Best interests, wishes and feelings and the Court of Protection 2015-2020

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In this article the authors analyse caselaw during the last five years on whether the trend is continuing that the Court is presuming in favour of following the identified wishes and feelings of the person.

Introduction

In order to make a best interests decision, judges of the Court of Protection in England & Wales now regularly talk of standing in the shoes of the individual whose case is before them. At one level, this simply reflects the structure of the Mental Capacity Act 2005 ('MCA 2005'): the legal fiction is that a judicial decision under s.16(2)(a) MCA 2005 is the decision of the person themselves. In and of itself, this does not suggest anything in terms of the **outcome** of the process of considering best interests: it would be quite possible to stand in the shoes of the person and to walk in the opposite direction to that which they would have gone. But, perhaps influenced by the UN Convention on the Rights of Persons with Disabilities (UNCRPD), or perhaps seeking to reflect the injunction of Lady Hale in *Aintree v James* that the purpose of the best interests test is to consider matters from the person's point of view,[1] it seems that judges are indeed seeking to walk further in P's shoes. In an article published in 2015, one of the authors of this article, Alex Ruck Keene, reviewed with Cressida Auckland both the history of the statutory best interests test in s.4 MCA 2005 and the caselaw to that point.[2] That article suggested that, in practice, it was possible to discern the emergence of a presumption in favour of following the identified wishes and feelings of the person.

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[1] *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 at paragraph 45.

[2] Ruck Keene, A., & Auckland, C. (2015). More presumptions please: wishes, feelings and best interests decision-making. Elder LJ, 293.

The caselaw: a framing

The review that we have conducted is inevitably limited by the fact that reported cases constitute only a tip of the iceberg of the decisions reached by the Court of Protection. Not only do a significant majority of the Court of Protection's work consist of deciding upon property and affairs applications, most of which is uncontested and will not give rise to any judgment. In most cases where a judgment is delivered, it will be cases heard by District Judges (so-called Tier 1 judges of the Court of Protection). Only a tiny proportion of such judgments will be published. In the context of an article analysing judgments delivered between 2007 and 2017, an estimate was given that the reported judgments represented under 0.5% of the judgments that one might have expected to see.[3] The proportion will be somewhat higher for cases which are heard before Tier 3 judges (i.e. High Court judges), who hear – in crude terms – those cases seen as most serious, but it is still relatively small.

Nonetheless, we have what we have, and if judgments reflect the definitive statement as to the best interests of the individuals in question, we are entitled to examine what those judgments have to say about the conception of those interests. Through a search of Bailii and Westlaw, we identified 43 cases between January 2015 (i.e. the point at which the previous article had stopped) and September 2020[4] from which it is possible to glean some substantive idea of the person's wishes and feelings (out of a total number of 281 judgments from the Court of Protection which appear on Westlaw for the same period). Parenthetically, we note that it might be thought somewhat surprising that the number of cases where it is possible to glean some substantive idea of the person's wishes and feelings is so low; in part this may be explained by the fact that the Court of Protection Judges may also be required to consider questions of the person's decision-making capacity alone, or other matters where there is no requirement to focus upon their best interests. But the fact that it is not possible to glean a sufficient sense of the person's wishes and feelings save in such a relatively small number of cases is undoubtedly striking.

We excluded from our sample those cases where the Judge has reached the conclusion that they do not know what the person's wishes, feelings, beliefs and values would have been. An example of such a case is *PW v Chelsea And Westminster Hospital NHS Foundation Trust & Ors,* concerning the question of whether clinically assisted nutrition and hydration ('CANH') should be

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[3] Ruck Keene, A., Kane, N. B., Kim, S. Y., & Owen, G. S. (2019). Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection. International journal of law and psychiatry, 62, 56-76.

[4] Listed in the Appendix to this article.

continued in respect of a man, RW. This case reached the Court of Appeal ([2018] EWCA Civ 1067), one of the grounds of challenge being that the first instance judge, Parker J, had not properly appreciated or given any weight to RW's wishes and feelings. Sharp LJ noted (at paragraph 45) the observation by Hayden J in in *Abertawe Bro Morgannwg University Local Health Board v RY & Anor* [2017] EWCOP 2 that the court must try and ascertain P's wishes and feelings and beliefs and values; but if they are not ascertainable, it is wrong to speculate. At paragraph 53, in the course of rejecting the ground of appeal relating to RW's wishes and feelings, Sharp LJ identified: (1) that Parker J had held the evidence did not establish what his beliefs as to the withdrawal of treatment would likely have been; (2) this was a view she was entitled to reach; and (3) without evidence as to sufficient quality as to his beliefs, it would be wrong to speculate.

Appellate level decisions

Before we address the first instance decisions which form the centre of our survey, we should note that, in the period the survey covers, the Supreme Court considered the MCA 2005 on three occasions.[5] On the first of these occasions, Lady Hale identified that the decision-maker stands in the shoes of P (at paragraph 1), but did not analyse further what this would require. In none of the cases did the Supreme Court have to undertake the same level of analysis of the purpose of the best interests test as it had done in *Aintree v James*, which formed in some ways the centrepiece of the previous article.

The Court of Appeal considered the MCA 2005 on 45 occasions, including the *PW* case identified above. Of most relevance for our purposes is the decision in *Re AB*. At first instance ([2019] EWCOP 26), Lieven J had found that it was in the best interests of a woman with learning disabilities to undergo a termination. The Court of Appeal, very unusually, overturned her evaluation on the basis that it was wrong. Central to its reasoning was that Lieven J had failed to have sufficient regard to AB's wishes and feelings – King LJ, interestingly, noting that the requirement is for the court to consider both wishes **and** feelings (paragraph 76). King LJ, giving the sole reasoned judgment of the court, also identified at paragraph 71 that:

> "*Part of the underlying ethos of the Mental Capacity Act 2005 is that those making decisions for people who may be lacking capacity must respect and maximise that person's individuality and autonomy to the greatest possible extent. In order to achieve this aim, a person's wishes and feelings not only require consideration, but can be determinative, even if they lack capacity. Similarly, it is in order to safeguard autonomy that s1(4) provides*

[5] *N v ACCG* [2017] UKSC 22; *An NHS Trust v Y* [2018] UKSC 46 and *Re D* [2019] UKSC 42.

> *that "a person is not to be treated as unable to make a decision merely because he makes an unwise decision."*

First instance decisions

So much for the appellate level courts. What of the first instance decisions? Out of the 43 cases decided at first instance, 12 concerned what might broadly be defined as living arrangements (i.e. residence, care and, often, contact arrangements); four concerned property and affairs; the balance (27) concerned medical treatment. This may be a factor of the selection bias in judgments that get reported, which, as noted above, privileges decisions of High Court/Tier 3 judges, before whom serious medical treatment decisions are usually allocated. Further, as Charles J identified in *Briggs v Briggs*, decisions about medical treatment, especially life-sustaining treatment cases, engage the *"fundamental and intensely personal competing principles of the sanctity of life and of self-determination which an individual with capacity can lawfully resolve and determine by giving or refusing consent to available treatment regimes."*[7] In other words, it might be thought that such treatment decisions are so personal that the line between substituted judgment – i.e. identifying what the person would have done – and best interests collapses almost to nothing. This certainly appears to be how Charles J approached matters, holding that *"if the decision that P would have made, and so their wishes on such an intensely personal issue can be ascertained with sufficient certainty it should generally prevail over the very strong presumption in favour of preserving life."*

Charles J was Vice-President of the Court of Protection. His successor, Hayden J, has adopted a stance in relation to medical treatment cases[8] which, on one view, might be said to be further away from substitute decision-making. He has, for instance, repeatedly adverted to the observations made prior to his appointment in *M v N* [2015] EWCOP 9 (at paragraph 28) that:

> "*…where the wishes, views and feelings of P can be ascertained with reasonable confidence, they are always to be afforded great respect.* ***That said, they will rarely, if ever, be determinative of P's 'best interests'****. Respecting individual autonomy does not always require P's wishes to*

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[6] Strictly, since the introduction of the Court of Protection Rules 2017, which do not include an accompanying Practice Direction in relation to serious medical treatments akin to Practice Direction 9E which had accompanied the Rules prior to then, there is now no such thing as "serious medical treatment" decisions as a category of case. However, the types of decision which, prior to 2017, fell within the scope of Practice Direction 9E, remain subject to distinctive treatment by the court.

[7] *Briggs v Briggs & Ors* [2016] EWCOP 53 at paragraph 62.

[8] Hayden J has heard a substantial number of such decisions, and very few cases (at least reported) relating to other aspects of the Court of Protection's jurisdiction.

> *be afforded predominant weight. Sometimes it will be right to do so, sometimes it will not. The factors that fall to be considered in this intensely complex process are infinitely variable e.g. the nature of the contemplated treatment, how intrusive such treatment might be and crucially what the outcome of that treatment maybe for the individual patient. Into that complex matrix the appropriate weight to be given to P's wishes will vary. What must be stressed is the obligation imposed by statute to inquire into these matters and for the decision maker fully to consider them.*"[9] (emphasis added).

However, despite these statements, it is striking that out of the ten medical treatment decisions made by Hayden J included within our sample (which, themselves, make up over a third of all of the treatment decisions), in six of them, P's wishes and feelings were followed.[10] In two of the other decisions, it could legitimately be said that P's wishes and feelings might be in tension;[11] leaving only two in which Hayden J expressly declined to follow what he knew or considered would have been P's wishes and feelings. In one of them (*Hounslow Clinical Commissioning Group v RW & Ors* [2019] EWCOP 12) Hayden J considered that, whilst he had no doubt that RW would have wished to die at home, he could not expose him to the risk of asphyxiation in circumstances where his son had made it clear that he would continue to seek to provide him with food and water against clinical advice. The other is a very stark case which, on one view, falls outside the scope of our review, because it concerned a woman who was at the

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[9] See, most recently (for purposes of this article), *Avon and Wiltshire Mental Health Partnership v WA & Anor* [2020] EWCOP 37 at paragraph 50.

[10] *NHS Cumbria CCG v Rushton* [2018] EWCOP 41; *Bagguley v E* [2019] EWCOP 49; *Imperial College Healthcare NHS Trust v MB & Ors* [2019] EWCOP 30; *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26; *Sherwood Forest Hospital NHS Trust & Anor v H* [2020] EWCOP 6; and *Avon and Wiltshire Mental Health Partnership v WA & Anor* [2020] EWCOP 37. For a detailed analysis of one of these cases in which Hayden J embarked upon an exercise in reconstruction, analysing the implications of the approach that he adopted, see *Barnsley Hospitals NHS Trust v MSP* [2020] EWCOP 26, as to which see also Kim, S. Y., & Ruck Keene, A. (2020). A new kind of paternalism in surrogate decision-making? The case of Barnsley Hospitals NHS Foundation Trust v MSP. *Journal of Medical Ethics.*

[11] *Sherwood Forest NHS Trust v H* [2020] EWCOP 5, in which, having resisted a procedure on the basis that she did not consider herself to require it, it appeared that P was able to trust a new surgeon, and had now become exhausted and (in the words of her daughter) just wanted "to get it sorted" (paragraph 34) and *Hull University Teaching Hospitals NHS Trust v KD* [2020] EWCOP 35, in which, whilst P was initially described as declining surgery because it might change her mental state (paragraph 13), she was also then described, after a meeting closer in time to the hearing as being "rather more resigned and compliant to the proposed surgical procedure" (paragraph 19). In relation to the *Sherwood Forest* case, it should be noted that there is a second decision ([2020] EWCOP 6), in which Hayden J took the view that P would, "if capacitous, wish to explore all the options that may be available to her" (paragraph 33), not least because of her strong religious beliefs leading her to value life as a gift from God. We have allocated this case to the category of following P's wishes and feelings.

time of the hearing considered to **have** capacity to make decisions about her birth arrangements and was reported to have told medical staff that having a caesarean section would be the last thing that she would want: *Guys And St Thomas NHS Foundation Trust (GSTT) & Anor v R* [2020] EWCOP 4 at paragraph 56. However, it falls within the scope of our survey because Hayden J was being asked to consider the position where – as was on the medical evidence said to be likely – the woman would lose capacity to make decisions about her birth arrangements as the birth approached, as a function of the impact of her bipolar affective disorder. In holding that it would nonetheless be lawful to carry out a caesarean section, Hayden J noted that:

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

It is also, perhaps, of note that Hayden J sought to 'smooth out' the clash between the decision he was taking, and the views being expressed by the woman by observing in the same paragraph that:

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

Hayden J concluded by noting (in a judgment delivered at the start of 2020, but relating to a decision in fact taken in mid-2019) that he did not think he had:

> *"66. […] previously delivered a judgment relating to serious medical intervention, in which I have decided the issue contrary to the identifiable*

> *wishes and feelings of P. These views are often articulated with clarity, colour and, with remarkable frequency, humour by P's family and close friends, at a time when P has lost the capacity for reasoned expression. The Court of Protection has, for example, recognised P's right to refuse lifesaving dialysis. It has declined applications to authorise amputations which would have, at least, significantly extended life. In extreme cases the Court has respected the refusal of nutrition by those with chronic eating disorders. The case law emphasises the importance of individual autonomy."*

However, Hayden J clearly took the view that cases relating to caesarean sections (and hence, presumably, other forms of decisions relating to pregnancy and birth arrangements) were in a different class to other types of medical treatment decisions. The rationale he gave at the end of his judgment for distinguishing these may or may not strike readers as convincing, but it is perhaps of note that he felt it necessary to identify why he had to give one:

> *"Caesarean sections however, present particular challenges even weighed against all these parlous circumstances. The inviolability of a woman's body is a facet of her fundamental freedom but so too is her right to take decisions relating to her unborn child based on access, at all stages, to the complete range of options available to her. Loss of capacity in the process of labour may crucially inhibit a woman's entitlement to make choices. At this stage the Court is required to step in to protect her, recognising that this will always require a complex, delicate and sensitive evaluation of a range of her competing rights and interests. The outcome will always depend on the particular circumstances of the individual case."*

Whilst the impression from the reported judgments might be that Hayden J is the only judge who hears serious medical treatment cases, that would be misleading. Other Tier 3 judges do, and the medical treatment cases falling within our survey were decided by a total of 13 other judges.[12] In these judgments, and excluding those of Hayden J already analysed above, the person's wishes and feelings were followed 7 times;[13] not followed (at least at first instance) 6 times, and in five they could be seen as sitting in tension with each other.[14] Digging deeper into this, the cases in which the person's wishes and feelings were not followed were the following:

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[12] *Wye Valley NHS Trust v B* [2015] EWCOP 60, *Briggs v Briggs and others* [2016] EWCOP 48, *D, Re* [2017] EWCOP 15, *Y v Healthcare NHS Trust and Others* [2018] EWCOP 18, *A Clinical Commissioning Group v P* [2019] EWCOP 18, *Royal Bournemouth and Christchurch v TG and Anor* [2019] EWCOP 21 and *Northamptonshire Healthcare NHS Foundation Trust v AB* [2020] EWCOP 20.

[13] *SJ, Re* [2018] EWCOP 28, *King's College Hospital NHS Trust v FG* [2019] EWCOP 7, *NHS Trust v JP* [2019] EWCOP 23, *Re AB* [2019] EWCOP 26, *Z, Re* [2020] EWCOP 20 and *GTI, Re* [2020] EWCOP 28.

1. *Re SJ* [2018] EWCOP 28, a case of a diabetic man suffering from chronic, unhealed bed sores in the context of significant obesity and incontinence. The unanimous medical evidence was that he lacked capacity to consent to medical treatment and that the insertion of a colostomy was vital to his recovery and survival; indeed, his consultant surgeon's evidence was that without colostomy surgery, SJ was likely to die within 6 months. In analysing the man's best interests, Moor J identified that the only thing that was against it was the man's wishes that it did not take place (and, to a lesser extent the wishes of his sister, to the same effect). At paragraph 39, Moor J was quite clear that he should overrule the wishes because he was *"of the view that the reason why SJ does not want the operation is because he believes that it will cause him further pain. That is not the evidence of the doctors. Indeed, the evidence of the doctors is that he is more likely to be in significant pain if he does not have this operation and I accept their evidence. It appears that as a result of his diabetes he has a high pain threshold and I am quite clear that there is unlikely to be any significant pain in any event as a result of this operation;"*

2. *Re GTI* [2020] EWCOP 28, a case concerning the question of whether a man with an established history of schizoaffective disorder, who had stabbed himself in the neck and who was therefore unable to eat food and drink orally without significant risks of aspiration. The medical proposal was to insert a percutaneous endoscopic gastrostomy ('PEG') tube, to which he had initially agreed, but to which he was now (it was considered to be incapacitously) objecting. Williams J's analysis of the position (at paragraph 60 of the judgment) is striking for his recognition of the matters at stake:

> *"I'm also particularly conscious of the insult to GTI's personal autonomy of imposing a medical procedure on him against his wishes. Although I am satisfied that he lacks capacity to make the decision it is he who has to live with it not I. I take seriously what he said to Mr. Edwards, not only the fact of the PEG being intrusive, but more importantly, that the state overriding his wishes and imposing a medical procedure on him would be experienced by him as a gross insult to his personal autonomy and dictatorial. How would I feel were that to be done to me I ask rhetorically. Of course, it is almost impossible to provide an answer given that the situation GTI finds himself in is beyond my ability to truly understand. If I were to suggest that I might feel angry*

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[14] *AB, Re* [2016] EWCOP 66, *East Lancashire Hospitals NHS Trust v PW* [2019] EWCOP 10, *University Hospitals of Derby & Burton v J* [2019] EWCOP 16, *Manchester University NHS Trust v E* [2019] EWCOP 19 and *Guys and St Thomas' NHS Foundation Trust v X* [2019] EWCOP 35.

and violated I doubt that it does justice to GTI's position. However there is another side to this from GTI's perspective I think. I do note though that GTI said his mother means the world to him. I also see that he speaks positively about his life prior to his injury. He enjoyed socialising and would like to expand his circle of friends. He aspired to meeting a partner. He emerges as an intelligent and articulate man who has much to live for. I do not believe that he wishes to continue on a slow decline towards malnutrition, starvation and death. I do not believe he would dream of putting his mother through that appalling process. I believe he would wish to resume as good a life as was possible given the cards life has dealt him. That appears to have been his attitude before and the evidence of those who have been involved with him for some years appears to support the likelihood of him adapting and making the best of his situation again. Thus, whilst I accept that in approving the carrying out of this procedure I am overriding his wishes, I believe that in the short, medium and long term it is the best course for him and I hope that at some point in the future he might (even if only to himself) see that was so."

3. *King's College Hospital NHS Trust v FG* [2019] EWCOP 7, concerning a man with schizophrenia, who had sustained a fracture and dislocation to his shoulder, which required treatment under general anaesthetic. He did not consent to the operation. His reasons included that he was worried about the effect of the general anaesthetic on his heart, its potential interplay with the medication clozapine which he was taking, and that the surgery had been ordered by MI5. Having found that he lacked capacity to make the decision about the case, Francis J therefore had to decide what was in the man's best interests. Featuring heavily in his analysis (at paragraph 18) was that, without treatment, he would be unable to participate in activities he enjoyed in the future such as fishing and wood chopping;

4. *NHS Trust v JP* [2019] EWCOP 23, concerning birth arrangements for a woman with learning disability. She strongly wished a natural vaginal birth, wishing (as put at paragraph 41) to retain autonomy over what happens and her body. In determining that a caesarean section (and covert medication) was in her best interests – as a "least worst option" (paragraph 44), Williams J identified that the woman was *"likely to experience distress, distrust, anger, frustration at both the deception that may be necessary and the carrying out of a surgical procedure against her will in respect of such a profoundly important matter. This is likely to be all the greater because it is proposed that the baby will be removed from her care"* (paragraph 43(i)). However, immediately prior to this, Williams J undertook an interesting exercise, pursuant to s.4(6) MCA 2005,

identifying factors that which would have been likely to influence the woman had she had capacity:

> *"The evidence demonstrates that JP does not tolerate pain well and welcomes intervention which reduces pain. She appears to believe that gas and air will eliminate the pain of childbirth. Regrettably that is likely to be an erroneous belief. It is more likely that JP would experience considerable pain, discomfort and distress from the process of childbirth. This is in part a natural physical consequence but the emotional distress that she might experience will in my view be all the greater because she does not understand truly what will be happening to her. If she were able to understand the great physical and emotional toll that giving birth naturally can give rise to it seems likely that she would wish for an intervention that would minimise or eradicate that pain. Were she to have capacity I conclude that she would, along with many other expectant mothers, opt for an elective caesarean probably under general anaesthetic."*

5. *Re Z [2020]* EWCOP 20, concerning a woman with a rare chromosomal abnormality syndrome, as a consequence of which she suffered from cognitive impairment and a bicornate (or heart-shaped) uterus. The question arose as to as to how secure effective contraception for the future. The woman told the judge that she was willing to have a long-lasting contraceptive injection but did not want to have an intrauterine contraceptive device fitted. Knowles J noted (at paragraph 12) that the woman "was unable to articulate why a long-lasting contraceptive injection was her preferred method of contraception other than by saying *'it's my body'*." Whilst Knowles J accepted that the use of an injectable contraceptive would accord with Z's wishes and took account of the least restrictive approach set out in s.1(6) MCA 2005, it would not *"effectively achieve the purpose for which contraception was sought, namely to prevent the very serious risks to Z's physical health which further pregnancies would undoubtedly bring. Z's poor compliance with not only past injectable contraceptives but with medical treatment in this pregnancy militated against me endorsing Z's wish to have an injectable contraceptive"* (paragraph 33).

The last case in which the person's wishes and feelings were not followed was the case of AB, which, as we have discussed, was overturned by the Court of Appeal, in significant part because Lieven J had not sought to grapple in sufficient detail with those wishes and feelings.

With the exception of *Re Z*, it is not perhaps too great a stretch to suggest that in each case the judge sought to justify why they were overriding the wishes and feelings of the person in part by recourse to explaining that they

were, in some way, seeking to achieve what the person would really want. We may or may not find this convincing (and Williams J frankly noted in *Re GTI* that GTI's position was beyond his ability truly to understand). But it is striking that each of these Judges felt that they had in some way to justify themselves by 'softening' the interference with P's wishes and feelings. By comparison, Knowles J's decision in *Re Z* in some ways has a very different, complexion – acknowledging, but frankly overriding, the person's wishes and feelings. Some might call the decision in *Re Z* old fashioned in its approach; others might call it more honest. But that it stands out in its rhetorical approach amidst the other decisions that we have outlined here is, in and of itself, noteworthy.

We noted above that there are five decisions where the person's wishes and feelings could properly be seen as sitting in tension with each other,[15] so it is not possible to simply say that they were overridden. They were:

1. *Manchester University NHS Trust v DE* [2019] EWCOP 19, concerning a Jehovah's Witness who was expressly saying that she did not wish to die but could not countenance receiving blood products. As the woman lacked capacity to make the decision, it fell to be made on a best interests basis. In doing so, it was of note that Lieven J expressly identified (at paragraph 28) that *"the evidence even at the oral hearing was that although DE described herself as a Jehovah's Witness she was not someone for whom those beliefs were central to her personality or sense of identity. During the oral hearing I did not get any sense that she would feel deeply upset if an order was made in the form sought, or that she would feel a deep conflict with her religious beliefs;"*

2. *East Lancashire Hospitals NHS Trust v PW* [2019] EWCOP 10, concerning a man with schizophrenia who urgently required his foot to be amputated to prevent sepsis spreading and endangering his life. Although PW was strongly opposed to the operation, Lieven J found that he did not want to die, and was labouring under a delusion that there was an alternative, namely IV antibiotics, which the medical evidence showed would not solve or materially alleviate the condition. In CRPD terms his will – to live – could therefore be seen in tension with his preference – not to have the operation;

3. *Re AB* [2016] EWCOP 66, a decision of Mostyn J relating to an HIV-positive woman who, when she had had capacity, had demonstrated that her wishes were to receive HIV treatment, but was now making it clear that

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[15] In addition to the decision of Hayden J in Sherwood Forest Hospital NHS Trust & Anor v H [2020] EWCOP 5 noted above.

she was opposed to it. In analysing the position, and approving not only treatment, but treatment involving deception, Mostyn J made clear that he had "no hesitation in concluding that virtually no weight should be given to AB's present wishes and feelings. Instead, I should place considerable weight on her past wishes, as demonstrated by the evidence, and on her hypothetical wishes, which I have no doubt would be in favour of the treatment" (paragraph 25);

4. *University Hospitals of Derby & Burton v J* [2019] EWCOP 16, concerning the question of whether it was in the best interests of a woman with autism and a severe learning disability to undergo a hysterectomy, salpingo-oophorectomy and colonoscopy while she was sedated to relieve P of extreme distress caused by her menstrual cycle. She was unable to express a clear view about the operation, and had a strong dislike of travel, which would be necessary to get her to hospital for the operation to be carried out. However, Williams J considered (at paragraph 38 (vii) that the evidence demonstrated that she *"approves of medical treatments which relieve her of pain and distress; her overcoming her dislike of travel to attend to her dental problems and her support for an ambulance being called when recently in severe pain illustrate her approach."*

5. *Guys and St Thomas' NHS Foundation Trust v X* [2019] EWCOP 35, concerning birth arrangements for a woman in mental health crisis who was unable to reconcile her conflicting religious beliefs (on the one hand of wanting a natural birth – which was considered to be clinically too risky – and also wanting a live, well and safely born baby). In that case, and perhaps somewhat controversially, the court made declarations as to her best interests on the basis of an interim declaration (i.e. on the basis of "reason to believe") as to her lack of capacity in the relevant domains, but it was clear that Theis J did not consider she was in a position where she was faced with a frank refusal of a Caesarean section (whether capacitous or otherwise);

When we turn from decisions relating to medical treatment to decisions relating to living arrangements, we find the following: 5 decisions in which the person's wishes and feelings were followed, and 6 in which they were not followed. Analysing, again, those decisions in which they were not followed:

1. *Re LC* [2015] EWCOP 25, a s.21A MCA challenge to a deprivation of liberty authorisation, in which the key issue was whether the woman at the centre of the proceedings should return home to live with and have contact with her husband, in circumstances where there had been incidents of abuse. DJ Eldergill, after a careful analysis, that her present

wishes and feelings were that she would prefer to live at her own home with her husband. However, he found that a return home was not in her best interests because the woman would not receive the care she required, in significant part because the local authority would not fund the care package he considered necessary to bring this about;

2. *DM v Y City Council* [2017] EWCOP 13, was a s.21A MCA challenge to a deprivation of liberty authorisation, the key issue being whether the man, who was currently an abstinent alcoholic, should continue to reside and be cared for at care home which did not allow alcohol, or whether he should be moved, as he wished to be, to a home which did allow the consumption of alcohol. Bodey J attached "much weight" (paragraph 26) to the "strength and consistency of DM's expressed wishes and feelings about alcohol." However, Bodey J also analysed what would happen if he were to move, including the loss of what was described as his only meaningful personal relationship in the world with another resident at the care home, and came to the conclusion (at paragraph 28) that, *"putting myself in DM's shoes in trying to reach a decision which is holistically in his overall best interests, I now find myself satisfied that it would be best for him to remain where he is […]. I consider that for DM to remain where he is would be the least restrictive option for him consistently with his best interests and that, although by moving he would be fulfilling his stated wish, he would be losing much else of real value to his quality of life."*

3. *Newcastle-Upon Tyne City Council v TP* [2016] EWCOP 61, concerning a woman in her 60s with cerebral palsy. She had lived what was described as a very sheltered life with her parents until she was around 48 when her mother died. She strongly wanted to return to live with an individual, FW, in respect of whom the statutory authorities had very significant concerns, in particular in respect of the degree of (malign) control that he appeared to exercise over her. HHJ Moir was clear that deciding that this was not in her best interests was *"a massive interference with TP's life and against what she has consistently stated to be her wishes. However, I have made findings as to the harm which she has sustained in the past which will continue and is likely to be exacerbated in the future if she resides with FW"* (paragraph 42). Interestingly, HHJ Moir sought to consider *"not just TP's expressed wishes but, as far as I can, with the help of the professionals the reasons behind those wishes. I have taken account of the evidence of the social workers, Dr Hughes and the independent social worker, Chris Wall, as to the harm to TP if she returned and the fact that her needs would not be met but subsumed in those of FW. She would lose her identity"* (paragraph 43);

4. *London Borough of Hackney v SJF & Anor* [2019] EWCOP 8, in which the central question was whether it was in the best interests of a 56 year old woman with a complicated matrix of physical and mental health issues to return home to live in her rented flat with her son. It was clear that she wished to do so, but Senior Judge Hilder found that this was *"not now impracticable to give effect to those wishes, even on a trial basis. The imperative towards implementing SJF's clear preference is outweighed by the equally clear potential for detrimental effect to her health. Were she to return to* [to the flat] *without services from healthcare professionals at home, and with extremely restricted ability to leave that property, it seems to me inevitable that care arrangements would break down very quickly and, at best, SJF would be back in hospital again"* (paragraph 71).

5. *Royal Borough of Greenwich v EOA* [2019] EWCOP 54, in which Williams J was considering where the young man in question should live pending the final hearing of welfare applications under the MCA and the inherent jurisdiction. The only accommodation which was available was a residential placement, so the choice was between that accommodation and having nowhere to live and no one to care for him. The man told Williams J "passionately and forcefully" that he did not wish to go there (paragraph 9), but Williams J considered that there "really is no other alternative;" whilst he hoped that the man would accept that he should go to live there for the short term until the court could consider matters again, it would necessary to ensure that he did so. It is more than usually frustrating that there is no further judgment available in this case because it appears from the (short) judgment summarised here that there was a realistic prospect that the man in fact **did** have capacity to decide where to live, which would have changed the complexion of the case considerably.

6. *Re AM* [2019] EWCOP 59, a s.21A MCA challenge to a deprivation of liberty authorisation, the key issue being whether the man – who had very complex physical healthcare needs – should return and be cared for at home, as he strongly wished. In a judgment lacking in paragraph numbers, District Judge Eldergill sought to find a way to give *"practical expression to his wishes in a way that is not self-defeating. By that I mean that there is no benefit to him and his wife in authorising a return home if it is likely that he will suffer unduly and be back in hospital, and then a nursing home, within a short period - and in a worse position from the point of view of their family life, because it is not X Nursing Home but somewhere less good and less accessible."* Ultimately, however, he found that this was simply not possible

because of the lack of clinical input that would be required to enable this.

Pulling the threads together from this (limited) sample, it can be seen that in three of them (*Re LC, Re EOA* and *Re AM)* the court found that it could not give effect to the person's wishes and feeling because its hands were tied by public funding decisions which constrained the options open to it on behalf of the person. They therefore show the limits that the court considers that it operates under in its ability to implement s.4 MCA 2005. *Re TP* could, on one view, be framed as a case in which the court was far from sure that the wishes being expressed by TP were, in fact, her own, as opposed to a reflection of the influence of an abuser. In *Re DM*, Bodey J was at pains to try to explain why it was that he was trying to secure what was actually important at an emotional and psychological level for the man in question; even if the outcome could be read as a paternalistic, it was not obviously paternalism governed by pure risk avoidance. Only *Re SJF* could perhaps be read as a decision where risk dominated, but it is difficult to see that the judge was being overly risk-averse in light of the evidence before her.

Turning, finally, to cases involving property and affairs, we note that they might give us pause because there has been something of an understanding that judges are **less** likely to follow the person's wishes and feelings in cases involving property and affairs, but in all of the cases within our review the judge followed them. However, this was a very small group of cases – only four – and, furthermore, none of them concerned the classic situation in which wishes and feelings will not be followed, i.e. where a person indicates a wish to spend money in a situation where to do so will place them in longer-term financial difficulties. More broadly, we also recall that we excluded from our review cases in which it could not sensibly be said that the court had before it evidence of the person's wishes and feelings: it is far from clear that there is routinely the intense focus on wishes and feelings in the context of property and affairs cases that there is in (in particular) serious medical treatment cases, but also in cases involving welfare.

Drawing the threads together

We cannot pretend that the results of our survey are entirely scientific – we exercised our own judgment in deciding whether (1) any given judgment contained sufficient evidence as to the person's wishes and feelings; and (2) whether the judge followed those wishes and feelings. We have, though, appended as an Appendix to this article a summary of the cases that we included within our survey so that readers can reach their own conclusions about (2).

However, we do think that the survey adds some perhaps useful flesh to the bones of assertions as to the place of wishes and feelings in best interests decision-making in the context both of the continuing growth of cases before the Court of Protection (which has continued unabated despite the pandemic – with, in particular, increasing numbers of cases involving serious medical treatment) and of the ongoing review of the Code of Practice. We remind ourselves that the obligation imposed by the CRPD, and also that by Article 8 ECHR,[16] is to **respect** the rights, will and preferences of the person. The CPRD Committee has sought to argue that the obligation goes further, and requires following the will and preferences of the person (or the best interpretation of that will and preferences);[17] however, this interpretation is far from universally accepted.[18] At a minimum, however, it is clear that wishes and feelings form a central part of consideration in any form of best interests analysis in England & Wales which is to comply with the ECHR as informed by the CRPD.

We think, without being too Polyanna-ish, that it is legitimate to say that the caselaw we have reviewed shows, at a minimum, that the Judges of the Court of Protection are seeking to take seriously the wishes and feelings of the subject of the proceedings where those wishes and feelings are identifiable.[19] Even where they override those wishes and feelings, the Judges recognise that they have to give a proper justification for doing so – we may or may not agree with their justifications but that is a second-order matter.

Perhaps more interestingly, we can also see two rather different models of what – through a CRPD lens – we could describe as respect for the rights, will and preferences of the person.

1. The first is to acknowledge that the person has a clear and consistent wish for a particular course of action but to identify that it is not possible to achieve that wish, either because of some entirely external factor (e.g., in the two cases of District Judge Eldergill's, that public funding is not available to secure the care package that is required) or – often closely linked – to achieve that wish would be so harmful for the person that the court cannot countenance it.

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[16] See *AM-V v Finland* [2017] ECHR 273.

[17] Committee on the Rights of Persons with Disabilities, 2014, Committee on the Rights of Persons with Disabilities General Comment no 1, Article 12: Equal recognition before the law.

[18] (For a convenient summary, see W. Martin, et al, Three Jurisdictions Report: Towards compliance with CRPD Art. 12 in capacity/incapacity legislation across the UK. An Essex Autonomy Project position paper, available at *EAP 3J Final Report revised (essex.ac.uk).*

[19] We recognise, of course, in saying this, that there remains a significant question mark over the extent to which proper efforts are made before and during proceedings to draw out those wishes and feelings.

2. The second is to find some way in which to identify that there is, in fact, no clash between the course of action identified as being the best interests of the person and their true will. A particularly good example of this is the *Re GTI* case, in which Williams J, whilst admitting the (true) impossibility of undertaking this task, nonetheless sought to identify what decision GTI would take if he could properly assess his circumstances. This approach is in line with the approach suggested by George Szmukler to achieving CRPD compliance in the context of a fusion law approach.[20] Readers will no doubt form their own conclusions both as to the extent to which the judgments are convincing (not least as a matter of rhetoric) in their analysis of the position. They will also form their own judgments as to whether it is more respectful to allow that the outcome represents a frank clash with the person's own wishes and feelings, or to seek to identify that it represents what the person either does or would truly wish.

A further observation that we make is that there is undoubtedly room within this analysis to raise questions about the extent to which **appropriate** respect is given in both individual cases and also – as a category – in relation to reproductive and birth rights. The decision in *Re R* is on one view particularly challenging, as it could be read as suggesting that, by definition, wishes and feelings expressed by women about their birth arrangements are to be afforded a lesser degree of respect than decisions made about other kinds of medical treatment. This might reflect the fact that judges are not allowed (as a matter of law) to take account the interests of the foetus in their decision-making, but – perhaps understandably – find it impossible not do so, and have to do so by the backdoor. Again, we might suggest that respect for rights, will and preferences should demand a more honest accounting of the position – even if that would not necessarily dictate the answer in any given case.

Conclusion

In the earlier article, Alex and his previous co-author suggested that there was a trend towards a presumption in favour of following the identified wishes and feelings of the person. We repeat the limits of the survey contained in this article, excluding as we did those cases where there was insufficient evidence to identify what the person would have wanted. However, at a very crude level, this review of the caselaw bears out the hypothesis in the earlier article – 22 of the cases within the survey being ones in which

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[20] Szmukler, G. (2019). "Capacity","best interests","will and preferences" and the UN Convention on the Rights of Persons with Disabilities. World Psychiatry, 18(1), 34-41.

[21] With one of those, *AB*, being reversed on appeal.

the best interests decision at first instance followed the person's wishes and feelings, as opposed to 14 in which they were not followed (and seven where they were in sufficient tension that they might on one view said to cancel each other out). Furthermore, examining those cases where the person's wishes and feelings were not followed reveals both that judgments of the Court of Protection provide rich material with which to interrogate what the concept of 'respect for rights, will and preferences' means in practice, and also poses important questions about how to secure such respect going forward both within and outside the court setting.

APPENDIX

	Case Name and Citation	Judge	Type of case[†]	Outcome
1	*LC, Re* [2015] EWCOP 25	DJ Eldergill	Living Arrangements	Wishes and Feelings not followed
2	*KW, Re* [2015] EWCOP 53	DJ Bellamy	Living Arrangements	Wishes and Feelings followed
3	*Wye Valley NHS Trust v B* [2015] EWCOP 60	Peter Jackson J	Medical Treatment	Wishes and Feelings followed
4	*PP, Re* [2015] EWCOP 93	DJ Batten	Property and Affairs	Wishes and Feelings followed
5	*Briggs v Briggs and others* [2016] EWCOP 48	Charles J	Medical Treatment	Wishes and Feelings followed
6	*J, Re* [2016] EWCOP 52	HHJ Karen Walden-Smith	Property and Affairs	Wishes and Feelings followed
7	*Newcastle-Upon Tyne City Council v TP* [2016] EWCOP 61	HHJ Moir	Living Arrangements	Wishes and Feelings not followed
8	*AB, Re* [2016] EWCOP 66	Mostyn J	Medical Treatment	Wishes and Feelings in tension
9	*DM v Y City Council* [2017] EWCOP 13	Bodey J	Living Arrangements	Wishes and Feelings not followed
10	*P, Re* [2017] 5 WLUK 680	HHJ Nicholas Marston	Living Arrangements	Wishes and Feelings followed
11	*London Borough of Brent v NB* [2017] EWCOP 5	DJ Glentworth	Living Arrangements	Wishes and Feelings followed

	Case Name and Citation	Judge	Type of case†	Outcome
12	*D, Re* [2017] EWCOP 15	Baker J	Medical Treatment	Wishes and Feelings followed
13	*SAD & ANOR v SED* [2017] EWCOP 3	DJ Glentworth	Property and Affairs	Wishes and Feelings followed
14	*London Borough of Lambeth v MCS and Anor* [2018] EWCOP 14	Newton J	Living Arrangements	Wishes and Feelings followed
15	*Y v Healthcare NHS Trust and Others* [2018] EWCOP 18	Knowles J	Medical Treatment	Wishes and Feelings followed
16	*London Borough of Islington v AA and others* [2018] EWCOP 24	SJ Hilder	Living Arrangements	Wishes and Feelings followed
17	*SJ, Re* [2018] EWCOP 28	Moor J	Medical Treatment	Wishes and Feelings not followed
18	*NHS Cumbria CCG v Rushton* [2018] EWCOP 41	Hayden J	Medical Treatment	Wishes and Feelings followed
19	*King's College Hospital NHS Trust v FG* [2019] EWCOP 7	Francis J	Medical Treatment	Wishes and Feelings not followed
20	*London Borough of Hackney v SJF & Anor [2019] EWCOP 8*	SJ Hilder	Living Arrangements	Wishes and Feelings not followed
21	*East Lancashire Hospitals NHS Trust v PW* [2019] EWCOP 10	Lieven J	Medical Treatment	Wishes and Feelings in tension

	Case Name and Citation	Judge	Type of case†	Outcome
22	*Hounslow Clinical Commissioning Group v RW & Ors* [2019] EWCOP 12	Hayden J	Medical Treatment	Wishes and Feelings not followed
23	*University Hospitals of Derby & Burton v J* [2019] EWCOP 16	Williams J	Medical Treatment	Wishes and Feelings in tension
24	*A Clinical Commissioning Group v P* [2019] EWCOP 18	MacDonald J	Medical Treatment	Wishes and Feelings followed
25	*Manchester University NHS Trust v E* [2019] EWCOP 19	Lieven J	Medical Treatment	Wishes and Feelings in tension
26	*NHS Trust v JP* [2019] EWCOP 23	Williams J	Medical Treatment	Wishes and Feelings not followed
27	*Re AB* [2019] EWCOP 26	Lieven J	Medical Treatment	Wishes and Feelings not followed (overturned by the Court of Appeal)
28	*Imperial College Healthcare NHS Trust v MB &Ors* [2019] EWCOP 30	Hayden J	Medical Treatment	Wishes and Feelings followed
29	*FL v MJL* [2019] EWCOP 31	DJ Sarah Ellington	Property and Affairs	Wishes and Feelings followed
30	*Guys and St Thomas' NHS Foundation Trust v X* [2019] EWCOP 35	Theis J	Medical Treatment	Wishes and Feelings in tension

	Case Name and Citation	Judge	Type of case[†]	Outcome
31	*Bagguley v E* [2019] EWCOP 49	Hayden J	Medical Treatment	Wishes and Feelings followed
32	*Royal Borough of Greenwich v EOA* [2019] EWCOP 54	Williams J	Living Arrangements	Wishes and Feelings not followed
33	*AM, Re* [2019] EWCOP 59	DJ Eldergill	Living Arrangements	Wishes and Feelings not followed
34	*A Local Authority v PS & HS* [2019] EWCOP 60	Judd J	Living Arrangements	Wishes and Feelings followed
35	*Guys and St Thomas' NHS Foundation Trust & Anor v R* [2020] EWCOP 4	Hayden J	Medical Treatment	Wishes and Feelings not followed
36	*Sherwood Forest Hospital NHS Trust & Anor v H* [2020] EWCOP 5	Hayden J	Medical Treatment	Wishes and Feelings in tension
37	*Sherwood Forest Hospital NHS Trust & Anor v H* [2020] EWCOP 6	Hayden J	Medical Treatment	Wishes and Feelings followed
38	*Z, Re* [2020] EWCOP 20	Knowles J	Medical Treatment	Wishes and Feelings not followed
39	*Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26	Hayden J	Medical Treatment	Wishes and Feelings followed
40	*GTI, Re* [2020] EWCOP 28	Williams J	Medical Treatment	Wishes and Feelings not followed

	Case Name and Citation	Judge	Type of case†	Outcome
41	*Hull University Teaching Hospitals NHS Trust v KD* [2020] EWCOP 35	Hayden J	Medical Treatment	Wishes and Feelings in tension
42	*Avon and Wiltshire Mental Health Partnership v WA & Anor* [2020] EWCOP 37	Hayden J	Medical Treatment	Wishes and Feelings followed
43	*Northamptonshire Healthcare NHS Foundation Trust v AB* [2020] EWCOP 40	Roberts J	Medical Treatment	Wishes and Feelings followed

† *Medical treatment cases include: medical treatment, medical procedures and medical care.*