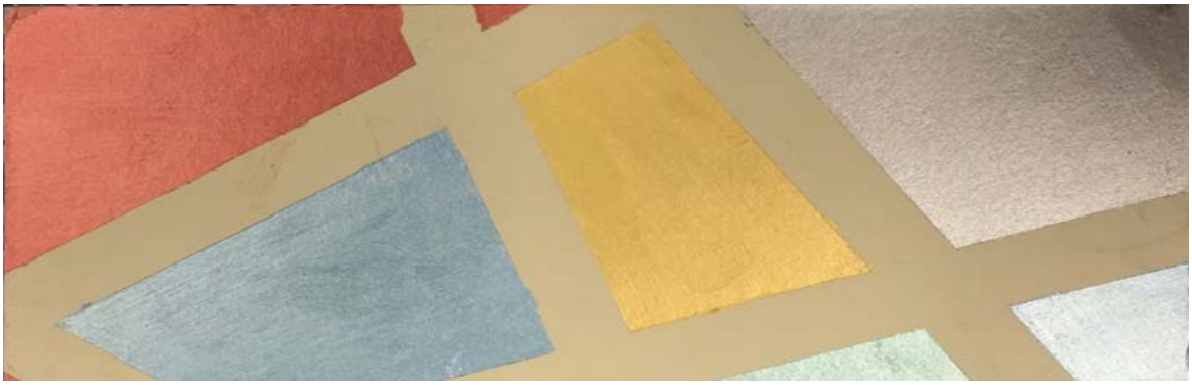
MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

May 2024 | Issue 140



Welcome to the May 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a rare successful capacity appeal, evicting someone from P's house and holistically approaching hoarding;

(2) In the Practice and Procedure Report: when you can remove deputies, and publishing judgments in serious medical treatment and closed material procedure cases;

(3) In the Mental Health Matters Report: when not to rely on capacity in the mental health context;

(4) In the Wider Context Report: capacity, autonomy and the limits of the obligation to secure life, and the European Court of Human Right raises the stakes for psychiatric admission for those with learning disabilities;

(5) In the Scotland Report: licence conditions and deprivation of liberty, and Executor qua attorney – a few steps back?

In the absence of relevant major developments, and on the basis people have enough to do without reading reports for the sake of reports, we do not have a property and affairs report this month. But some might find of interest the blog by Alex prompted by a question in the property and affairs context of whether you need to have capacity to consent to having your capacity assessed.

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.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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.

Contents

Residence, care, sex and marriage: an (unusual) successful appeal on capacity 2
Holistically approaching hoarding 5
Upholding P's property rights 7
Children, capacity and accepting the diagnosis 8
Short note: forced marriage and travel planning 10

Residence, care, sex and marriage: an (unusual) successful appeal on capacity

Re ZZ (Capacity) [2024] EWCOP 21 (Theis J)

Mental capacity – assessing capacity

Summary

This is an example of a relatively rare species of case, namely a successful appeal in relation to capacity. At first instance, HHJ Burrows had found that ZZ had capacity to make decisions about residence, sexual relations and marriage. The local authority appealed his conclusions, the appeal being opposed by ZZ through his litigation friend the Official Solicitor.

As Theis J described him:

> *5. ZZ is a 20 year old man with a diagnosis of mild learning disability ('LD'), attention deficit hyperactivity disorder ('ADHD') and possible obsessive compulsive disorder ('OCD'). He suffered sexual abuse as a child and has himself been convicted of sexual assault on a 5 year old family member, resulting in an Intensive Referral Order for 12 months and a Sexual Harm Prevention Order ('SHPO'), which expires in October 2024. It is a condition of the SHPO that ZZ does not live or sleep in any premises where there is also a child under the age of 18 years unless approved by the local authority and does not have unsupervised contact with a child.*

A particular concern was what was said to be a very high risk of committing harmful sexual acts towards others. ZZ was said to be at high risk of absconding from the placement he was in, repeatedly making it clear that he wished to live with his girlfriend (with whom he wanted to enter into a sexual relationship).

Theis J summarised the judgment of HHJ Burrows as follows (Dr Rippon being the independent expert appointed to assist on the question of capacity):

> *46. In relation to the decisions under scrutiny the Judge dealt with residence at [35] – [37] where, having referred to the matters listed in LBX, he then posed the question whether ZZ understood that care is an important aspect of the place where he would have to live. He accepted the submissions on behalf of the Official Solicitor that care is not part of the relevant information in ZZ's case, as what the local authority submit brings into the mix another placement that ZZ has to consider, namely one without the proper level of support, and that simply is not an option at the present time, so the Judge concluded 'If one removes the 'care' point from the LBX list as it applies to this case, there is no doubt ZZ has the*

capacity to decide on residence' [36]. The Judge continues that he has reached that conclusion as ZZ 'does not actually have a decision to make over whether he lives in a care setting'[37] although he recognises the situation could change and if it did, ZZ's capacity would need to be re-assessed.

47. In relation to capacity to engage in sexual relations he referred to the test in JB and the fact specific nature of any decision. He referred to Dr Rippon's evidence on the relevant matters and noted that Dr Rippon's evidence on the issue of consent has vacillated, her focus is on ZZ's insight into his ability to control his behaviour and stop himself from engaging in behaviour he knows is wrong and situations where ZZ may find himself in where he may find it difficult to stop himself because of his sexual urges. The Judge stated at [46] "Clearly, urges are, by their very nature, difficult to control, and it would be setting the bar too high if capacity to consent to sexual relations were to be ruled out because a person was unable to control an urge (for instance) to carry on with the sexual act. Having said that, ZZ is a sexual offender who is unable to control his urges to engage in very harmful and criminal sexual behaviour, as I have already found."

48. He then set out his conclusion at [47] as follows:

'All that being said, I agree with the Official Solicitor's submissions on this. I do not accept that a sixth factor or limb ought to be introduced into the JB test, namely, to have insight into and the ability to control one's urges. I also agree the conclusion I have reached, namely that Peter has capacity in this area, fits in with Cobb J's statement in Re Z [2016] EWCOP 4, namely that ordinary risk taking, which may be unwise does not render the decision incapacitous. I would go further. A person can have the capacity to engage in sexual relations, understanding that his partner may withdraw her consent at any moment, and that with that he must stop the sexual act. If, however, when that withdrawal of consent happens the person is unable to overcome his urges, that is nothing to do with capacity to consent to sexual relations.'

49. Turning, finally, to the issue of marriage he concluded in [50] that in the light of his conclusion regarding sexual relations ZZ has capacity to enter into a marriage.

Theis J reminded herself of the fact that:

75. The Judge below had the benefit of hearing the evidence, in particular from Dr Rippon, and this court recognises that the test is not whether this court would have reached the same conclusion, or a different one. The question is whether the Judge was able to reach the conclusions he did on the evidence he had, within the relevant legal framework.

76. Ms Roper was right to remind the court of the importance of the presumption of capacity, it is an important principle that underpins the MCA. Also, that the court needs to consider whether it is satisfied on the balance of probabilities that that presumption is rebutted. In relation to capacity to engage in sexual relations, cases such as JB have reiterated that the bar must not be set too high. Further, that the court should guard against the protection imperative.

77. Equally, Mr O'Brien was right to emphasise the need for the court to consider the serious grave consequences for ZZ and others, as referred to in JB at [74], the need for the Court of Protection to guard against approaching questions of capacity in

> *silos (see Hull CC v KF at [24]) and to have in mind the overlap between different decisions.*

Theis J was critical of the evidence of Dr Rippon, noting that it was at times confused and confusing (paragraph 78), and that whilst this "*perhaps reflected the complexities in this case,* [it] *also made the task facing this experienced Judge much more difficult*."

Residence

Theis J noted that the decision reached by HHJ Burrows was founded on his conclusion that the case that ZZ received was not a relevant matter for him to consider when making current decisions about where he should live. However, Theis J identified that he had not taken into account the issue of whether ZZ's wish to live with his girlfriend and her mother was "*a pipe dream*" or not. Dr Rippon had identified that it was not, as "*…during the course of both interviews that was what he wanted, that's where he wanted to live, that was his…the place that, you know, that they'd identified as where he did want to live*" (para 80).

At paragraph 82, Theis J found that HHJ Burrows had fallen into error in the following ways:

> *(1) He did not properly analyse the evidence regarding whether ZZ's wish to live with TD and her mother was a pipedream or not, as had been asserted by the Official Solicitor on ZZ's behalf. In her oral evidence Dr Rippon considered it was more than that and gave her reasons for saying that. In addition, this was the view ZZ had expressed over a period of time to a number of people.*
>
> *(2) On the particular facts of this case, the Judge fell into error by not properly considering that the requisite care needed was relevant information to the issue of residence. In my judgment arguably it was. Ms Roper accepted that the declaration made by the Judge would have been more accurate if it stated that the declaration about residence was in the context of the care being provided. To do that would have required the Judge to analyse ZZ's ability to understand relevant information about the need for the care and support and use or weigh it in reaching a decision. That would include considering, in the context of residence, the evidence that ZZ did not consider he required the care and support that was being provided.*
>
> *(3) The risk in the Judge's approach to this issue is that it has been considered in a silo, with implications for the local authority in being able to coherently manage a care plan for ZZ in the light of the declarations made which, although referred to at [48], was not properly addressed by the Judge.*

Sexual relations

Theis J found that this was a particularly difficult issue, but that (at paragraph 85) "*not without some hesitation*" she had reached the conclusion that the decision on this aspect was wrong because:

> *(1) The Judge did not properly deal with various aspects of Dr Rippon's evidence in particular (a) whether ZZ was able to use or weigh information about consent in the context of ZZ's sexual impulsivity and the complexity of the causes of that, including his mental impairment; (b) that ZZ's disinhibited sexual behaviour was due to a combination of his mental impairment, which included his cognitive functioning and executive functioning and gave disproportionate weight to the significance of ZZ's ordinary sexual urges/desire.*

> *(2) The Judge wrongly equated ZZ's sexual disinhibition with the usual risk-taking of a person of commensurate maturity (as Cobb J did in Re Z). The Judge failed to properly weigh in the balance the evidence that ZZ has a record of sex offending and has been assessed as manipulative and presenting a very high risk. His sexually disinhibited behaviour falls into a different category than that envisaged by Cobb J in Re Z, with the result that the ability to use or weigh the question of consent needs to be considered in that context.*
>
> *(3) The Judge erred in not following the approach set out in JB by asking himself first is the person unable to decide the matter for himself by reference to the matter and the relevant information, second is there a clear nexus between his inability to make a decision in relation to the matter and an impairment of, or disturbance in the mind or brain. If he had taken that structure it would have directed him to the relevant parts of Dr Rippon's evidence.*

Marriage

As regards regards marriage, Theis J declined to resolve the difference of judicial opinion as to between Parker J and Mostyn J as to whether it is a pre-condition of capacity to marry that the individuals concerned have capacity to enter into sexual relations. On the facts of ZZ's case, however, she found that the ground of appeal was also made out, because it was a consistent feature of the evidence that ZZ wishes to marry his girlfriend and for them to have children.

Outcome

Theis J was sitting as an appeal judge. On the facts of the case, she did not take the path of herself declaring that ZZ lacked capacity in the material domains. Rather, she remitted the case to reconsider the question of capacity.

Comment

This is the second case in relatively quick succession to emphasise the difficulty of disentangling residence and care (see also *Re CLF* at paragraphs 36 and 37). In the context of a person with care needs, we would strongly suggest that it would be an unusual case in which it is possible to address residence and care separately without falling into the hole between two silos (to mix metaphors).

The case is also of note for Theis J's observation that following the order of considering capacity set down by the Supreme Court in *JB* is important, not just because that is what the law requires, but because it does actually make a difference when it comes to considering whether the 'causative nexus' is made out. In this regard, it is perhaps also worth flagging that, albeit somewhat belatedly, the *White Book* now helpfully has the ordering the correct way around for the benefit of those considering litigation capacity in the conduct of civil proceedings.

Holistically approaching hoarding

A Local Authority v X [2023] EWCOP 64 (Theis J)

Mental capacity – assessing capacity

Summary[1]

X had lived in her local authority rented maisonette for over 27 years. Over the last two years of proceedings, strenuous and creative attempts had been made from a range of services to address the significant risks posed by the level 9 hoarding within the property. Environmental health had served access notices

[1] Note, this case, although decided in 2023, only appeared on Bailii recently.

under s87 of the Public Health Act 1936 and warrants to enforce clearance, but access was mostly refused, with X threatening self-harm if there was entry. Mental health tried to assist with her OCD and hoarding disorder, and a specialist hoarding therapy service was engaged, unsuccessfully. The position and risks remained largely the same as X's anxiety that something would be thrown away prevented progress to clear the clutter and carry out repairs. Accordingly, the local authority sought an order to temporarily remove X from her home to enable the risks to be addressed.

Taking a holistic approach that looked at X's capacity to make decisions about her residence, her care/support and her items and belongings, Theis J identified the relevant information as including:

1. the obligations under the tenancy agreement;
2. what areas X needed support with;
3. what type of support;
4. what were the consequences if X did not have that support or she refused it;
5. the volume of belongings and the impact on use of rooms;
6. safe access and use;
7. creation of hazards;
8. safety of the building and
9. the removal or disposal of hazardous levels of belongings.

The evidence established that, because of her mental impairments, X was unable to use and weigh the impact of her actions on the tenancy agreement, or to engage in the therapeutic support offered to address the chronic situation (paragraph 95). She also lacked capacity to make decisions about her property and financial affairs, with impulsive purchasing of items which impacted upon the health and safety concerns, and restricted movement within X's property.

As to best interests, X strenuously objected to any sort of removal of either herself or her possessions. To do either would cause very great distress, acute anxiety and could tip her over into a suicidal state of mind. The fire risk was substantial, the hoarding level at 8/9, and the risk to X of tripping or falling and of the emergency services, if required, being unable to get to her, remained significant. Theis J concluded that there was no further support that could be given to bring about any real change. The various services had worked patiently, creatively and with resilience over a number of years but little had changed. The action required to remove the clutter from the home could only take place in the absence of X.

It was in X's best interests to be removed (with restraint as a last resort) and deprived of her liberty at a nearby supported living placement for a limited period of time to enable the clearance to take place, with a plan to return her once the works required had been undertaken. Theis J held:

> *105. I have reached the conclusion that X's best interest are served by the local authority application being granted. In doing so I readily accept the considerable risks that are being taken in overriding X's expressed wishes and the consequences for her of such a step being taken, bearing in mind her mental disorder and the suicide threats she has made. Those matters weigh heavily in the balance. Having said that, I consider the balance is tipped the other way by what I regard as the substantial and increasing risks X would be left exposed to if this order was not granted. They are*

> *serious risks that would have a direct impact on X's health and safety. There is no prospect of any other step being taken that would bring about out any meaningful change. The evidence set out in the detailed contingency plan includes provision that would seek to mitigate the impact on X of what is proposed by the multi-disciplinary approach, where X would have the continuing involvement and support of the Official Solicitor and a hearing to review the next steps by the court.*

Comment

This is the second reported MCA hoarding case and endorses the *Re AC and GC* approach. Together they paint a similar picture of professional support and patience being required to exhaust all less restrictive options to address the hoarding risks before compulsory measures are sought. They also make an interesting contrast with the case of *Parkin* noted in the Wider Context section of this report.

In *Re AC and GC*, specifying the hoarding decision regarding items and belongings was particularly important for GC who was generally able to make decisions. Whereas in this case, a more holistic approach was taken to capacity which combined the information relevant to residence, care and hoarding, perhaps to avoid potentially incompatible decision silos.

Upholding P's property rights

A Local Authority v Sam M and Helen [2023] EWCOP 68 (HHJ Burrows)

Best interests – property and affairs

Summary[2]

Whether it was in Sam's best interests for his mother to move out of his bungalow was the main issue in this case. He was in his 30s with a serious assault having caused quadriplegia, non-epileptic attack disorder, dysphagia and left him at constant risk of aspiration. With a financial deputy to manage his funds, he received 2:1 carer support. His mother, Helen, lived there with permission (a 'bare licensee') but her behaviour led to suboptimal care, a toxic atmosphere, and the risk of the breakdown of the care package. Suffering from depression, she self-medicated with alcohol and prescription drugs which led to her being abusive to staff. But having not had a drink for a month, she was now intending to receive support for alcohol addiction.

With the Official Solicitor not having been involved in the other parties' agreement to seek a 6-month adjournment to give Helen the opportunity to demonstrate she could keep with the rehabilitation she had started, His Honour Judge Burrows felt a best interests decision was called for given that Sam's incapacity was not in dispute, and the toxicity and dysfunctional culture and conflict within his home was affecting his level of care and rehabilitation, and increasing costs by £30,000-40,000 per year. Sam did not want his mother evicted but also wanted peace in his house and proper rehabilitation.

Having considered the Article 8 rights of them both, with Sam's best interests as the court's primary concern, it was not in his best interests for Helen to live in the same house at the present time. Her moving out after being given reasonable notice of 14 days, with steps taken to ensure they can have a good relationship and she can visit but not interfere with the care workers. This would enable Sam to get the care he needs and avoid the risk of him being placed

[2] Note, this case, although decided in 2023, only appeared on Bailii recently.

in residential care if there was a breakdown in the care package.

Comment

This case is a good example of how useful it is to carefully identify the decisions that P could make with capacity, particularly in the context of proprietary rights. Recognising that Sam's mother was a licensee albeit with Article 8 rights, the court was clear as to the options it had available. The case also illustrates that "it is never a good idea to leave any party out of discussions, but when the one left out represents the person concerned, the Official Solicitor, that is 'suboptimal' practice'" (paragraph 2). Whether Sam was deprived of his liberty in his own home remained to be seen.

Children, capacity and accepting the diagnosis

Y NHS Foundation Trust v AN & Anor [2024] EWHC 805 (Fam) (Family Division (Cusworth J))

Other proceedings – family (public law)

Summary

This case (which we note here, because it could easily have been in the Court of Protection), concerned a 16 year old girl, AN, who had very recently been diagnosed with acute leukaemia. After one night in hospital, she had discharged against medical advice but with the support of her parents. At the time, the doctor concerned was satisfied that she had the capacity to take that decision. Shortly afterwards, the consultant haemotologist visited AN at home to explain to her the urgency in starting treatment, and that why it would usually be done as an inpatient. AN explained that she was not refusing treatment, but needed time to come to terms with her diagnosis. She didn't believe that she would become unwell over several days at home. The haemotologist considered that she had capacity to understand the diagnosis, and the proposed need for inpatient treatment, and the risks of not having treatment. The haemotologist agreed to give her limited time at home before seeing her again ideally to admit her for treatment two days later. At that point, AN returned to hospital, where blood tests that she had "*an aggressive, rapidly progressive form of blood cancer that untreated would be expected to result in life threatening complication within a matter of days or weeks. With appropriate treatment, however, there is a very high chance of remission, and a good chance of long-term cure*" (paragraph 6). The intention was that AN should be immediately admitted, but after many hours of conversation, AN remained of the view that she did not wanted to be admitted:

The view of the haemotologist was that, whilst AN had no impairment or disturbance in the functioning of her mind or brain, AN "*was not accepting of her diagnosis, or of the inevitability that she would become unwell in the absence of urgent treatment. This led her in her statement to conclude that AN 'does not display sufficient capacity today to make decisions about her treatment/safety*'" (paragraph 8).

In circumstances where it was clear that AN would not remain in hospital to start treatment and that her mother would only accept delaying admission, providing supportive medication and continuing blood tests, the hospital brought an urgent out of hours application. Cusworth J conducted the proceedings remotely so that he was able to hear from AN's mother, and saw AN. As Cusworth J noted:

> *11.* […] *As AN is 16, she remains a minor and so would in those circumstances usually be represented through Cafcass as her guardian. I have been referred to the January 2023 guidance provided jointly by Cafcass and the Official Solicitor dealing with out of hours medical cases involving children.*

However, given that the issue of capacity has been raised, and in light of AN's age, this may yet become a case that should appropriately proceed in the Court of Protection, in which case the court could appoint the Official Solicitor as AN's litigation friend. In circumstances where no officer of Cafcass was available at short notice, and pursuant to the Attorney-General's Memorandum of 19 December 2001, paragraph 3, the Official Solicitor was satisfied that this was a case where 'there is a danger of an important and difficult point of law being decided without the court hearing relevant argument', as reconfirmed and explained in the President's Guidance dated 26 March 2015.

Cusworth J, in a written judgment delivered after the events of the night, summarised the case law on the operation of the inherent jurisdiction in relation to capacitous minors, and continued:

16. In this case, the factual background is clear and not in dispute. I accept the evidence of Dr X of the risks to AN if she goes home over the weekend and begins her treatment, but without the intravenous fluids that would protect her kidneys and the regular and reliable testing that would come with her admission. There is a clear and very serious further risk to AN's already compromised health if she is not admitted for treatment tonight. And she is currently in a bed in the hospital and allowing treatments to be administered to her.

17. Furthermore, the fact of an existing underlying infection suggests that the prospects of unmanageable damage occurring before the matter can come back before a court remain significant. Given that to be effective, once necessary tests have been administered to AN, after allowing final decisions about her representation to be taken, and then to get her further instructions, a court hearing next week cannot be before Wednesday 14 February, the period of concern for the court is some 5 nights. Unless AN has a change of heart, or there is a further emergency, the question of her admission would next fall to be considered then.

18. In all of those circumstances, this is clearly a case in my judgment where intervention would be appropriate, if justified in the interests of AN's welfare. I do however pay serious regard to her expressed views and wishes and to those of her parents, both in supporting her and for their own part in advocating for a return home for their daughter. She is clearly an intelligent and articulate young person who, despite the most traumatic of circumstances has nevertheless been able to converse at length with her doctors and in so doing impress on them her capacity and her awareness of her situation. It is not a surprise that she has found the final step, of acknowledging the gravity of her diagnosis and consenting to immediate and demanding treatment a hard one to take over such a short period of time. I remind myself that just this time last week, all of the events since her diagnosis were completely unforeseen and unforeseeable. She has in fact coped remarkably well with the most terrible of situations. It is completely understandable that she would like to be at home.

19. In that situation, I have given very careful thought to whether AN's autonomy should be respected, and she should be given the additional time to process her position which is in effect what she feels that she needs. However, I have come to the very clear view that, notwithstanding her age and her expressed wishes, her welfare needs do dictate that she must now remain where

she is and commence inpatient treatment as Dr X urgently recommends. I bear in mind that this is not a young person who is refusing treatment, but rather one who clearly says that she wants to be treated, but simply wishes to delay the commencement of that treatment. The evidence is very clear that such a delay risks seriously compromising the efficacy of the treatment. The potentially extremely serious side effects of the steroids which AN would be taking at home would not be mitigated by the intravenous hydration which could be provided in a hospital setting. Further, chemotherapy, which would otherwise begin at the start of next week, would almost certainly be delayed, increasing further the risk of the cancer proving fatal.

20. In this case, both the likelihood of an infection causing a serious negative impact on AN's health if the treatment outlined by Dr X is not now started, and the extreme consequences of such an impact for AN, are clear. As against those dangers, alongside of course AN's own clearly expressed wish for more time, I have to weigh the very positive potential outcomes if the treatment is commenced immediately without those risks being run. In those circumstances I am clear that the balance falls comfortably in favour of intervention, and in acceding to the Trust's application for an order which will keep AN in hospital where she is now, so that the life-saving treatments which are available can be administered to her.

21. I hope that she will understand this decision and accept the treatments as offered, as Dr X anticipated that she would. I was gratified to understand from Ms David that the Trust do not propose any physical or chemical means of restraint in order to administer AN's treatment, but rather just to ensure that she is not free to leave the hospital, in the expectation that while she is there, she will permit the treatment that she so badly needs.

At the time of writing, there is no record of what happened at the subsequent hearing; one hopes that, by that time, an agreement had been reached between AN and the treating team about the way forward.

Apart from being a useful reminder of how the courts are available 24 hours a day / 7 days a week for truly urgent cases, the decision is also of interest for the extent to which the questions in issue were filtered through the prism of capacity. This was clearly right, but the whole question of decision-making in the context of 16-17 year olds is riddled with unnecessary complexity: see further here for my attempt to make things slightly clearer.

The case also stands as an interesting counterpart to the decision in *ST* in the context of patients who find it difficult to accept a diagnosis and prognosis: *ST* was heard in the Court of Appeal on 1-2 May; whilst judgment is awaited, the Court of Appeal has made clear that the parents' appeal will be allowed on the basis that Roberts J erred in her approach to the question of whether a person who does not believe their doctor necessarily lacks capacity to make decisions about their medical treatment.

Short note: forced marriage and travel planning

In *Re AG (Welfare: Forced Marriage Protection Order)* [2024] EWCOP 18,[3] Theis J considered the position of a 24 year old woman with a mild learning disability. She had undergone a

[3] Katie having been involved in this case, she has not contributed to this note.

marriage ceremony in 2019 in circumstances which were unclear, Theis J ultimately finding that she could not conclude that she had been forced to marry by her parents, noting that "[t]*his uncertainty is founded largely on the failure of the local authority to properly investigate and analyse the evidence, or keep it under review*" (paragraph 134). She was, however, satisfied that the marriage was not entirely free from family influence, in particular from her parents. She had subsequently been divorced under Sharia law, and was at the time of the hearing in a shared lives placement, having made a capacitous decision to move there.

The local authority responsible for her sought orders:

1. Under the Forced Marriage (Civil Protection) Act 2007 for a Forced Marriage Protection order ('FMPO') for one year to prevent the parents from forcing AG to get married, for the local authority to continue to retain AG's travel documents, prevent the parents from applying for more travel documents for AG and to prevent AG from travelling abroad unless accompanied by her shared lives carer. Her parents opposed this and the Official Solicitor sought interim orders for 6 months to enable further risk assessments to be undertaken.

2. Under the MCA 2005 for approval of the current care plan as being in AG's best interests and for an order authorising the local authority to deprive AG of her liberty in her current placement. The parents and Official Solicitor support the order approving the current care plan but opposed any orders that authorised the deprivation of liberty as being not required or justified on the evidence.

The Official Solicitor sought short term orders under the inherent jurisdiction to provide a structure around AG's contact with her family and to enable AG to retain her capacity regarding such contact in accordance with the principles outlined in *DL v A Local Authority and others* [2012] EWCA Civ 253.

The judgment is lengthy and detailed. In summary, Theis J acceded to the application for an FMPO for a limited period of time:

> *with detailed directions for the necessary risk assessments to be undertaken to include an informed analysis of the risks and protective factors with Article 3, including informed effective and consistent engagement with the family by someone with real expertise in this area and an analysis of the risks of any trip to Pakistan. This work should include an assessment of AG's capacity to travel and a framework to underpin any travel, as suggested on behalf of the Official Solicitor. The proposed framework is set out at the end of this judgment. It is aimed to assist professionals working with AG, but may also be of relevance when care planning in similar cases involving travel abroad.*

The framework was as follows:

> *1. Where is it proposed that AG travels? Research the destination, travel options to get there, the facilities available there (including access to medical care), accessibility and transport options*
> *2. What are the dates of travel?*
> *3. Where is it proposed that AG will stay?*
> *4. Who will be travelling with AG?*
> *5. What care and support will be required during the stay?*
> *6. Who will provide that care and support?*
> *7. Consider writing and/or carrying a "travelling letter" which provides a brief description of AG's needs and any*

diagnos(es) and the details of her doctor. If appropriate, include details of any difficulties that could occur and what assistance might be needed.
8. Consider whether international roaming is available (so that AG can use her mobile phone on a foreign network) and ensure she has an adaptor so her mobile phone can be charged.
9. What are the flight details? When contacting travel providers and airlines, clearly state any needs and any assistance that AG may require.
10. What are the Visa requirements?
11. What vaccinations are needed before travel?
12. What medication is needed? Ensure there is enough medication for the trip and possible delays.
13. Check that any prescribed medication can be taken abroad (some medication contains ingredients that are illegal in some countries).
14. How will the trip be funded?
15. How much money is needed to cover all costs?
16. Who will provide assistance to AG with finances when abroad (as necessary)?
17. What travel insurance is needed? Check that it covers the places that AG will visit, the duration of the visit and any planned activities.
18. Is AG's passport valid?
19. Check whether the emergency contact details on the back of the passport have been completed.
20. Is there an extra form of photo ID that can be checked?
21. Consider any advice that has been provided by the Foreign, Commonwealth & Development Office (FCDO) regarding travel to the area chosen (and any safety and security issues raised).
22. Provide contact details for the nearest British embassy, high commission or consulate, or the FCDO in the UK.
23. Consider what to do if AG goes missing abroad, including detail of how to report it to the police and how the FCDO can assist.
24. Whether independent travel training can be given to AG before the proposed trip to maximum her independence and autonomy.
25. Ascertain the wishes of AG and all those who should be consulted regarding the trip.

Whilst Theis J endorsed the case plan put forward by the local authority, on the basis that AG lacked capacity to make decisions about her care (but not about residence or contact), she did not accept that AG was deprived of her liberty, either objectively or subjectively. In this, the local authority's case was somewhat hampered by the fact that it had only a relatively few months previously declined to grant a standard authorisation in respect of a care home where she was then resident, on the basis that the mental capacity requirement was not satisfied. She considered that, in the event that AG did express a wish to move from the placement "*there is a clear statutory framework to deal with that situation through a combination of the statutory responsibilities of the local authority under the Care Act 2014 and the statutory protection provided by ss 5 and 6 MCA, and, in an emergency situation, section 4B MCA*" (paragraph 145, being clear – see paragraph 114 – that s.4B provided authority whilst a decision was being sought from the court).

Theis J acceded to the Official Solicitor's invitation to invoke the inherent jurisdiction on a time-limited basis with the aim of supporting AG being free from external pressure to facilitate her unencumbered decision-making. At paragraph 148, Theis J identified that:

> *In the unusual circumstances of this case I am satisfied that the inherent jurisdiction should be invoked in the way*

outlined by Ms Sutton. I am satisfied that a combination of the order regulating contact between AG and her parents, supported by the framework to manage any changes in a way that supports any consequent decision will best enable AG to retain her capacity about making decisions about contact, and, indirectly, residence. The order will only be in place for a limited period until December 2024. I am satisfied, bearing in mind the history of this matter that without that structure being in place it is very likely AG will be unable to manage the consequences of any pressure on her to spend increasing time with her parents which, in turn, will impact on her ability to make capacitous decisions.

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. 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 KC: 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. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. 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.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a 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 2022). 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.

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. 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.

Adrian Ward: adrian@adward.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 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.

Adrian will be speaking at the following open events:

1. Adults with Incapacity at the Horizon Hotel, Ayr on 22 May 2024, organised by Ayr Faculty (contact Claire Currie claire@1stlegal.co.uk)
2. Adults with Incapacity Conference in Glasgow on 10 June 2024, organised by Legal Services Agency (contact SusanBell@lsa.org.uk)
3. The World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here)
4. The European Law Institute Annual Conference in Dublin (10 October, details 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