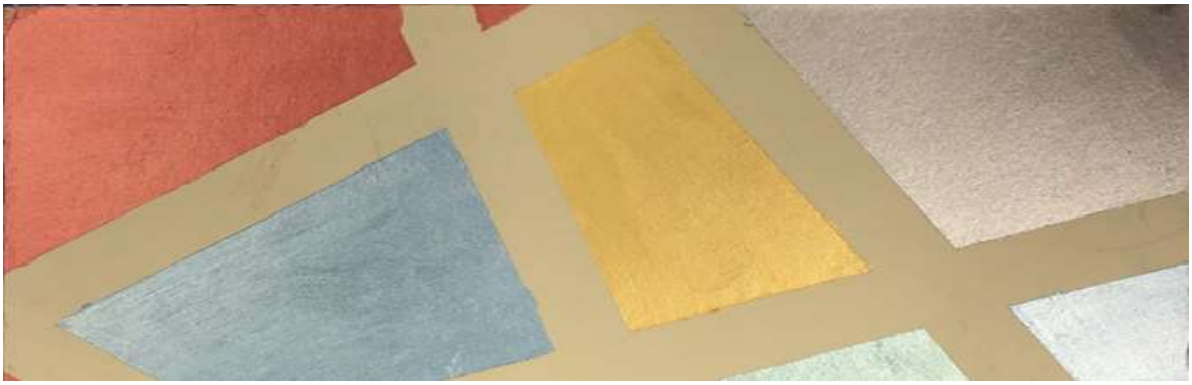
MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE
May 2021 | Issue 113



Welcome to the May 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a judgment looking beyond the diagnosis, paying for sex and the Court of Protection, navigating autism and indoctrination and relevant updates about visiting guidance in relation to care homes;

(2) In the Property and Affairs Report: a staunch judicial defence of *Banks v Goodfellow*, Child Trust Funds and capacity, and updates from the OPG;

(3) In the Practice and Procedure Report: discharging a party without notice, the white leopard of litigation capacity and CoP statistics;

(4) In the Wider Context Report: DNACPR decisions during COVID-19, litigation capacity in the civil context, and the interaction between capacity and the MHA 1983 in two different contexts;

(5) In the Scotland Report: the new Mental Welfare Commission practice guidance on capacity, rights, and sexual relationships. Our Scottish team has been too busy making law in different countries to write more this month, but will bring updates next month about legislative developments on the cards as the new Scottish administration finds its feet.

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.

Editors
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

Discharging a party, special advocates and transparency 2
In search of white leopards: the relationship between subject matter and litigation capacity 8
E-filing in deprivation of liberty cases 12
Short note: domestic abuse and fact-finding 13
Court of Protection statistics October-December 2020 13

Discharging a party, special advocates and transparency

Re P (Discharge of Party)[2021] EWCA Civ 512 (Court of Appeal (Jackson, Baker and Warby LJJ)

Practice and procedure – Court of Protection – other – without notice applications

Summary

In this unusual case, the Court of Appeal considered an appeal by a decision of Hayden J to discharge a party from proceedings without notice following concerns that contact with the party and disclosure of information to her might be a risk to P.

P was described as a *'highly vulnerable 19-year-old woman'* who had diagnoses of *'cerebral palsy, atypical anorexia, post-traumatic stress disorder and selective mutism.'* Until April 2019, P had lived with her mother, AA, in the family home. P had been the subject of a child protection plan in 2018 due to concerns that she had been neglected; during assessments, it was discovered that P had been sexually abused by a male visitor to the family home. By April 2019, *'P's condition had deteriorated.'* She was severely underweight with a body mass index of 10.9 and considered to require treatment in a paediatric medical ward. An application was made in April 2019 to the Court of Protection to move P from the family home and to a residential unit; P's direct contact with AA was also supervised and limited to weekly (though with more substantial indirect contact). As proceedings continued, it appeared that the preponderance of the evidence was that P had capacity to make decisions as to her contact with others.

Without notice discharge of AA from proceedings

In November 2020, the local authority and trust were presented with information that P had been sexually abused by AA's partner, and that P feared for her safety. The information also set out that P had informed AA of both her earlier abuse by the male visitor to the family home and the more recent abuse by AA's partner, and AA had either taken no action, or told P not to disclose having been sexually abused.

Following receipt of this information, the local authority, trust and Official Solicitor made a joint application to hold a hearing partially in private, and to prohibit any further contact between P and AA. This application was made without

notice to AA until her leading counsel was informed shortly before the hearing that an application to exclude AA and her legal representatives was to be heard.

At the hearing held on 3 November 2020, AA was discharged as a party to the proceedings on the court's own initiative, without an application to do so having been made by any party. All contact between P and AA was ended. Hayden J stated that "*if the question of contact between P and [AA] requires to be reconsidered, then [AA] will be contacted and invited to apply to re-join proceedings and participate in them if she so wishes"* (in an extract from the judgment given at paragraph 16 of the Court of Appeal's judgment).

Baker LJ, giving the sole reasoned judgment of the Court of Appeal, described the circumstances of AA's discharge, and her attempts to challenge this decision:

> *2. The appellant was given no notice that the order was going to be made, no notice of the evidence on which the Court relied when making the order, and no opportunity to make representations before it was made. No judgment was delivered at the hearing on 3 November and the appellant was given hardly any indication of the reasons why the order was made. At the same time as making the order, the judge directed that, if the appellant wished to make any representations in respect of the order, she should do so within three days, by 6 November. Despite having no copy of the order, nor any notice of the evidence supporting or the reasons for the order, the appellant's lawyers complied with that direction. A fortnight later, having heard nothing from the Court, they sent an email asking when they might expect a decision following the filing of their submissions. In reply to a further email dated 27 November, they received an email from the judge's clerk stating that the judge was unclear what they were inviting him to do and that, if they wished to make an application, he would try to accommodate it. On 8 December, the appellant's solicitors filed a notice of application asking for a judgment relating to or reasons for the order dated 3 November and any further decision made in the light of the submissions filed on 6 November. The second order under appeal, adjourning the application for a judgment, was made in response to that application.*

At paragraph 3m the Court of Appeal set out what it understood to be the reasoning for the discharge of AA as a party:

> *The principal explanation for the judge adopting this highly unusual, if not unique, course was that the other parties to the proceedings had disclosed information to the court without notice to the appellant and the judge concluded that, if the information was disclosed to the appellant, there was a risk that P, who is, as I have already noted, a highly vulnerable young woman, would suffer serious harm.*

AA appealed her discharge as a party. Following the 3 November hearing, she had become aware of some of the information which the court had relied on in making the decision to discharge her as a party, but not all of it. A linked police investigation relating to the same information had commenced, *'and the investigation officers have raised concerns about any further disclosure at this stage.*'

As a result, part of the appeal itself was held in closed session, and AA was represented by a special advocate who had full access to the closed materials. The respondents prepared a summary or 'gist' document of the closed material, which was approved by Hayden J, and was disclosed to AA and her representatives.

Case management powers of the Court of Protection

The Court of Protection Rules give the court broad powers of case management in furtherance of the overriding objective, and to dispense with the provisions of any other rule. The court may exclude a person from attending a hearing or part of it or determine that a hearing is to be held in private if there is a good reason for it. The court may require a document to be edited prior to service, or dispense with the service of a document. The court also has power to direct a party to proceedings to be removed as a party.

However, notably, COP Rule 3.4(4) states:

> *(4) Where the court proposes*
> *(a) to make an order on its own initiative; and*
> *(b) to hold a hearing to decide whether to make the order*
> *it must give the parties and may give any person it thinks likely to be affected by the order at least 3 days' notice of the hearing.*

Baker LJ accepted that the Court of Protection has "*wide powers to exclude parties from hearings, to withhold information from parties, to discharge parties from the proceedings, and to dispense with the rules altogether*" (paragraph 30) However, these must "*be exercised in accordance with the overriding objective and with wider principles of law and justice which have been developed and recognised both at common law and latterly under the Human Rights Act 1998*" (paragraph 30).

Discussion

After a detailed review of the case law, Baker LJ summarised the issue at paragraph 51 thus:

> *By the time of the hearing on 3 November 2020, there had plainly been a serious development in the case which required the court to take action. The court could have made injunctions or other protective orders. It could have directed that some of the evidence be withheld from the appellant for a period of time, or served in a redacted or gisted form. It could have excluded the appellant from hearings for a period of time. It could have appointed a special advocate to represent her. If satisfied that the circumstances were exceptional, it might conceivably have been appropriate to discharge the appellant as a party after giving her a fair opportunity to make representations. What was unprecedented, however, was to discharge her as a party without notice, without disclosure of any evidence, and without giving any reasons for the decision.*

Baker LJ did not rule out the possibility that, in an extremely urgent and serious matter, there may be a justification for withholding information or excluding a party from a hearing – or even, in some exceptional circumstances, discharging a party. "*It is, however, difficult to think of any circumstances in which a party who has played a material role in the course of proceedings can fairly be discharged without notice, without any opportunity to make representations, and without*

being informed at all of the reasons for the decision" (paragraph 52).

Baker LJ noted (at paragraph 53) that the decision to discharge a party was not a decision made "for or on behalf of P" (and thus bound to be made in P's best interests), but nonetheless, the best interests of P were a central consideration in any decision made in relation to withholding evidence from a party.

AA's Article 6 and 8 rights were also engaged:

> *53.* […] *Insofar as her rights conflicted with P's, the law required the conflict to be resolved by reference to P's best interests…But any restriction on the appellant's rights should have gone no further than strictly necessary.*

In light of all of these matters, Baker LJ considered that in November 2020, there was a

> *54.* […] *very strong argument for withholding information from the appellant and suspending her contact with P for a period. But I have reached the clear conclusion that it was not shown to be necessary to discharge her as a party and that there was certainly no basis for discharging her without notice.'*

Baker LJ emphasised that the ordinary principles of judicial requirement are a requirement in the Court of Protection, and *'can only be in an extraordinary class of case that any one of them can be disregarded.'*

> *55. […]* [t]*he same legal principles of fairness and natural justice apply across all jurisdictions, but the way in which they are applied varies depending on the nature of the proceedings and the circumstances of the individual case.*

Baker LJ also noted that the primary reasoning given by the court for its decision to discharge AA as a party was that it was no longer in P's best interests to have contact with her (and at the time of the hearing, P appeared to have stating that she did not wish to do so). However, the information had only come to light a few days prior, and it appeared that P's wishes in relation to her mother had not been consistent:

> *57.* […] *It could not be assumed that the position that had emerged in the days leading up to the hearing was permanent and definitive. Given the complex history of the case, it was not possible for the court to reach a final decision on contact at that stage… [AA] had been an active party in the proceedings for over 18 months. Until shortly before the hearing on 3 November, it had been anticipated that P might return to live with the appellant in due course. Even if contact was to be suspended indefinitely, and evidence withheld from the appellant, it did not follow that she should be instantly discharged as a party.*

Baker LJ also noted some confusion in relation to the status of the court's order, where it appeared to have been the position of the parties that P had capacity to make decisions as to contact with others. It did not appear that the court was invited to reconsider P's capacity, nor did the court make a s.16 order on capacity. The order contained a recital that the Court was "concluding" that "as a vulnerable adult" it was not in P's best interests to have contact with the mother or her partner' and was headed as having been made in both the Court of Protection and in the Inherent Jurisdiction of the High Court. Whilst Baker LJ did not comment expressly upon this confusion, it is clear that he considered that

it added to the mix in terms of identifying where things had gone awry.

On the facts of the case before him, Baker LJ considered (at paragraph 60) that, while it was necessary to withhold information about the police investigation and local authority investigation into the welfare of P's child that did not justify discharging the appellant as a party.

More broadly, Baker LJ considered that, generally, the fact of an ongoing investigation would not necessitate discharge as a party; nor did the convenience of discharging a party to avoid disclosure of material form a proper basis for departing from the ordinary principles of a judicial inquiry (paragraph 60).

Baker LJ endorsed the approach taken:

> *61. […] by Cobb J in KK v Leeds City Council [2020] EWCOP 64 that a judge considering an application to be joined as a party "should always consider whether a step can be taken … to acquaint the aspirant with the essence of sensitive/withheld material, by providing a 'gist' of the material, or disclosing it to the applicant's lawyers". In the M and M case, Hedley J had identified a staged approach to applications to discharge a party, starting with full participation then considering partial participation, for example by redacting documents and then, only as a last resort, excluding the party from the proceedings. In this case, the judge adopted the opposite approach, asking whether there was any reason for the appellant remaining a party, and having concluded that, given the priority of P's rights, there was no reason, discharging her without notice. Had the judge simply decided to suspend contact and withhold information from the appellant for a period of time, he would have been in a better position to determine whether it was necessary or appropriate to discharge her as a party once the picture had become clearer. In all probability it would have been possible at a subsequent hearing to disclose at least part of the information, either redacted or in the form of a gist document.*

The court also considered that Hayden J could have instigated the special advocate procedure, though noted that a closed material hearing will rarely be appropriate in these circumstances. The court noted that in this case, "*there is nothing in the closed material which goes substantially beyond the gist document*" (64):

> *65. To sum up, given the serious concerns about the harm allegedly suffered by P and the risk of future harm, the judge was entitled to consider the matter in the first instance without notice to the appellant and to withhold evidence from her. He would have been fully entitled to make the order which the respondents were asking for, suspending contact between P and the appellant for a limited period, probably measured as a few weeks in the first instance, to allow the parties to reflect. In my judgment, however, he plainly went too far by discharging the appellant as a party without giving her the opportunity to make representations and by failing to consider alternative procedures which might have protected P's best interests whilst limiting the infringement of the appellant's rights. I see no reason to doubt that he considered the written representations subsequently filed on the appellant's behalf, but in my judgment he ought to have provided reasons for his decision, albeit in brief terms, and was*

> *wrong to adjourn indefinitely the application for a judgment.*

The court allowed the appeal, which had the effect of restoring AA as a party, though noted that the first instance judge might wish to make an order that she not be served with documents for the next 28 days while the parties took stock what information would be appropriate to serve on her.

Comment

There are a number of notable points in this judgment.

Process for considering withholding information from a party or excluding a party from a hearing

Baker LJ set out a useful road map for how parties and the court should consider steps to take where the court and certain parties need to be aware of material information, but there is a view that it would be contrary to P's welfare for all parties to be informed. While the Court of Appeal did not rule out the potential for discharging a party in extremely grave cases, it gave robust guidance that parties should start from the position of full participation of all parties, and consider any departure from that status incrementally, for example:

- The temporary withholding of information while urgent orders are put in place, followed by disclosure at a later time;
- Long-term withholding of certain information while the party continues to otherwise participate in proceedings on the basis of the 'open' information;
- The partial exclusion of a party from a hearing;
- The use of a 'gist' document to set out the contours of the information considered to put P at risk to allow some participation of the party giving rise to concern;
- The partial exclusion from a hearing (incorporating open and closed portions);
- The use of a special advocate.

Baker LJ noted, in particular, that the use of a 'gist' document in the appeal allowed AA to largely have effective participation, and that there was little discussed in closed session that added materially to that document. The 'gist' document was prepared by the respondents and approved by the court, who appeared to all be satisfied that the material in it could be disclosed to AA without compromising the ongoing investigations.

Special Advocate

At paragraph 5, Baker LJ also noted that the judgment:

> *it provides an opportunity to set out a description of how this Court has proceeded in these unusual circumstances which may be of assistance in any future proceedings of this kind which require a form of closed procedure. It appears that this is the first case in which a special advocate has been instructed in the Civil Division of the Court of Appeal.*

It is noted in the judgment that the use of a special advocate appeared to pose significant

logistical challenges to arrange, which were overcome only after the respondents offered to provide funding for this function. The Court of Appeal did not recommend the regular use of a Special Advocate in circumstances where a party's receipt of full information in proceedings is considered to potentially pose a risk of harm to P:

> *62. If necessary, the judge could have instigated the special advocate procedure. This is undoubtedly a more complex and costly option. But as Mr Cragg submitted to us in the closed session, the special advocate procedure is flexible and can be implemented quickly, as this appeal has demonstrated. On instructions from SASO, Mr Cragg confirmed that it can be used in this rare type of case. As Cobb J observed in KK v Leeds City Council, a closed material hearing will rarely be appropriate in these circumstances but it is an option to be considered wherever important evidence has to be withheld from a party.*

Transparency

The judgment is also notable for mentioning that observers were present at the appeal, and that they sought the parties' skeleton arguments. In obiter dicta, the court offered some guidance as to parties' consideration of drafting skeleton arguments with a view to the presence of observers who may seek them:

> *In preparation for the hearing of the appeal, counsel for all the parties filed open skeleton arguments and the respondents' counsel and Mr Cragg filed closed skeleton arguments. In passing I observe that the manner in which Ms Paterson's documents were drafted was particularly helpful, with the closed skeleton argument highlighting those passages which were excluded from the open skeleton. Regrettably, however, and in breach of the requirements set out in para 33 of PD52C, the parties' open skeletons were not all formulated in a way they considered suitable for disclosure to court reporters. As a result, the court was unable immediately to meet requests by two observers to provide the skeletons, and it was more difficult for those observers to follow the arguments during the hearing. In future, this is a point which should be considered by the parties and the court during preparation of an appeal.*

In search of white leopards: the relationship between subject matter and litigation capacity

Re P (Discharge of Party) [2021] EWCOP 27 (Mostyn J)

Mental capacity – litigation

Summary

In this case, Mostyn J solely had to consider the issue of P's litigation capacity.

P was 60 years old, and had diagnoses of schizophrenia and HIV. She lived with her daughter, and P was employed as a carer. She had been detained under the Mental Health Act 1983 between 2018 and 2019, and at the time of this application, was being treated under a Community Treatment Order (CTO). The relevant NHS Trust had brought an application to the court of protection in January 2021 seeking orders that:

> *5.* […] *P lacked capacity to decide whether to take the HIV medication; that it was in*

> *P's best interests to take her HIV medication (which takes the form of an oral tablet, taken once daily); and, inferentially, that she should be made to do so.*

P had stopped taken her medication in 2018, due to what was described in the judgment as "*fixed delusional beliefs and ongoing auditory command hallucinations, and hears God telling her not to take her HIV medication, but rather to pray. P has also previously seen snakes emerge from her HIV medication*." The medical evidence presented stated that P had a 50% probability of dying within a year if she refused to take her medication. P took psychotropic medication she was required to take pursuant to the CTO (and she attributed her doing so solely to the existence of the CTO).

Mostyn J noted the history of this application:

> *7. The matter first came before me on 1 February 2021 ("the February hearing"). At that hearing, I made an order that it was in P's best interests to take daily oral HIV medication, and I directed P to take the daily medication. It was hoped that the existence of such an order would result in P taking her HIV medication, even if begrudgingly, given that she takes her antipsychotic medication, albeit reluctantly, because of the existence of the CTO.*
>
> *8. Unfortunately, the order has had no effect and P still refuses to take her HIV medication. I therefore heard the matter again on 28 April 2021 ("the April hearing").*

The issue of P's litigation capacity had also arisen at the earlier hearing. The court had evidence from P's consultant psychiatrist concluding that P had litigation capacity. The psychiatrist noted (in an extract set out at paragraph 9 of the judgment) that:

> *I believe that because P's delusions are encapsulated and because she is coherent and not thought disordered she will, with assistance be able to participate in litigation proceedings and understand the process. She is also fully aware of the fact that her delusional belief system is at odds with her medical and psychiatric team's advice, but nevertheless she remains adamant not to comply with that advice due to her delusions, hence the need for the application to the Court of Protection.*

As a result, the first hearing (in which the relevant substantive orders were made) proceeded with P acting on her own behalf rather than through a litigation friend.

Following that hearing, the same psychiatrist later reversed her conclusion after reviewing an assessment by P's care coordinator. She found (in an extract set out at paragraph 12 of the judgment) that:

> *P did not think the proceedings related to her. Secondly, P's refusal to read the court papers and to communicate with others about the proceedings would be replicated in refusal to engage with counsel in my opinion, to instruct and take expert evidence."*

Given the conflict in the evidence, before considering the substantive application, the court heard submissions on the preliminary issue of whether P had litigation capacity (with the Trust arguing that she did not, and the Official Solicitor arguing that she did). The court

also heard evidence from P's treating psychiatrist.

Mostyn J found that P lacked litigation capacity in these particular proceedings. At paragraphs 26-29 emphasised the following points:

- A person can have capacity in relation to some matters but not in relation to others: *Dunhill v Burgin* [2014] UKSC 18;
- When judging a person's capacity to conduct litigation the question is whether the person can conduct the particular proceeding rather than litigation generally:
- "*Conducting litigation is not simply a question of providing instructions to a lawyer and then sitting back and watching the case unfold. Litigation is a heavy-duty, dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, on many occasions, on a number of issues, over the span of the proceedings as they develop*": *TB and KB v LH (Capacity to Conduct Proceedings)* [2019] EWCOP 14 at paragraph 29 per MacDonald J;
- "'[L]*itigation capacity required the ability to recognise a problem; to obtain and receive and understand relevant information about it, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision; and the ability to communicate that decision*": *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889;
- "[T]*he level of capacity to conduct litigation is set relatively high. Litigation, even so-called simple litigation, is a complex business. For virtually every case the substantive law, to say nothing of the procedural rules, is a daunting challenge, and can be a minefield*" (paragraph 29)

At paragraph 31, Mostyn J noted his disagreement with the conclusions of MacDonald J in *TB and KB v LH (Capacity to Conduct Proceedings)*:

> *that if a person lacks capacity to conduct proceedings as a litigant in person she might, nevertheless, have capacity to instruct lawyers to represent her and that the latter capacity might constitute capacity to conduct the litigation in question. I differ because, as MacDonald J himself eloquently explained, conducting proceedings is a dynamic transactional exercise requiring continuous, shifting, reactive value judgments and strategic forensic decisions. This is the case even if the litigant has instructed the best solicitors and counsel in the business. In a proceeding such as this, a litigant has to be mentally equipped not only to be able to follow what is going on, but also to be able figuratively to tug counsel's gown and to pass her a stream of yellow post-it notes. In my opinion, a litigant needs the same capacity to conduct litigation whether she is represented or not.*

Mostyn J robustly agreed with the conclusions of Munby J (as he then was) in *Sheffield City Council v E* [2004] EWHC 2808 (Fam) that it was unlikely for a person have capacity to litigate about a decision she lacked the capacity to make for herself:

> *33.* […] *I would go further and say that it is virtually impossible to conceive of circumstances where someone lacks capacity to make a decision about medical treatment, but yet has capacity to make decisions about the manifold steps or stances needed to be addressed in litigation about that very same subject matter. It seems to me to be completely illogical to say that someone is incapable of making a decision about medical treatment, but is capable of making a decision about what to submit to a judge who is making that very determination.*

On the facts, Mostyn J concluded that P's opposition to taking her antiretroviral medication was:

> *34.* […] *completely irrational and directly contrary to her best interests. There is no doubt that she suffers from an impairment of, or disturbance in the functioning of, her mind. As a direct consequence it is clear that she cannot understand the information relevant to the administration of the antiretroviral medication, nor can she use or weigh it as part of her decision-making process. The assessment of P's incapacity in this regard was open and shut.*

Mostyn J therefore considered that he had two issues before him:

1. The substantive question of P's best interests with respect to taking medication, which needed to be taken regardless of whether P had litigation capacity; and
2. Whether P had litigation capacity, or required a litigation friend to conduct proceedings for her.

Mostyn J found that the answer to the second question:

> *34.* […] *merely determines how P conducts the proceedings….if a party is assumed to have litigation capacity then she is taken to be capable of understanding, in a real sense, what is being proposed, and why. She is taken to be able to weigh, again in a real sense, the advantage of the medication. This understanding, and this weighing, will be the key drivers of the formation of the forensic decisions that she will make in the litigation process. Thus, she weighs all the information, both written and spoken, to formulate instructions to her lawyers in order to equip them to cross-examine and advocate generally on her behalf.*

Mostyn J queried:

> *37. How P could be assessed as being capable of doing all this when her schizophrenia-induced belief is that God has spoken to her and told her not to take the medication, and where she believes that the medication is infested by snakes, is completely beyond me.*

Mostyn J concluded that P lacked litigation capacity, and had throughout proceedings (despite the his earlier findings to the contrary, accepting that he had "take[n] his eye off the ball" when allowing the case to proceed on the basis that she had had capacity). Mostyn J stressed his view of how unlikely it was a person would have litigation capacity where they lacked subject matter capacity:

> *39.* […] *I am not saying that differential decisions are impossible, but I am saying, as I have previously said in an admittedly*

> *completely different context, that such a case should be as rare as a white leopard. And this is not one of them.*

Comment

Mostyn J's discussion of litigation capacity in the context of COP proceedings is notable for two primary points:

1. His analysis of where the bar should be set for a person to be able to conduct litigation; and notably, that he did not consider that it was relevant whether the person was to conduct proceedings him or herself, or with the assistance of legal representatives; and
2. His more general comments that he found it 'virtually impossible' for a person to conduct proceedings about an issue in which the person did not have subject-matter capacity.

The judgment takes a notably stronger view on the latter point than the leading authority of *Sheffield City Council v E*, and if followed, would result in even fewer people who are the subject of Court of Protection proceedings being able to conduct their own litigation. The logic presented – specifically, that it is not clear what less important a person needs to be able to understand, retain or use and weigh to make a decision about how to argue a case to the judge than is needed to make the decision in one's own right – would seem likely will be the subject of further comment in other applications in which this issue arise.

Mostyn J's conclusions as to the relevance (or otherwise) of lawyers in the context of determining whether a person has litigation capacity are in line with the observations of Lady Hale (in the civil context) in Dunhill v Burgin, in which she had held (at paragraph 21) that "*the test of capacity to conduct proceedings for the purpose of CPR Part 21 is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers*" (paragraph 18). However, on one view, and especially within the context of the Court of Protection, they do not not sit easily with either the principle of support within s.1(3) MCA 2005 or the broader requirements of access to justice in Article 13 Convention on the Rights of Persons with Disabilities. After all, it could properly be said that one of the roles of the lawyer is to support their client to be able to make their own decisions as to the litigation by providing them (for instance) with information about the decisions that they need to take in a way that is appropriately tailored to their needs. On this analysis, it would only be if the client is unable – even without that support – unable to make those decisions that they should be said to lack litigation capacity.

E-filing in deprivation of liberty cases

HMCTS have announced that:

> *To further support digital working within the Court of Protection we are starting to use electronic filing of documents (aka e-filing) for all Deprivation of Liberty cases. This involves the introduction of an automated system where correspondence and attachments received by email are placed directly onto the court's digital files (e-files). As well as providing the many general efficiencies of increased digital working, the use of the e-filing system will enable faster allocation of information to court files to ensure that judiciary and court*

administrators have immediate access to information within minutes of it being received by email.

When will the changes happen?

The e-filing system is being introduced at the Court of Protection to manage Deprivation of Liberty cases submitted to First Avenue House (FAH), London on/around the end of March 2021

For more details, see the update here.

Short note: domestic abuse and fact-finding

Although the decision in *H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448 is a family law case, it provides useful general guidance from the Court of Appeal to approaching fact-finding when it comes to allegations of domestic abuse which may apply in cases in the Court of Protection or High Court involving vulnerable adults. In particular, the Court of Appeal emphasised the following general points:

- It was now accepted without reservation that it was possible to be a victim of controlling or coercive behaviour or threatening behaviour without ever sustaining a physical injury. Importantly, it was now understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour (para 27) (see also in the Court of Protection context *Re LW* [2020] EWCOP 50);
- A pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a Scott Schedule (para 31);
- The value of Scott Schedules in domestic abuse cases had declined to the extent that, in the view of some, they were now a potential barrier to fairness and good process, rather than an aid (para 43);
- Serious thought was needed to develop a different way of summarizing and organising the matters that were to be tried at a fact-finding hearing so that the case was clearly spelled out but the process did not distort the focus of the court from the question of whether there had been a pattern of behaviour or a course of abusive conduct (para 46). There was a need to move away from using Scott schedules (para 49).

Court of Protection statistics October-December 2020

The most recent set of statistics have been published. They show (perhaps unsurprisingly) a decrease in applications in the period October – December 2020, down some 6% on the equivalent quarter in 2019. Of those, 41% related to applications for appointment of a property and affairs deputy. The statistics also show an increase in orders made, up 3% on the equivalent quarter in 2019.

In terms of deprivation of liberty, there were 1,363 applications relating to deprivation of liberty made in the most recent quarter, which is an increase of 16% on the number made in the same quarter in 2019. This comprised 105 applications for orders under s.16, 395 s.21A applications and 863 so-called "Re X"

applications (for whatever reason, this last represents a fall from the previous quarter, when 1,299 had been made). However, there was a decrease by 8% in the orders made for deprivation of liberty over the same period from 820 to 757.

There was also a sharp decrease in the number of LPAs received, some 191,414, down 14% compared to the equivalent quarter in 2019.

Editors and contributors

Alex Ruck Keene: **alex.ruckkeene@39essex.com**

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 and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole QC: **vb@39essex.com**

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen: **neil.allen@39essex.com**

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Annabel Lee: **annabel.lee@39essex.com**

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.

Nicola Kohn: **nicola.kohn@39essex.com**

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.

Katie Scott: **katie.scott@39essex.com**

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

Rachel Sullivan: **rachel.sullivan@39essex.com**

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: **stephanie.david@39essex.com**

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

Arianna Kelly: **arianna.kelly@39essex.com**

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click here.

Simon Edwards: **simon.edwards@39essex.com**

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.

Scotland editors

Adrian Ward: **adw@tcyoung.co.uk**

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.

Jill Stavert: **j.stavert@napier.ac.uk**

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

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.

Neil is doing a (free) event for Dementia Carers on 11 June 2021 at 3pm. The online session provides an overview of carer rights in the context of dementia. It is part of the University of Manchester's research project which is analysing the changes to local authority support during Covid-19. Neil is particularly keen to understand the impact on carers over 70 looking after partners living with dementia at home. For details, and to book, see here.

Neil is doing a DoLS refresher (by Zoom) on 29 June 2021. For details and to book, see here.

Neil and Alex are doing a joint DoLS masterclass for mental health assessors (by Zoom) on 12 July 2021. For details, and to book, see here.

Advertising conferences and training events

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

Our next edition will be out in June. 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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085