MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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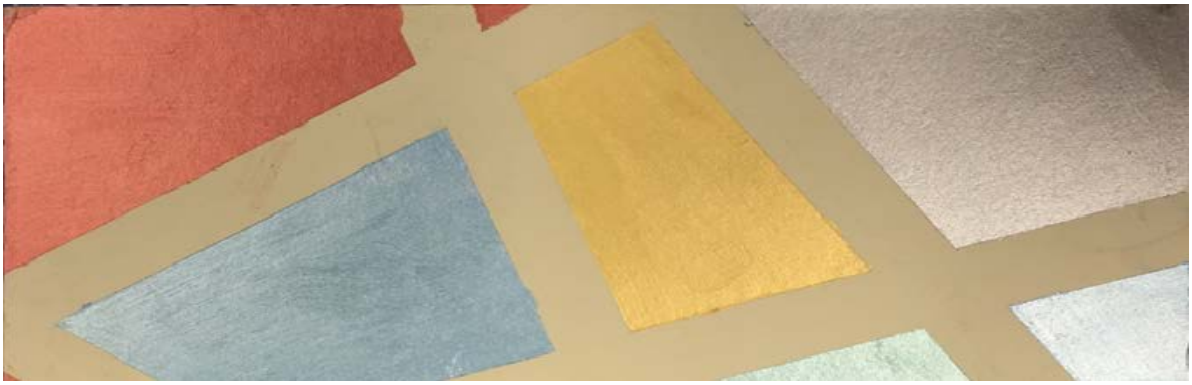

Welcome to the November 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: reasonably adjusting to disability in the context of dialysis and identifying will and preferences across a spectrum of difficult medical cases;

(2) In the Property and Affairs Report: the Law Commission's further consultation on wills;

(3) In the Practice and Procedure Report: two sets of 'Ps' and the costs of welfare appeals;

(4) In the Wider Context Report: the CQC's State of Care report, deprivation of liberty and those under 18, litigation capacity and access to court, and the inherent jurisdiction in Ireland;

(5) In the Scotland Report: bureaucracy vs justice and a tribute to Adrian upon his retirement from one of his posts.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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

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'Two Ps' - navigating two sets of best interests

HH v Hywel DDa University Health Board & Ors [2023] EWCOP 18 (Francis J)

Practice and procedure (Court of Protection) – other

How should the Court of Protection should proceed in a 'two P' situation: i.e a situation where two individuals both appear to lack the capacity to make the relevant decisions, and where those decisions are interconnected? In *HH*'s case, the individuals concerned were husband, AH, and wife, HH. For reasons that are very relevant to the husband and wife, but not relevant for the wider point, both were the subject of separate s.21A MCA 2005 proceedings. The question was whether they could (or should) be either consolidated or heard together by the same judge, a question which regularly arises, but which has not been the subject of a reported case.

Everyone before the court agreed that the court had the power to consolidate the proceedings or hear them together; the question was whether it should. The local authority – the supervisory body for both s.21A applications – and the litigation friends for both husband and wife considered that the applications should be heard together before the same judge. The Health Board objected. The Health Board's objections were framed in multiple different ways, but essentially could be reduced down to the fact that the court should not be tempted into a position where it was required to find a compromise between the best interests of two Ps. Francis J was not persuaded:

> *40. Judges are, in the Family Division, completely used to making decisions about children in families where their interests may conflict with each other. Furthermore, there is a significant danger, in my judgement, that if the interests of the husband and wife such as AH and HH in this case were to be determined by two different judges, there is a real risk that those judges might make different findings of fact. In a case such as the instant one, issues such as whether the parties might be abusive towards each other or encourage each other to drink could be at the heart of a best interests determination.*
>
> *41. There is an obvious risk that a judge in court A hearing the case of AH might make different factual determinations from the judge in court B next door in respect of HH. This would lead, it seems to me, to an absurd and impossible situation. In my judgement, it is essential to go back to the statutory framework and the rules which govern that. Rule 3.1(2) of the Court of Protection Rules 2017 sets out a list of the Court's general powers of case management. Among those powers referred to above, the Court may consolidate proceedings and/or may hear two or more applications on the same occasion.*
> *42. Both husband and wife in this case, through their representatives, ask for the two applications to be heard on the same occasion by the same judge. It*

would, I suggest, defy common sense if different judges were to make different determinations in respect of each of them when they are and have been a couple for decades. Just because they may now have different interests does not mean that I, as the judge, cannot apply a best interests test in respect of each of them.

43. I accept that this may lead the judge, and if that is me, it may lead me, to making a finding that each of them has different needs and different best interests, and so their best interests may conflict. Surely the appropriate thing then that we need to do is to balance these interests, to consider the conflict and to make a proper determination in a holistic manner having regard to the needs of each of them and the best interests of each of them.

44. The idea that a judge sits in one court dealing with AH whilst another judge sits in another court dealing with HH without even consulting each other would, it seems to me, be remarkable and would be regarded by most people, I suggest, as plainly wrong. It is so often the task of the judge to balance interests, and I have already referred to the circumstances which so often arise when dealing with cases pursuant to the Children Act 1989.

45. I have already said that I am not going to consolidate because nobody is asking me to do so. My view is that the same judge should hear these cases having heard the evidence and submission in respect of each case and should make a determination in respect of each of AH and HH. It is, as I have said, entirely possible that they may have different needs and different interests and therefore different decisions have to be made in respect of each of them. As I have said, this is not very different from a judge in the Family Court making decisions in respect of a sibling group.

46. Accordingly, I find that I agree with the submissions made by Counsel respectively for AH and HH and the Local Authority, and there is no reason in principle why both applications cannot be heard concurrently by the same judge at the same time. I agree that this is properly characterised as a case management decision and that there is nothing within the framework of the Mental Capacity Act which expressly prohibits the same decision maker from making a best interests decision on behalf of one or more incapacitated adults whose interests are closely connected and might conflict. Indeed, I go further and find that it is likely to be appropriate in cases such as this for the same court to hear the best interests decisions and that this should be the accepted approach in circumstances such as this.

On the facts of the case before him, Francis J made a specific point of noting that:

10. [...] *HH is not a party to AH's proceedings and that she is not eligible therefore for legal aid for such purposes. This means that her litigation friend is not funded by any public body for these proceedings. AH is a party to HH's proceedings, but his litigation friend is compelled to act on a voluntary basis as no legal aid is available.*

11. Not for the first time in Court of Protection proceedings, I find myself dismayed at the absence of Legal Aid in these circumstances where it is plainly needed. Whilst technically the Health Board may not be an arm of the state, to all right minded people I venture to suggest that a publicly funded NHS body is exactly that. I find it hard to imagine that the legislators intended that people in these circumstances

> *should be without public funding. I wish to acknowledge the Court's gratitude to those who have acted pro bono in this case.*

Later, at paragraph 59, Francis J also noted that he agreed with the submission that:

> *any proposal that AH's case could be resolved without his wife also being joined as a party would be plainly wrong. I agree that this also raises issues of fairness, natural justice and compliance with article 6 ECHR. I also agree with Mr Hadden that any proceedings which effectively excluded HH as a party would also raise concerns about whether this would represent an unjustified interference with their rights under article 8 ECHR. Mr Hadden submits that the practical difficulties identified in these cases serve to highlight why the Court should direct that the case should be heard together not separately or consecutively. I agree with that submission.*

Comment

Francis J used some quite uncompromising language in his rejection of the arguments put before by the Health Board, but we would suggest he was right to do so, for the reasons he gave. More 'existentially,' the Supreme Court made clear in *A Local Authority v JB* [2021] UKSC 52 that we not exist in isolation when it comes to considering whether we can process the consequences of our actions. Similarly, what is in a person's best interests is inevitably going to be viewed in context – and life is such that there will be many situations where that context includes interactions with others who may have their own cognitive impairments.

Appeals from personal welfare decisions – the Court of Appeal allocates the costs

Re VA (Medical Treatment) [2023] EWCA Civ 1190 (Court of Appeal (Baker, Lewis and Wiliam Davis LJJ))

CoP jurisdiction and powers – costs

In this case, the Court of Appeal considered an appeal by a litigant in person (on her behalf, and on behalf of other family members) from a decision[1] of Hayden J relating to her mother, a 78 year old woman identified as VA. Hayden J had declared that VA lacked capacity to conduct proceedings or consent to medical treatment including extubation and associated treatment and care. The order further provided that, pursuant to s.16 MCA 2005, it was in VA's best interests, and the court consented on her behalf, to undergo extubation and the provision of palliative care in accordance with a care and treatment plan prepared by the treating team at the hospital where she was being looked after. The order was made some seven weeks after Morgan J endorsed a consent order that a tracheostomy and insertion of a PEG was in VA's best interests, but in circumstances where very shortly afterwards the woman's daughter, VK, sought to challenge the position.

As the Court of Appeal made clear, there had been a very difficult relationship between the family and the treating team at the hospital where VA was being cared for, and much of the appellant's argument focused on complaints about the Trust's alleged failure to engage with the family. However, Baker LJ noted:

> *Furthermore, complaints about the Trust's failure to engage with the family do not give rise to a ground of appeal against the order. The complexity of the*

[1] Made in August 2023, but not appearing on Bailli until October 2023.

> *issues involved and the grave consequences of the decision to be taken plainly required that every effort be made to engage with the family. The Trust strongly refutes the suggestion that it failed to engage with the family in an attempt to identify what course lay in VA's best interests. In the course of the hearing before us, Mr Parishil Patel KC drew attention to a chronology in the bundle which illustrated the efforts made by hospital staff to engage with the family. The family members reject these assertions and insist that the efforts made by the Trust were insufficient. As Mr Patel conceded, the deterioration in relations between the Trust and the family is deeply regrettable.*
>
> *This Court is in no position to resolve this aspect of the dispute between the parties and it is unnecessary to do so for the purposes of this appeal. Whatever shortcomings there may or may not have been in the hospital's efforts to engage with the family, there can be no doubt about the opportunities afforded to the family by the courts. There is no merit in VK's assertion that the Trust failed to follow proper procedure in initiating the proceedings. Whatever may or may not have happened prior to the proceedings, the documents filed with the court and disclosed to the family in the course of the proceedings provided a comprehensive picture of VA's condition and full details of all matters relevant to the best interests decision. The reason why successive judges have agreed to reopen the decisions recorded in Morgan J's order was because of the family's assertions that its terms do not reflect what the family had agreed. It is clear from the transcript of his judgment delivered on 25 August that Hayden J gave the family members a fair opportunity to present their case and conducted a characteristically careful and sensitive analysis of the family's evidence. I therefore reject VK's assertion that there has been any breach of human rights so as to invalidate the court's decision.*

Baker LJ had initially considered that there were three aspects of Hayden J's judgment which justified review by the Court of Appeal.

> *First, it is striking that, within seven weeks of a court order made by consent authorising the carrying out of a tracheostomy in preference to extubation, another judge reached the opposite conclusion. Secondly, it seemed to me at least arguable, on a preliminary reading of what is a relatively brief judgment, that the judge did not carry out a sufficiently thorough analysis of the benefits and disadvantages of the two options. Thirdly, it also seemed to me at least arguable, on an initial reading of the judgment, that the judge's assessment of VA's wishes and feelings fell short of what was required. Admittedly, none of the family members who addressed the court articulated their criticism of the decision in precisely those terms, although they underlie points made by the family, in particular by MA.*

However, after hearing full argument, Baker LJ (with whom the other members of the Court of Appeal agreed), reached the clear conclusion that none of these concerns stood up to scrutiny so as to give rise to a meritorious ground of appeal.

As it had indicated it would, the Trust sought its costs of the appeal against the appellant, although, at the hearing, the Trust noted that the fact that an order was made did not mean that it would be enforced "*thereby hinting that, in the event that such an order was made here, the Trust might refrain from enforcing it against the appellant*" (paragraph 50).

The reasons given by Baker LJ for his refusal to accede to the Trust's application, but instead to make no order for costs (save for the usual provision that the Trust should pay 50% of the Official Solicitor's costs) are sufficiently important to set out in full:

> *51. Rule 19.3 of the Court of Protection Rules 2017 provide that, "where the proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings". Rule 19.4(1) permits the court to depart from the general rule if the circumstances so justify, adding that "in deciding whether departure is justified the court will have regard to all the circumstances including (a) the conduct of the parties; (b) whether a party has succeeded on part of that party's case, even if not wholly successful, and (c) the role of the public body involved in the proceedings". The Court of Protection Rules do not, however, apply to appeals to this Court from the Court of Protection. Such appeals are governed by Part 44 of the Civil Procedure Rules.*
>
> *52. CPR rule 44.2, headed "Court's Discretion as to costs", provide, so far as relevant:*
>
> > *"The court has discretion as to*
> > *(a) whether costs are payable by one party to another;*
> > *(b) the amount of those costs; and*
> > *(c) when they are to be paid.*
> > *If the court decides to make an order about costs –*
> > *(a) the general rule is that an unsuccessful party will be ordered to pay the costs of the successful party; but*
> > *(b) the court may make a different order.*
> > *The general rule does not apply to the following proceedings –*
> > *(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division;*
> > *(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.*
> > *In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –*
> > *(a) the conduct of all the parties;*
> > *(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
> > *(c) any admissible offer to settle made by a party ….*
> > *The conduct of the parties includes*
> > *(a) conduct before, as well as during, the proceedings ….*
> > *(b) whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue;*
> > *(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and*
> > *(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."*
>
> *53. My reasons for concluding that there should be no order as to costs fall into two categories – general reasons applicable to such cases and specific reasons relating to this particular case.*
>
> *54. For many years, the general practice in proceedings relating to children has been to make no order as to costs save in exceptional circumstances, for example, as identified by Wilson J (as he then was) in* Sutton London Borough Council v Davis (No 2) *[1994] 2 FLR 569 where "the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable". This applies to the costs of*

an appeal as well as to costs at first instance, although the application of the principle may be different. As Baroness Hale of Richmond observed in in Re S *[2015] UKSC 20 at paragraph 29:*

> *"Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in EM v SW, In re M (A Child) [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, 'nobody knows what the judge is going to find' (paragraph 23), whereas on appeal the factual findings are known. Not only that, the judge's reasons are known. Both parties have an opportunity to 'take stock' and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case."*

55. This case is about an incapacitated adult, not a child. Accordingly, the express exclusion of the "general rule" that costs follow the event, which applies in family appeals to this Court under rule 44.2(3), does not apply. But the jurisdiction exercised by the Court of Protection in proceedings relating to P's welfare is akin to the jurisdiction relating to children in family proceedings. In children's proceedings, under s.1 of the Children Act 1989, the welfare of the child is the paramount consideration. In proceedings in the Court of Protection, under s.1(4) of the Mental Capacity Act 2005, any act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in her best interests. Accordingly, for my part I would anticipate that, save in exceptional circumstances, there will usually be no order for costs of an appeal against a decision relating to P's personal welfare.

56. On the specific facts of this case, it was manifestly appropriate to make no order for costs against the appellant, because (1) the issue involved was of the utmost gravity and importance to VA and her family; (2) there was nothing in the conduct of the appellant or her siblings to warrant any such order; (3) it was not unreasonable of them to pursue their case that a tracheostomy was in their mother's best interests; (4) whatever difficulties may have arisen in their relations with the Trust, there was nothing inappropriate in the way in which they pursued their case – on the contrary, they presented their arguments in a helpful and articulate manner; (5) there was sufficient merit in their case to lead me to conclude that this Court should grant permission to appeal, although ultimately for the reasons set out above I reached the firm conclusion that the appeal should be dismissed.

57. For those general and specific reasons, I concluded that there should be no order for costs against the appellant. (emphasis added)

Comment

It is perhaps not entirely surprising that the Trust did seek costs – medical treatment cases are not only costly for families (who, some might think problematically) are not eligible for non-

means-tested legal aid,[2] but also for the Trusts involved, not least because of a convention that the Trust must not only bear its own costs, but 50% of those of the Official Solicitor. Whilst the convention has been judicially endorsed (see *An NHS Trust v D* [2012] EWHC 668 (COP)), it might be thought that it would be much more satisfactory if the Official Solicitor was properly funded to allow her to discharge her function as litigation friend of last resort (including acting as both litigation friend and solicitor in medical treatment cases) without needing to drain the limited funds of Trusts involved in medical treatment cases.

However, as Baker LJ has made clear, Trusts will face an equally uphill battle seeking their costs of an appeal as they do seeking their costs at first instance. That the Court of Appeal should follow the same 'no order for costs' regime as the Court of Protection does in welfare cases is undoubtedly correct at the level of broad principle. But it is important to note that it is not a decision that is entirely neutral in its effects.

[2] By contrast with the position, as of 3 August 2023, of parents of children involved in cases about life-sustaining treatment.

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Conferences

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

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

Advertising conferences and training events

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

Our next edition will be out in December. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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