing (in particular) upon participation written by Dr Jaime Lindsey of the University of Essex.

Alongside these documents, it also helpful to flag the guide to remote hearings produced by the Transparency Project. It is designed for those attending family proceedings, but has practical information which may be equally useful to those attending hearings before the Court of Protection.

The COP Mediation scheme in practice

The Court of Protection mediation scheme in practice

Even though COVID-19 may be making everyone rethink how conventional proceedings unfold in the Court of Protection, it does – or should not – detract from the importance of mediation. On the Court of Protection Handbook website can be found a guest post by Alex Troup of St John's Chambers, Bristol, outlining his experience as a mediator under the Court of Protection Mediation Scheme which is currently up and running on an informal pilot basis.

Litigation capacity and litigation friends – news from the civil courts

Hinduja v Hinduja & Ors [2020] EWHC 1533 (Ch) (High Court (Chancery Division) (Falk J))

Litigation friend – family members

Summary

In a judgment relating to the business affairs of the Hinduja family, the Chancery Division has undertaken an important analysis of when, precisely, medical evidence is required to support the proposition that a party in civil proceedings requires a litigation friend, as well as the circumstances under which it can

properly be said that a person should not be a litigation friend.[1]

The proceedings were brought under Part 8 of the Civil Procedure Rules to determine the validity and effect of two letters. Through an oversight, however, the Claimant's advisers did not file a certificate of suitability from the Claimant's daughter at the time, as required by CPR r. 21.5. Such a certificate was filed, and Falk J had to consider whether and how to regularise the position. For technical reasons which are immaterial here, she took the view that the better course was to make a fresh order to appoint his daughter, Vinoo, as litigation friend under CPR r.21.6. There were two preconditions to the exercise of that power: (1) that the Claimant, SP, was a protected party and (2) whether Vinoo met the conditions set down in CPR r.21.4(3) to be a litigation friend. Were she to make such an order, Falk J would then make an order regularising the position under CPR 21.3(4) (and the Defendants, whilst challenging the two pre-conditions noted above, did not challenge the making of such an order if they were met).

Was SP a protected party?

The core submission of the Defendants was that the court did not have sufficient evidence to conclude that SP lacks capacity to conduct the proceedings. It was submitted that the information contained in the certificate of suitability did not properly address the tests in the MCA 2005, and no medical evidence was provided. Relying upon *Masterman-Lister v Brutton* [2003] 1 WLR 1511, the Defendant submitted that SP's Article 6 ECHR rights were engaged, and the court should require medical evidence to be provided.

Especially in cases before the civil courts, it has been a working assumption that medical evidence was required. However, as Falk J noted:

> *There is no requirement in the* [Civil Procedure Rules] *to provide medical evidence. The absence of any such requirement was commented on by Chadwick LJ in Masterman-Lister at [66]. There is no reference to medical evidence in CPR 21.6. The only reference to medical evidence is in paragraph 2.2 of PD 21, which applies where CPR 21.5(3) is being relied on. That requires the grounds of belief of lack of capacity to be stated and, "if" that belief is based on medical opinion, for "any relevant document" to be attached. So the Practice Direction provides that medical evidence of lack of capacity must be attached only if (a) it is the basis of the belief, and (b) exists in documentary form. It does not require a document to be created for the purpose.*

Falk J considered that references by the Court of Appeal in *Masterman-Lister* and the later case of *Folks v Faizey* [2006] EWCA Civ 1381 to medical evidence being needed in almost every case were not:

> *39.* [….] *intending to lay down any rigid principle under which medical evidence is required unless the circumstances are exceptional. The question will always depend on what the circumstances are. For example, Folks v Faizey was a personal injury claim where the claimant*

[1] The case also concerned consideration of restricting access to court documents, not considered here.

> *had suffered a severe head injury in a road traffic accident. The issue of capacity arose during the proceedings, the Court of Protection was involved (which would have required at least some medical evidence in any event), and there was a real dispute between medical experts about whether the claimant had capacity. The need for medical evidence was obvious. Similarly in Masterman-Lister, which like Folks v Faizey related to serious injuries following a road traffic accident, there was a real issue about capacity.*

Falk J also considered that the suggestion in *Baker Tilly v Makar* [2013] COPLR 245 that medical evidence would ordinarily be required was, again, related to the factual context. Baker Tilly was, she considered, an "*extraordinary case where a judge had concluded that a litigant lacked capacity based on her behaviour in the course of the proceedings. That is not something that the court is ordinarily in a position to do*." By contrast, in this case:

> *41.* […] *the certificate was provided by a close family member. Vinoo lives with her parents and cares for them daily. There can be no one who is in a better position to comment on whether her father has capacity to conduct the litigation. The certificate of suitability confirms that her father is no longer able to give instructions to lawyers and has asked her to do so. The fact that he may have capacity to ask her to act in the litigation does not mean that he has capacity to conduct proceedings. As explained in Masterman-Lister at [74] and [75], questions of capacity are issue specific.*

Falk J also considered that:

> *44. The wording of the certificate amounts to confirmation that SP is not able to make decisions for himself in relation to the proceedings because of an impairment. The confirmation is specific to the proceedings and in my view sufficiently addresses the test in s 2(1) of the 2005 Act.*
>
> *45. I also do not accept Mr Rees' suggestion that the evidence must expressly address each of the tests in s 3 of the 2005 Act, that is SP's ability to understand, retain and use or weigh information, or to communicate decisions (tests which I note are, in any event, expressed in the alternative: a person lacks capacity if any one of them is not met). The certificate confirms that SP is not able to give instructions to lawyers. In the context of a clear statement that SP lacks capacity to conduct the proceedings due to disease, I think that addresses the statutory test.*

In the context of the case itself, Falk J noted that there was no evidence that actually contradicted the evidence that SP lacked capacity to conduct the proceedings. Nor did she consider it necessary, or in accordance with the overriding objective, to require medical evidence to be produced.

Suitability of litigation friend

In order to appoint Vinoo as SP's litigation friend, Falk J had to be satisfied that (a) Vinoo could fairly and competently conduct proceedings on SP's behalf, and (b) she had no interest adverse to that of SP. (There was no dispute that Vinoo had provided the required undertaking to pay costs). The Defendant's case was that the tests in CPR 21.4(3)(a) and (b) are not met. The Defendants maintain that Vinoo has her own

separate financial interest in pursuing the proceedings, and that she would not be in a position to form an independent and objective judgment about the merits of the claim and SP's best interests. The correct course, the Defendants submitted, would be to appoint an independent professional or the Official Solicitor.

Falk J undertook a detailed analysis of the case-law, in particular the decision in *R (Raqeeb) v Barts NHS Trust* [2019] EWHC 2976 (Admin), in which MacDonald J had stressed the need for the litigation friend to approach the litigation with objectivity. Falk J suggested, however, that:

> *59.* […] *some caution is required in relation to MacDonald J's comments about objectivity. It should also not be assumed that a relative with a financial interest is necessarily debarred from acting as a litigation friend.*
>
> *60. The comments made about objectivity were obviously made in the context of the facts of that case. The key tests to apply are those set out in the rules. In conducting litigation fairly and competently on behalf of a protected party, it is obvious that a litigation friend must acquaint him or herself with the nature of the case and, under proper legal advice, make decisions in the protected party's best interests. Being "objective" in this context cannot mean independent or impartial vis-à-vis both parties to normal adversarial civil litigation. The litigation friend is acting on behalf of the protected party. Any objectivity required must relate to the litigation friend's ability to act in the protected party's best interests, and in doing so listen to and assess legal advice, and properly weigh up relevant factors in making decisions on the protected party's behalf.*

Falk J continued:

> *61. The requirement not to have an adverse interest is closely linked to the requirement that the litigation friend can fairly and competently conduct the proceedings. Any adverse interest would obviously risk compromising the litigation friend's ability to act fairly in the protected party's best interests, or at least risk giving the appearance of doing so. For example, in Nottinghamshire County Council v Bottomley [2010] EWCA Civ 756 a litigation friend who was subject to a conflict of interest as between the local authority who employed her and the child she was representing was removed. Stanley Burnton LJ made the point at [19] that a litigation friend must be able to exercise some independent judgment on the advice received, and it would be unfair to expect the litigation friend to choose a form of settlement most unfavourable to her employer. He also said that the principle that justice must be seen to be done requires the litigation friend not to be seen as having a conflict.*
>
> *63. Whether the existence of a financial interest on the part of the litigation friend should debar them from acting will depend on the nature of the interest, and whether it is in fact adverse or whether it otherwise prevents the litigation friend conducting the proceedings fairly and competently on the protected party's behalf. A person is not prevented from being a litigation friend simply because they have a personal interest in the proceedings. It would, for example, be relevant if any personal interest that the litigation friend had meant that he or she could not*

> *approach the litigation in a balanced way, in the sense of not being able to weigh up legal advice and decide what should be done in the protected party's best interests. But it would be highly unlikely that a litigation friend would be unable to do so simply because he or she has an interest in the proceedings, in circumstances where that interest is aligned with that of the protected party.*

Finally, Falk J agreed with the observations of Laurence Rabinowitz QC sitting as a Deputy High Court Judge in *Davila v Davila* [2016] 4 WLUK 347, that the fact that the litigation friend has his own independent interest or reasons for wishing the litigation to be pursued ought not, in general, to be a sufficient reason for impeaching the appointment, because such an interest would generally run in the same direction as the protected party rather than being adverse to his interests. She also agreed with his observation that the reference to being able fairly and competently to conduct the proceedings was aimed at ensuring that the litigation friend has the skill, ability and experience to be able properly to conduct litigation of the sort in question, but that in general the court should not be required to conduct an enquiry extending far beyond that, considering unproven allegations not directly related to the matters giving rise to the litigation.

On the facts of the case before her, Falk J concluded that there were no good grounds to indicate that Vinoo could not fairly and competently conduct proceedings on SP's behalf. As against the Defendants, she observed:

> *66. SP's litigation friend will not, and indeed cannot, be impartial: he or she is conducting adversarial proceedings on behalf of the protected party. What is required is that the litigation friend acts in the protected party's best interests.*

Falk J also took into account that SP had chosen Vinoo as one of his attorneys under lasting powers of attorney for both his property and financial affairs, and health and welfare, under powers of attorney made in June 2015. As such, Falk J observed, "*she has a duty to act in his best interests. The fact that she was appointed to these roles by SP is also a strong indication that he trusted her to act in his best interests, and indeed to do so in all aspects of his life. Obviously this does not automatically qualify Vinoo to act as a litigation friend, but it is of some relevance*" (paragraph 67).

Interestingly, Falk J found that the fact that (depending upon how proceedings unfolded), Vinoo might be required in due course to give evidence "*cannot sensibly prevent her from acting as a litigation friend. As already indicated, there is no requirement for independence and there is no basis to suggest that acting as a witness means that she cannot fairly conduct proceedings on her father's behalf, or that she has an adverse interest*" (paragraph 79).

One other point of particular note was that:

> *85.* […] *it is the court that will ultimately decide the effect of the [key] letter, making its decision on the facts and law in the normal way. In the same way that in Raqeeb XX's religious views were not relevant to the substantive issues before the court, Vinoo's motivations will not be relevant to the decision that the court makes, and the court will in any event want to hear both sides of the argument (Raqeeb at [36] and [41]). Furthermore,*

> *the question of SP's own subjective views or wishes (whether in July 2014 or subsequently), and the extent (if at all) to which that question is relevant, will be matters to be determined by the trial judge on the evidence.*

Comment

Falk J's careful analysis of whether, and why, medical evidence is required before a court can conclude that a party is a protected party is important. Perhaps reflecting the traditional deference shown by civil courts to medical expertise in the context of capacity (a deference not shared by the Court of Protection with its much greater familiarity with the concept), it seems usually to have been understood that medical evidence was required. However, as Falk J makes clear, the CPR (and, for that matter, the FPR and the Court of Protection Rules) have no requirement for medical evidence. It will – and should – be a matter for the judge to determine in the circumstances of the case before them whether there is a need for medical evidence to enable them to determine whether an individual is a protected party.

Similarly, Falk J's analysis of the obligations upon a litigation friend (and hence the determination of suitability to be a litigation friend) is nuanced and careful. Caution may, though, be required in translating them across to the avowedly inquisitorial jurisdiction of the Court of Protection, where, traditionally, the litigation friend for P does seem to be treated as under a duty dispassionately to examine where P's best interests lie, no matter how those issues are framed by the other parties (see, for instance, the reference by Charles J in *Re UF* [2013] EWHC 4289 (COP) to the need for the litigation friend to be able to take "*a balanced and even-handed approach to the relevant issues*," endorsed by Baker J in *B v D* [2016] EWCOP 67). Whether, of course, (1) a litigation friend is in fact under a duty to act in MCA best interests; and (2) whether (even if they are) that requires them to act as gate-keeper to determine what arguments to advance on behalf of P, are different questions, addressed here.

Intermediaries and lay advocates

Two cases decided recently have considered these support mechanisms. In *S (Vulnerable Parent: Intermediary)* [2020] EWCA Civ 763, the Court of Appeal made some important observations about the role of intermediaries in 'hybrid' hearings and also emphasised the particular difficulty faced by at last some of those with learning disabilities in participating in proceedings by video. As Peter Jackson LJ noted:

> *27. A particular issue may arise where a witness with a learning disability is being questioned by an advocate who is not physically present. Even assuming that the technology works in an optimal way, the process removes many of the visual cues that are so valuable to individuals with a cognitive impairment. On 22 April 2020, the Equality and Human Rights Commission published an interim report into video hearings in the criminal justice system and their impact on effective participation by defendants who have a cognitive impairment or a mental illness. Such defendants may have difficulty retaining information, have a short attention span, be reluctant to speak up and have extreme anxiety:*

> *"We found that video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions."*

One of the report's recommendations to government is to consider the use of registered intermediaries to provide remote communications support to such defendants in video hearings.

28. There is of course no direct read-across between a defendant in prison and a party or witness attending court as part of a hybrid hearing. I mention the EHRC interim report only to underpin the fact that the use of remote technology has additional implications for parties and witnesses with a learning disability. Being questioned by someone whose face appears on a screen is not the same as face-to-face conversation and the demands of following a hearing in more than one medium inevitably adds to any existing difficulties in understanding what is being said.

In *C (Lay Advocates) (No.2)* [2020] EWHC 1762 (Fam), Keehan J usefully clarified the role of a lay advocate, and also funding responsibilities. In terms of the role, he clarified the position at paragraph 11 thus:

i) a lay advocate does not provide legal services;

ii) a lay advocate is not a McKenzie Friend;

iii) a lay advocate is not an intermediary (albeit an individual may be qualified to act as an intermediary and as a lay advocate);

iv) the term 'lay advocate', for the purposes of this judgment, means a person who is qualified and/or has experience of assisting and supporting a party in proceedings who has an intellectual impairment or learning difficulties which compromises their ability to process and comprehend information given to them. The function of the lay advocate is to ensure that the party does understand the information provided and is able to respond to the same and thereby, is enabled to participate effectively in the proceedings. This assistance and support will be required both in court during the proceedings and out of court for the purposes of taking instructions and preparing the party's case for the court proceedings.

The Secretary of State for Justice, who appeared before Keehan J, agreed on behalf of HMCTS and the LAA that:

i) payment for lay advocates at hearings is a matter for HMCTS; and

ii) payment for lay advocates to assist with communication between the client and their solicitor out of court is, in cases benefitting from legal representation funded by civil legal aid, a matter for the LAA subject to the LAA being satisfied that it is a justifiable and reasonable disbursement in the course of the legal representation provided.

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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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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; honorary membership of the Law Society of 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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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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.

We are taking a break over August, and hope that at least some of you are able to do so too. Our next edition will be out in September. 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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