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MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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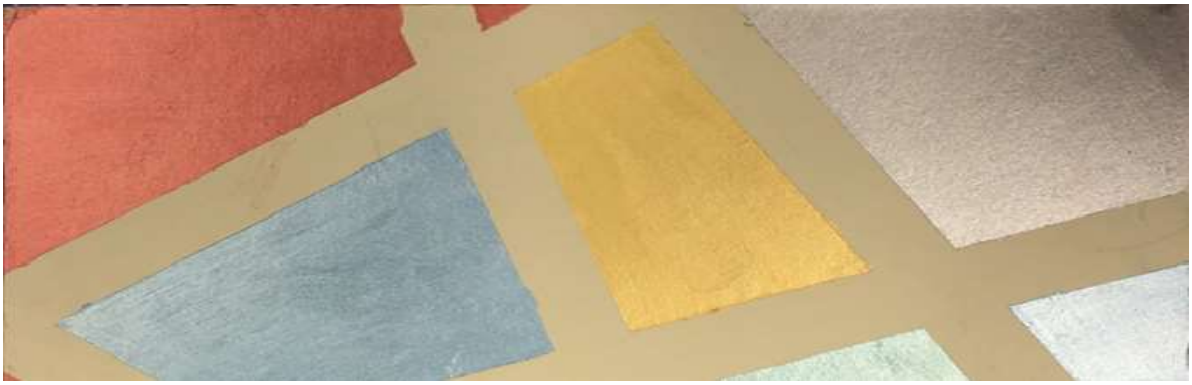

Welcome to the November 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, an important LPS update, and the judicial eye of Sauron descends on new areas to consider (ir)relevant information;

(2) In the Property and Affairs Report: a complex case about when the settlement of an inheritance;

(3) In the Practice and Procedure Report: for how long does a Court of Protection judgment remain binding, and helpful guidance for experts reporting upon capacity;

(4) In the Wider Context Report: challenging reports about the disproportionate effect of COVID-19 upon those with learning disability, young people with learning disability and autism under detention, and capacity and public hearings before the Mental Health Tribunal;

(5) In the Scotland Report: discharge from hospital without proper consideration of ECHR rights.

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. 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, and Neil a page 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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Reporting upon capacity for the court (and more broadly) – what (not) to do

AMDC v AG & Anor [2020] EWCOP 58 (Poole J)

Mental capacity – assessing capacity

This decision serves as an important reminder of how demanding the process of assessing and reporting upon capacity is – or should be. The case concerned a 68 year old woman, AG, whose capacity was asserted by the local authority applicant to be lacking in respect of a broad number of welfare-related domains, as well as the management of her property. However, on the second day of the final hearing of the application, following the conclusion of the oral evidence of the jointly instructed expert, the local authority informed the court that it did not consider that it could rely upon this evidence – the sole evidence before the court – to prove that AG lacked capacity in the material respects.

All the parties agreed that, although further delay in determining capacity was very regrettable, it was necessary for instructions to be given to a fresh expert to report to the court. As Poole J identified, this was not a case in which the application could simply be dismissed for lack of evidence. Importantly, he founded himself upon the following observations by Baker J, as he then was, in *Cheshire West and Cheshire Council v P* [2011] EWCOP 1330 (at paragraph 52):

> *The processes of the Court of Protection are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests.*

Poole J was satisfied that, notwithstanding the concerns about the expert opinion evidence, the evidence as a whole established that there was reason to believe that AG lacked capacity to make the decisions under consideration and that it was in her best interests to make interim orders and directions. Poole J therefore authorised the continued deprivation of AG's liberty with her residence and care being in accordance with a safeguarding plan dated 20 May 2020. A resumed hearing was fixed in January 2021 with directions for the receipt of evidence from a new expert psychiatrist. These interim orders deprived AG of her liberty and interfered with her Article 8 rights. Amongst other restrictions, the ongoing regime which the

court had authorised to continue until the final determination of this case effectively prevented AG from engaging in sexual intercourse, from leaving ECH and from choosing her care arrangements. Because of the impact of an adjournment on AG, and to assist the newly instructed expert, Poole J was invited to and agreed to give an interim judgment.

The expert, Dr Quinn, had given evidence on many previous occasions. However, in this case, Poole J noted that "[h]*is evidence left the parties, the court, and even Dr Quinn himself, with some 'disquiet'*." Poole J made clear that he was not questioning Dr Quinn's professionalism, expertise or conduct, but rather that he shared the concerns raised with him in questioning at the hearing relating to his reports, including (as set out at paragraph 24), the following:

> *(a) Paragraph 4.16 of the Code of Practice states, " It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person understand". The expert's reports did not provide sufficient evidence either that AG had been given the relevant information in relation to each decision, or of the discussions the expert had had with P about the relevant information.*
>
> *(b) It is not a criticism of an expert that at different times they have reached different conclusions about a person's capacity. Capacity can change and new evidence may come to light. However, in this case significantly different conclusions had been reached at different times without clear explanations of why the conclusions had changed or how the evidence as a whole fitted together. Further, the change in opinion between the June report and the August letter had followed the receipt of a single further statement and without any further face to face assessment.*
>
> *(c) The expert's final conclusion had been reached on a broad-brush basis rather than by reference to each decision under consideration.*
>
> *(d) A lack of information to show how AG had been assisted to engage when the expert had "hit a brick wall" in his attempts to have a discussion with her at his final interview. The lack of information left doubt as to whether AG was incapable of understanding the purpose of the interview, whether she had been given adequate support to engage, or whether she had simply chosen not to talk to the expert.*
>
> *(e) A lack of a cogent explanation for why the presumption of capacity had been displaced in relation to the decisions under consideration. Conclusions were stated but not clearly explained.*

Poole J then indicated that it might be helpful to provide some indications of how experts' reports on capacity in a case such as this could best assist the court. In doing so, he emphasised that he did not wish to be prescriptive about the form and content of reports – the Court of Protection Rules r15 and the Practice Direction 15A should of course be followed by all experts and those

instructing them. He also refrained from commenting upon the way an expert should interview or assess P – those are matters for the expert's professional judgment. As he noted at paragraph 26, "[t]*he inquiry into capacity will vary considerably from case to case, and experts must always be sensitive to what is required for the individual assessment in which they are engaged*." Poole J was also *"mindful of the very recently* [5 November 2020] *published final report of the President's Working Group on Medical Experts in the Family Courts, in which Mr Justice Williams and his working group highlight the pressures on expert witnesses that surely apply also to those giving evidence in the Court of Protection – the rates of remuneration, the lack of support and training, the court processes and perceived criticism by lawyers, judiciary and the press*." It was therefore "*with due care therefore that I provide the following comments which are intended merely to assist experts when writing reports in cases such as the present one. The Working Group recommends constructive feedback to encourage good practice*."

Poole J started by reminding himself that expert evidence under COPR r.15 was by no means the only way in which capacity assessments are provided to the court. He noted, in particular, that some s.49 reports are written by psychiatrists who might, in other cases, provide an expert report under r.15. Importantly, he reminded himself at paragraph 27 that "[a]*n assessment of capacity is no less important when carried out under s. 49 or by a social worker or Best Interests Assessor*." The guidance that he then set out he indicated "*might be of assistance to all assessors, but it is specifically directed to r15 expert witnesses because that is the form of evidence under consideration in this case*."

28. When providing written reports to the court on P's capacity, it will benefit the court if the expert bears in mind the following:

(a) An expert report on capacity is not a clinical assessment but should seek to assist the court to determine certain identified issues. The expert should therefore pay close regard to (i) the terms of the Mental Capacity Act and Code of Practice, and (ii) the letter of instruction.

(b) The letter of instruction should, as it did in this case, identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between any impairment and the inability to decide. It will assist the court if the expert structures their report accordingly. If an expert witness is unsure what decisions they are being asked to consider, what the relevant information is in respect to those decisions, or any other matter relevant to the making of their report, they should ask for clarification.

(c) It is important that the parties and the court can see from their reports that the expert has understood and applied the presumption of capacity and the other fundamental principles set out at section 1 of the MCA 2005.

(d) In cases where the expert assesses capacity in relation to more than one decision,

i) broad-brush conclusions are unlikely to be as helpful as

specific conclusions as to the capacity to make each decision;

(ii) experts should ensure that their opinions in relation to each decision are consistent and coherent.

(e) An expert report should not only state the expert's opinions, but also explain the basis of each opinion. The court is unlikely to give weight to an opinion unless it knows on what evidence it was based, and what reasoning led to it being formed.

(f) If an expert changes their opinion on capacity following re-assessment or otherwise, they ought to provide a full explanation of why their conclusion has changed.

(g) The interview with P need not be fully transcribed in the body of the report (although it might be provided in an appendix), but if the expert relies on a particular exchange or something said by P during interview, then at least an account of what was said should be included.

(h) If on assessment P does not engage with the expert, then the expert is not required mechanically to ask P about each and every piece of relevant information if to do so would be obviously futile or even aggravating. However, the report should record what attempts were made to assist P to engage and what alternative strategies were used. If an expert hits a "brick wall" with P then they might want to liaise with others to formulate alternative strategies to engage P. The expert might consider what further bespoke education or support can be given to P to promote P's capacity or P's engagement in the decisions which may have to be taken on their behalf. Failure to take steps to assist P to engage and to support her in her decision-making would be contrary to the fundamental principles of the Mental Capacity Act 2005 ss 1(3) and 3(2).

As Poole J noted in concluding at paragraph 29, "[t]*he newly instructed expert in this case may or may not reach the same conclusions as Dr Quinn, but it will be important that the parties and the court can see from their report that the fundamental principles of the MCA 2005 have been followed, that proper steps have been taken to support AG's decision-making and participation in the assessment, and that the conclusions reached are adequately explained*."

Comment

Poole J has only very recently been appointed to the High Court bench, and then to sit as a nominated judge of the Court of Protection, but he has – with respect – come sprinting out of the starting blocks. The guidance given in this judgment is crisp, clear and immensely helpful, not just for those completing expert reports for the purposes of the Court of Protection, but for anyone completing a capacity determination. The comments amplify the equally helpful observations of the (Australian) judge, Mr Justice Bell, in *PBU and NJE v Mental Health Tribunal* (relating to medical treatment, but equally applicable to other contexts) that

The fundamental principles of self-determination, freedom from non-consensual medical treatment and personal inviolability, and the equally

fundamental principles behind the right to health, are most respected by capacity assessments that are criteria-focussed, evidence-based, person-centred and non-judgmental. Such assessments engage with the demand (or plea) of the person to be understood for who they are, free of pre-judgment and stereotype, in the context of a decision about their own body and private life.

Particularly welcome, for our part, are three points in particular:

1. The distinction that Poole J draws between "assessment" – the process of thinking about P – and "report" – the record of the conclusions of that thinking process. In our capacity guide we talk about "determination" rather than "report," but we equally seek to draw a distinction between the two concepts. Using the term "assessment" to cover both the process of thinking and the process of recording the conclusions of that thinking is dangerous for two reasons: (1) many "capacity assessment" forms are predicated on the basis that they are simply records of why P does not have capacity, as opposed, which is pre-loading the position; and (2) it can lead people to forget that assessment is a process which needs to be continued for as long as is required until it is possible to reach a conclusion;
2. The reminder of the fact that experts, as much as those involved in the day to day care, treatment or affairs of P, are bound to take practicable steps to support them before reaching the conclusion that they lack capacity in any material domain; and
3. The reminder that capacity assessments, including those prepared for the court, are not the sole domain of psychiatrists, as this is an ongoing, and unhelpful, myth.

The judgment also provides a useful immediate confirmation that the findings of the very detailed (and frankly somewhat depressing) report of the Working Group on Medical Experts in the Family Courts are equally applicable in relation to experts appearing before the Court of Protection.

For how long does a Court of Protection judgment remain binding?

An NHS Trust v AF & Anor [2020] EWCOP 55 (Poole J)

Practice and Procedure (Court of Protection) – other

Summary

Poole J has answered an important question that has – oddly – not been definitely determined previously: when does a decision of the Court of Protection stop being binding? The question is important, given that the court has to make decisions about capacity and best interests on the facts as they are at the point of its decision, but we know that it is entirely possible for those facts to change.

The case is the follow up to the decision of Mostyn J in March 2020 (*A CCG v AF* [2020] EWCOP 16), in which it had been held that it was in the best interests of AF, a man in his mid-seventies who had a severe stroke in May 2016, to continue receive Clinically Assisted Nutrition and Hydration ('CANH') via a PEG. That decision was not appealed by his daughter, who had

argued strongly that he would not have wished to continue to be fed.

At that point, the PEG tube had been in place since 2016 and they usually last for two to four years before requiring replacement. Therefore, in March 2020 it could have been expected that re-insertion would soon be required. However, the court in March 2020 was not made aware of that expectation and therefore the order made did not expressly cover the need for reinsertion of the PEG tube.

After the judgment of Mostyn J, AF continued to live at his care home receiving CANH via his PEG without incident until on 28 August 2020 the PEG tube became blocked. After an overnight admission to hospital the blockage resolved and he was discharged back to the care home. On 9 October 2020 the PEG tube fell out. It is likely that the bumper which helped to keep the tube in place, failed due to wear and tear. AF was taken to the Emergency Department of the Applicant Trust's hospital and was admitted under the care of the gastroenterology team. A feeding tube was inserted, not for the purpose of administering hydration and nutrition, but to maintain the patency of the PEG tract. AF was able to consume food orally and sometimes does so, but with no gastrostomy in place he was not receiving sufficient nutrition to sustain life. By order of Williams J on 16 October 2020, the feeding tube was removed and a balloon gastrostomy ('BG') inserted. AF was discharged back to the care home on 20 October 2020. A BG will typically last for about three months before having to be replaced.

AF was then admitted to hospital again on 28 October when very unwell with pneumonia. The evidence before the court was, however, that he was a good condition nutritionally and was physiologically robust such that when he recovered from his pneumonia, it was likely that he would be fully restored to his pre-pneumonia condition. The consultant gastroenterologist's evidence was that she would expect, other things being equal, that with continued CANH he could live for a few more years yet.

Poole J was asked to declare that it was lawful (when AF was medically sufficiently fit) to undergo insertion of a PEG.

AF's daughter argued that was that it was not in AF's best interests to have the PEG re-inserted or to continue to have CANH. She went further, contending that it was not in AF's interests to receive any active treatment, including antibiotics, or blood tests for the purpose of monitoring and investigation, and that it was in his best interests to be placed back on an end of life pathway as had briefly been overnight on 28th and 29th October 2020. She told that the court she thought that the BG should now be removed.

Poole J outlined the decision that Mostyn J had reached, and the evidence that had been before him in March 2020. At paragraph 19, he noted that:

> *The judgment was not appealed. The question now arises as to the extent to which, if at all, my evaluation of AF's best interests should be circumscribed by the findings made by Mostyn J seven months ago.*

The three parties before him (the Trust, the Official Solicitor, and AF's daughter) proposed slightly different formulations of the approach

that should be adopted. At paragraph 22, Poole J set out that:

> *both principle and good practice point to the same approach to this application in which the court is being asked to make a best interests evaluation only a few months after another court has made a determination of best interests in respect of a similar decision, concerning the same P, and after a full hearing.*
>
> *(a) There is no strict rule of issue estoppel binding on the court.*
>
> *(b) Nevertheless, the court should give effect loyally to a previous judicial finding or decision that is relevant to the determinations it has to make, and should avoid re-opening earlier findings that cannot be undermined by subsequent changes in circumstances. An example would be a finding that P lacked capacity at a particular point in time. Such findings, if not successfully appealed, should generally only be re-opened if new evidence emerges that might reasonably have led the earlier court to reach a different conclusion.*
>
> *(c) Where there has been no material change of circumstances subsequent to a previous judgment, no new evidence that calls for a re-opening of the earlier findings, and the earlier evaluation of best interests clearly covers the decision that the new court is being asked to consider, appropriate case management might involve the court summarily determining the new application.*
>
> *(d) Determinations of capacity and best interests are sensitive to specific decisions and circumstances, therefore the court will exercise appropriate restraint before making any summary determination.*
>
> *(e) If the decision or circumstances that the new court is being asked to consider are not clearly covered by the earlier judgment, or there has been a material change of circumstances or new evidence that calls into question the previous findings, the court should manage the case in a way that is proportionate having regard to the earlier judicial findings and decisions.*
>
> *(f) In dealing with the new application proportionately, the court's focus will be on what has changed since the previous ruling, and any new evidence. It should usually avoid re-hearing evidence that has already been given and scrutinised in the earlier proceedings.*

Applying that approach to the facts of the case, all parties "*pragmatically agreed that the failure of the PEG on 9 October 2020 was a material change in circumstances that had not been expressly contemplated by the court in March 2020, and that therefore the decision to re-insert the PEG was a new decision for the Court to consider. Similarly, there was no argument against approaching AF's recent hospital admission for pneumonia as a change in circumstances that required a best interests evaluation, in particular given SJ's position that treatment for it should cease*" (para 23). Poole J observed that "[i]*t might have been contended, but was not, that it was implicit in Mostyn J's determination that re-insertion of the*

PEG was in AF's best interests because it was necessary to ensure the continuation of CANH. The focus of the evidence before me was therefore on developments since Mostyn J's judgment."

That having been said, Poole J held that:

> *24. Nevertheless, Mostyn J's conclusions are highly material to my evaluation of best interests in relation to these new decisions. Indeed, it would be wrong in my judgment to re-open his findings that (i) AF had lacked capacity in 2016 when he made statements indicating that he wanted to die; (ii) as of March 2020 AF derived "pleasure and satisfaction" from his life; and (iii) AF's statements before his stroke, that he would not want to be kept alive as a "body in a bed", were not applicable to his condition in March 2020. Those findings cannot be altered by subsequent events and there is no new evidence to demonstrate they could now be challenged. I also give significant weight to Mostyn J's very firm conclusion that at the time of his judgment it was in AF's best interests to receive continuing CANH through his PEG.*

Having considered the further evidence as to developments since March 2020, Poole J was "quite satisfied" (paragraph 28) that it was in AF's best interests to undergo re-insertion of the PEG.

Importantly, and no doubt reflecting on what had happened since March 2020, Poole J concluded at paragraph 30 by observing that:

> *The court cannot predict every treatment decision that may have to be made over the remainder of AF's life. However, all parties agree that there ought to be an ongoing care plan, in accordance with guidance from the BMA at section 2.7 of its document, "CANH and adults who lack the capacity to consent – guidance for decision-making in England and Wales." The Trust has agreed to write to the GP and CCG to inform them of this judgment and to ask them to use their best endeavours to ensure advance care planning now takes place, the CCG will be asked to put advance care planning on the agenda for the forthcoming best interests meeting that has been convened to determine whether AF should change GPs.*

Comment

Strong views have been expressed both about the original decision of Mostyn J (including the process of the hearing itself, one of the very first to be held remotely during the pandemic) and about the merits of the judgment reached by Poole J. We do not comment upon those views here, although we do note that the judgment of Poole J makes very clear the potential consequences for a person who does not agree with the outcome of a decision but does not seek to appeal it.

For present purposes, we focus upon the approach taken to Poole J to how to answer the question of what to do where the Court of Protection has previously considered an issue. Now that the Court of Protection has been 'in business' in its current form for 13 years, there are a substantial number of cases where decisions made both as to capacity[1] and best

[1] [1] Note, this is not the same as the situation where the court is aware at the time that the case is before it that the person's capacity to make the relevant decision(s) may fluctuate and expressly sets out contingency planning. This position has now helpfully

interests on the evidence available at the time simply do not now fit. It had never been entirely clear what was to happen in such circumstances, and this decision very helpfully resolves this ambiguity.

Although strictly only relating to the position where the court, itself, is being asked to revisit an earlier decision, the logic of this judgment applies equally outside the courtroom. If anyone does not agree with the decision when it is made, they should appeal. Otherwise, and in the same fashion as applies in the mental health setting,[2] then unless there has been a material change of circumstances or new material that could not have been known to the court at the point when it had made its decision (whether as to capacity or best interests), those concerned should loyally follow the decision. In legal terms, their belief as to the individual's capacity and best interests will only be "reasonable" (and hence enable them to be protected from liability by s.5 MCA 2005) if it is what the court has decided. If there has been such a change of circumstances or new material, they may conclude that they may now reasonably be able to come to a different conclusion about either the person's capacity or best interests. However, especially if the conclusions of the court were reached after it had had to resolve a dispute about capacity or best interests, it would always be sensible to consider obtaining legal advice as to whether they can simply proceed on the basis that the facts have now changed, or whether it is necessary to go back to court to ask for the original decision(s) to be revisited.

Entirely separately, the judgment is also of considerable importance in reminding us of the importance of ensuring that there is ongoing consideration of whether CANH is in the best interests of the person, rather than simply making a decision at point A in time and assuming that this will remain fixed for all time. It is helpful, therefore, in terms of emphasising that guidance as to how this can and should be done has been given by the BMA and RCP (with the endorsement of the GMC).

The inherent jurisdiction, deprivation of liberty and out of hours applications

Mazhar v Birmingham Community Healthcare Foundation NHS Trust & Ors [2020] EWCA Civ 1377 (Court of Appeal (Hickinbottom, Newey and Baker LJJ))

Article 5 – Deprivation of liberty

Summary

In, the Court of Appeal almost, but not quite, answered the question of whether it is lawful to use the inherent jurisdiction to deprive an adult of their liberty. They also gave very helpful interim guidance as to what needs to be done in any application under the inherent jurisdiction in relation to a vulnerable adult.

The case has a very long and tangled procedural history which is – for these purposes – irrelevant. It stems from a without notice application made to Mostyn J as urgent applications judge for an order

been considered and resolved in *GSTT & SLAM v R* [2020] EWCOP 4.

[2] See *R(Von Brandenburg) v East London and The City Mental Health NHS Trust* [2003] UKHL 58, [2004] 2 AC 280.

under the inherent jurisdiction enabling Mr Mazhar to be removed from his home and taken to hospital to provide urgent medical treatment. That application was granted, the order made, and Mr Mazhar removed. There was never any suggestion put to Mostyn J – or indeed subsequently – that Mr Mazhar had a mental disorder, or lacked decision-making capacity in the relevant domains. The key question for the Court of the Appeal was whether Mostyn J could make such an order: Mr Mazhar ultimately pursuing solely a declaration that he was wrong to do so (as opposed to damages, a claim which could have caused some procedural complications).

Can the inherent jurisdiction be used to deprive a vulnerable adult of their liberty?

Baker LJ, giving the sole reasoned judgment of the court, noted that the question of whether an order could be made under the inherent jurisdiction depriving a vulnerable adult of their liberty had never arisen for consideration before the Court of Appeal. However – and frustratingly for those who had been awaiting a definitive pronouncement – he considered that, because of the way in which matters now stood procedurally, it was neither necessary nor appropriate to determine the question. He did, though, make the following observations at paragraph 52:

> *52.* […] *The preponderance of authority at first instance supports the existence of this jurisdiction, but there is some authority to the contrary. There is also uncertainty as to whether it is permissible in urgent situations to depart from the Winterwerp criteria, in particular the requirement for medical evidence. The qualification in Winterwerp itself ("except in emergency cases") suggests that some limited departure may be permissible, although more recent decisions of the European Court have not repeated that qualification. But it could be said that the pragmatic approach of this court in G v E about the difficulties faced by judges dealing with a busy court list applies also, for different reasons, to judges sitting out of hours.*

Out of hours inherent jurisdiction applications

Baker LJ made a number of preliminary observations about the difficulty of judges sitting out of hours, including that:

- A judge is not infrequently required to make a decision on an important issue in less than optimal circumstances with incomplete evidence. Unable to wait until more information is available, he or she will have to do the best they can on the limited material in front of them. Sometimes, this will be no more than the scantiest information. This means that it is essential that any party seeking to invoke the court's jurisdiction in these circumstances spells out as far as possible in the evidence or written submissions the reasons for applying without notice, the jurisdiction they are seeking to invoke, the test to be satisfied in order to exercise the jurisdiction, and the basis on which it is said the test is satisfied in the case in question.
- The judge's instinct may well be to err on the side of caution and take the course that seems the least risky to the individual's physical well-being. This is an example of the "protection imperative" – the need to protect the vulnerable child or adult which may draw the professional

and the judge to the outcome that is more protective. This tendency may arise whenever a court is exercising a jurisdiction that is substantially protective in nature. As Munby J noted in *Re MM* [2007] EWHC 2003 (Fam), the court must adopt a pragmatic, common sense and robust approach to the identification, evaluation and management of perceived risk. However, this is not easy where it has to be carried out at speed, and particular care is needed where the application is made without notice. Baker LJ drew attention to the observations of Charles J in *B v A (Wasted Costs Order)* [2012] EWHC 3127 (Fam) (at paragraph 11):

> "*… there is a natural temptation for applicants to seek, and for courts to grant, relief to protect the vulnerable …. But this temptation, and the strong public interest in granting such relief, does not provide an excuse for failures to apply the correct approach in law to such applications. Indeed, if anything, the strong public interest in providing such relief and its impact on the subjects of the relief and their families mean that the correct approach in law should be followed and so the sound reasons for it, based on fairness, should be observed*."

- There is often a chain of professional trust relied on in such circumstance. Inevitably, however, the scope for human error in such a chain will raise, and each person is liable to the feelings described as the "protective imperative" above.
- It is often impractical to deliver a judgment in these circumstances when sitting out of hours, but practitioners who submit draft orders, and judges who approve them, should record in the order at least a summary of the reasons for the decision, for the benefit of any party not present and any subsequent court conducting the next hearing or considering the matter at a later stage in the proceedings.

In the instant case, Baker LJ found that:

> *71.* […] *the Trust's application for, and the granting of, the order for which there was no proper evidence and without giving Mr Mazhar the opportunity to be heard amounts to a clear breach of his article 6 rights and was a flagrant denial of justice. However, notwithstanding my criticisms of how the application was made and granted, I am unpersuaded that this court should go further and declare that the errors in this case amounted to "a gross and obvious irregularity". In the absence of a judgment, or a clear account of the reasons for the judge's decision recorded on the face of the order, such a declaration would not be appropriate, particularly having regard to the difficulties faced by judges hearing cases out of hours to which I have already referred. Justice will be served by the decision of this court to allow the appeal and the observations I have already made.*

Lessons learned

Baker LJ proposed to draw the judgment to the attention of the President of the Family Division to allow him the opportunity to consider, after appropriate thought and consultation whether

fresh guidance should be given to practitioners and judges about applications of this sort. For the time being, however, he identified at paragraph 74 the following clear lessons to be learnt:

> *(1) Save in exceptional circumstances and for clear reasons, orders under the inherent jurisdiction in respect of vulnerable adults should not be made without notice to the individual.*
>
> *(2) A party who applies for an order under the inherent jurisdiction in respect of vulnerable adults without notice to another party must provide the court with their reasons for taking that course.*
>
> *(3) Where an order under the inherent jurisdiction in respect of vulnerable adults is made without notice, that fact should be recorded in the order, together with a recital summarising the reasons.*
>
> *(4) A party who seeks to invoke the inherent jurisdiction with regard to vulnerable adults must provide the court with their reasons for taking that course and identify the circumstances which it is contended empower the court to make the order.*
>
> *(5) Where the court is being asked to exercise the inherent jurisdiction with regard to vulnerable adults, that fact should be recorded in the order along with a recital of the reasons for invoking jurisdiction.*
>
> *(6) An order made under the inherent jurisdiction in respect of vulnerable adults should include a recital of the basis on which the court has found, or has reason to believe, the circumstances are such as to empower the court to make the order.*
>
> *(7) Finally, and drawing on my own experience of these cases, if an order is made out of hours in this way, it is essential that the matter should return to court at the earliest opportunity. In this case, the order properly included a direction that "the matter shall be listed for urgent hearing on the first available date after 25 April 2016". In the event, however, it did not return to court until four weeks later. It has not been necessary to enquire, or reach any conclusion, as to why such a lengthy delay occurred. I would suggest, however, that it will usually be better for the order to list the matter for a fixed return date, say 2 pm on the next working day, either before the judge making the order or the urgent applications judge. Had that occurred in this case, the consequences of the errors made on 22 April 2016 might to some extent have been ameliorated.*

Comment

It is unfortunate that the Court of Appeal could not resolve definitively whether the inherent jurisdiction can lawfully be used to deprive an adult of their liberty, although the fact that Baker LJ expressly noted that question was whether it could be used "provided the provisions of Article 5 are met" means, it is suggested, that it is clear that it cannot properly be used unless there is evidence (commensurate with the urgency of the situation) that they are of "unsound mind," in the awkward language of Article 5(1)(e). Pending the giving of such further guidance as the President of the Family Division considers necessary in due course, the "lessons learned" section of the judgment is very helpful in terms

of framing practice in relation to these difficult applications – especially in urgent situations. It may also be of assistance to readers to look at the 39 Essex Chambers inherent jurisdiction guidance note and also our guidance note as to without notice hearings (this latter relates to hearings before the Court of Protection, but is equally applicable to applications under the inherent jurisdiction).

The habitual residence checklist (and an observation about necessity)

The Health Service Executive of Ireland v IM [2020] EWCOP 51 (Knowles J)

International jurisdiction of the Court of Protection – other

Knowles J has given a helpful summary of the approach to determining whether an adult with impaired decision-making capacity remains habitually resident within England and Wales.

The person in question, IM, was 92. She had been resident in Kent for over 55 years before moving to Ireland in September 2018, a little over 2 years prior to the matter coming to court. If, as the applicant (the Irish statutory body responsible for her) contended, she remained habitually resident in England and Wales, then issues as to her health and welfare were matters for the Court of Protection. Conversely if, as both IM's litigation friend and Kent County Council, the respondents, argued, then such matters would fall within the jurisdiction of the Irish High Court.

The legal framework was summarised by Knowles J in terms that merit reproduction in full as a convenient summary of the statutory position and case-law:

28. "Habitual residence" is defined in neither the MCA nor the Convention. In An English Local Authority v SW and Others [2014] EWCOP 43, Moylan J (as he then was) held that the meaning to be given to habitual residence in the context of the Convention and the MCA should be the same as in other family law instruments such as the 1996 Hague Child Protection Convention and Council Regulation EC 2201/2003 (Brussels IIA) though he also acknowledged that different factors will be relevant and will bear differential weight (see [64]-[65]).

29. Thus, habitual residence is to be determined in accordance with the guidance given by the Supreme Court and the Court of Justice of the European Union in a number of recent cases. The following principles are key:

a) Habitual residence is a question of fact and not a legal concept such as domicile (A v A (Children: Habitual Residence) [2014] AC 1 at [54]);

b) The test adopted by the ECJ is the "place which reflects some degree of integration by the child in a social and family environment". The child's physical presence should not be temporary or intermittent (Proceedings brought by A (Case C-523/07) [2010] Fam 42 at [38]);

c) Consideration needs to be given to conditions and reasons for the child's stay in the state in question (Mercredi v Chaffe (Case C-497/10PPU) [2012] Fam 22 at [48]);

d) The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a

different result from that which the factual enquiry would produce (see A v A above at [54]);

e) Both objective and subjective factors need to be considered. Rather than consider a person's wishes or intentions, it is better to think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there - their state of mind (Re LC (Children) [2014] AC 1038 at [60]);

f) It is the stability of the residence that is important, not whether it is of a permanent character (Re R (Children) [2016] AC 76 at [16]); and

g) Habitual residence is to be assessed by reference to all the circumstances as they exist at the time of assessment (FT v MM [2019] EWHC 935 (Fam) at [13]).

30. In Re LC (Children) (see above), Baroness Hale stressed the need to look at the circumstances which led to the move in question:

> *"The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then and later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another".*

31. In An English Local Authority v SW (see above), Moylan J made the following additional points:

a) The overarching test for habitual residence should be the same whether one is considering adults or children, although different factors may or will have differing degrees of relevance [66].

b) The expression "degree of integration" is an overarching summary or question rather than the sole, or even necessarily the primary factor in the determination of habitual residence. The court's focus should not be narrowed to this issue alone as a question of fact [68] and [72].

c) Integration, as an issue of fact, can be an emotive and loaded word. It is not difficult to think of examples of an adult who is not integrated at all in a family environment and only tenuously integrated in a social environment but who is undoubtedly habitually resident in the country where they are living. Integration as an issue of fact can also raise difficulties when a court is determining the habitual residence of a person who lacks capacity [70].

d) The court "should not lose sight of the wood for the trees" [71].

> *32. Where an incapacitous adult has been moved from one jurisdiction to another, the question of the authority that the person effecting the move had to make it is also important. In Re MN (Recognition and Enforcement of Foreign Protective Measures) [2010] EWHC 1926 (Fam), Hedley J held that a move which was wrongful should not effect a change in the habitual residence of the incapacitated adults and should leave the courts of the country from which that person was taken free to take protective measures [22]. In determining whether a decision is wrongful, the court must look not only at the terms of the authority conferred upon the person taking the decision, but also at their motives for taking that decision.*
>
> *33. The fact that the person effecting the move has formed a subjective view that it is in P's best interests may not suffice to prevent the move from being wrongful. Pursuant to s.4(9) and s.5(1)(b) of the MCA, a person making a decision on behalf of an incapacitous adult must "reasonably believe" the decision to be in their best interests. Thus, in Re QD (Jurisdiction: Habitual Residence) (No 1) [2019] EWCOP 56, Cobb J held that a decision by P's children to move him from Spain to England was wrongful and that they could not rely upon the doctrine of necessity [29]. The judge indicated that, whilst they may have believed that they were acting in P's best interests, this was not a reasonable belief on their part.*

Applying that framework to the facts before her, and noting, whilst she had had to try to resolve factual inconsistencies without hearing evidence, but that this was "*not unusual in what is intended to be a summary process to resolve doubt as to this court's jurisdiction to make decisions for IM*" (paragraph 7), Knowles J found that IM was now habitually resident in Ireland. She identified that she assumed that IM had had capacity to make the decision to move unless it was established that she did not and whilst there was some evidence that her capacity fluctuated, there was a larger body of evidence suggesting that she had had that capacity. She also found that the decision to move was not one taken "with unreasonable pressure" from an individual, VS, with whom she had an undoubtedly complex relationship. As she noted at paragraph 42:

> […] *He provided her with care and support as her medical records attested and she was wholly reliant upon him. I have no doubt that IM's decision to move to Ireland was made with the knowledge that she needed VS to care for her and did not want to live in England without him. That relationship of dependency between an elderly vulnerable person and their carer is entirely common and understandable. Though it is difficult to see objectively why IM would wish to move from Kent where she was long established and had potent family connections, the need to be with VS is likely to have displaced these and other considerations when IM agreed to move. For IM, the most important consideration would have been that she would continue to live with VS, who would look after her as he had already done for many years.*
>
> *43. No one involved with IM at the time was sufficiently concerned before the move to assist her in seeking advice support from statutory agencies. The move to Ireland was not achieved by stealth or made in an overly hasty manner. VS made no attempt to conceal the proposed move and IM discussed it freely with her GP and with FS over time.*

> *Her misgivings about moving expressed to the GP in August 2018 were understandable but do not, of themselves, suggest that IM had not voluntarily decided to move. Though that decision might have been unwise given that IM was leaving behind all she was familiar with, it was not without emotional and practical justification as far as IM was concerned.*

Whilst VS had handled IM's money in a way that aroused concern, Knowles J was "*not persuaded that the desire to enrich himself at IM's expense was the sole justification for the move to Ireland*" (paragraph 44). Finally, Knowles J found that IM was both settled in Ireland and seemingly content to stay there.

Knowles J was invited to decide whether to consider to exercise the inherent jurisdiction to make decisions about her welfare given her British citizenship, on the basis that "[g]*iven that her property was in this jurisdiction, Mr Rees QC* [on behalf of the HSE] *submitted that England and Wales remained the most appropriate forum in which to take decisions about IM*." However, the HSE acknowledged that, if she declined to exercise the inherent jurisdiction with respect to IM, the HSE envisaged bringing proceedings in the Irish High Court to determine IM's best interests as to residence. If she were to remain resident in Ireland, the Irish High Court would be asked to approve steps to obtain the transfer of her property from England to the General Solicitor for Minors and Wards of Court in Ireland. On that basis, and

> *48. Having reflected on the HSE's submission, I decline to exercise the inherent jurisdiction with respect to IM. To apply the inherent jurisdiction in this case as a means of making orders with respect to IM would constitute a subversion of the comprehensive regime available in the MCA for those who lack capacity to make decisions about welfare, property and other matters as IM clearly does. Further, it would improperly reserve to this court decisions about IM's welfare when there is a robust and appropriate jurisdictional framework in Ireland for taking such decisions about a person who is habitually resident there.*

Finally, the court addressed the fact that the OPG had applied to withdraw the proceedings relating to IM at a time when it knew that the issue of IM's habitual residence was a matter unresolved by the court and did so without drawing that issue to the court's attention. The court then acceded to that application without apparently recognising that the issue was unresolved. Although she declined to give formal guidance to avoid such a situation arising again, Knowles J observed that:

> *51* […] *it seems self-evident to me that care should be taken in concluding proceedings on paper where there are unresolved issues which might potentially have implications for the court's jurisdiction and, most importantly, the welfare of a vulnerable and incapacitous person. Further, it seems to me that parties to proceedings should properly draw the court's attention to those unresolved issues when making applications which might bring the proceedings to a conclusion. Had the OPG done so, the hearing on 25 November 2019 might well have gone ahead.*

Comment

The issue of when the habitual residence of an adult with impaired decision-making capacity may change is an important one, and not just in relation to overtly 'foreign' cases such as IM's. For these purposes, Scotland and Northern Ireland are just as foreign; the framework outlined by Knowles J is therefore equally helpful as a checklist for considering intra-UK moves as it is for considering the position where a person has moved outside the UK.

The only note of caution that we would enter against both this judgment (and that of Cobb J *Re QD (Jurisdiction: Habitual Residence) (No 1)* [2019] EWCOP 56 is that it is not immediately obvious why the doctrine of necessity would be relevant. As Sir Robert Nelson held in *ZH v Commissioner of the Police for the Metropolis* [2012] EWHC 604 (Admin), "*where the provisions of the Mental Capacity Act apply, the common law defence of necessity has no application. The Mental Capacity Act requires not only the best interests test but also specific regard to whether there might be a less restrictive way of dealing with the matter before the act is done, and, an obligation, where practicable and appropriate to consult them, to take into account the views of the carers. It cannot have been the intention of Parliament that the defence of necessity could override the provisions of the Mental Capacity Act which is specifically designed to provide specific and express pre-conditions for those dealing with people who lack capacity*" (paragraph 44). Sir Robert Nelson also made clear in the same case (at paragraph 40) that a person can be acting by reference to the MCA (and be 'covered,' insofar as necessary by the defence in s.5 MCA 2005) whether or not they have specific knowledge of the Act at the time, so long as they reasonably believe at the material time are the facts which determine the applicability of the Mental Capacity Act. The decision in ZH was upheld by the Court of Appeal without considering these observations further, but it is suggested that they are a correct statement of the law. This being so, it is suggested that the correct analysis in deciding whether or not a move was wrongful was whether those concerned in bringing it about could have brought themselves within the scope of s.5 MCA 2005 at the time.

Court of Protection Users Group meeting

The minutes of the most recent meeting, held on 8 October 2020, are now available. They cover such matters as:

- Disposal times for applications (by judges and ACOs)
- Backlogs
- The electronic applications pilot
- The upfront notification pilot
- Remote hearings, at present and going forward
- *Re X* applications, and the expectation of a 'winter onslaught' of such applications 548 applications having been received in August 2020 compared to 245 in February 2020
- ALRs – 31 having been appointed in 2020, with 10 having self-nominated
- Digital developments
- Transfer of urgent hearings to regional hubs

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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.

Jill Stavert's Centre for Mental Health and Capacity Law (Edinburgh Napier University)'s Autumn 2020/January 2021 webinar series will include a contribution by Alex on 2 December 2020 at a webinar about Psychiatric Advance Statements. Attendance is free but registration via Eventbrite is required. For 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 December. 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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