
GARDEN COURT
CHAMBERS

Court of Protection:

Recent Developments in Health & Welfare

Amanda Weston QC, Garden Court Chambers
Helen Curtis, Garden Court Chambers
Ollie Persey, Garden Court Chambers
Bethan Harris, Garden Court Chambers

29 June 2021

Recent Developments in Health & Welfare - Capacity

Helen Curtis, Garden Court Chambers

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Introduction

- Looking at cases since the last update June 2020:
- Capacity to litigate
- Capacity assessments in practice
- Capacity to decide to engage in sexual relations
- Capacity in pregnancy
- Capacity for children

Capacity to litigate

- *Re P* [2021] EWCOP 27 - Mostyn J

- sole issue was capacity to litigate – P lacked capacity to make decisions about HIV treatment and initially thought to have capacity to litigate.

- ‘virtually impossible to conceive of circumstances where someone lacks capacity to make a decision about medical treatment, but yet has capacity to make decisions about the manifold steps or stances needed to be addressed in litigation about that very same subject matter. It seems to me to be completely illogical to say that someone is incapable of making a decision about medical treatment, but is capable of making a decision about what to submit to a judge who is making that very determination’ (para 33).

Capacity assessments in practice

- *Pennine Acute Hospitals NHS Trust v TM* [2021] EWCOP 8 – Hayden J

- Trust sought bi-lateral knee amputation on TM who strongly objected from the outset and believed he would get better without surgery. Changes to TM's brain's white matter had a number of potential explanations.

- 'it is clear therefore that there are a number of identified pathologies which separately or in combination are likely to explain the disturbance or functioning in TM's mind or brain…It is a misunderstanding of s.3 MCA 2005 to read it as requiring the identification of a precise causal link when there are various, entirely viable causes. **Insistence on identifying the precise pathology as necessary to establish the causal link is misconceived**. Such an approach strikes me as inconsistent with the philosophy of the MCA 2005. What is clear, on the evidence, is that the Trust has established an impairment of mind or brain and that has, in light of the consequences I have identified, rebutted the presumption of capacity (para 37).

Capacity assessments in practice

- *A Mental Health Trust v ER & Anor* [2021] EWCOP 32 – Lieven J

- Agreed lacked capacity to make decisions to litigate or about her anorexia but had capacity to decide about treatment for physical conditions. Renal failure may have been caused by the eating disorder but now a separate condition. Lieven J met with ER, found her 'very articulate, clear in her views and in my view, insightful as to her condition' – material which suggested ER may have capacity to make decisions about her anorexia and to litigate. Dr Cahill asked to give oral evidence.

- 'While the evidence of psychiatrists is likely to be determinative of the issue of whether there is an impairment of the mind for the purposes of s.2(1) MCA, **the decision as to capacity is a judgment for the court to make**' (para 28)

- 'Capacity and autonomy are such important principles, that **lack of capacity cannot be assumed for the sake of expediency**' (para 31)

- *A Local Authority v AB and SB (by the Official Solicitor)* [2020] EWCOP 43 – HHJ Anderson – no need for further capacity assessment on contact, previous direction discharged

Capacity assessments in practice

- *KG (Capacity)* [2021] EWCOP 30 – Cobb J
- KG in hospital since 2016 and did not want to leave to live in residential home near his family

- ‘What the **'relevant information**' is under section 3(1)(a) MCA 2005 will depend on the decision to be made but includes the reasonably foreseeable consequences of the decision or failure to make a decision (section 3(4)). I recognise that it is important not to overload the test with peripheral detail, but to limit it to the "salient" factors (per LBL v RYJ [2010] EWHC 2664 (Fam) at [24], and CC v KK & STCC [2012] EWCOP 2136 at [69]). On the issue of residence, I follow the guidance offered by Theis J in LBX v K, L, M [2013] EWHC 3230 (Fam) (at [43]), and on the issue of care, dicta in the same case at [29]. I accept that these formulations are "to be treated and applied as no more than guidance to be adapted to the facts of the particular case" (B v A Local Authority [2019] EWCA Civ 913 at [44]). (para 17)

- ‘On the evidence which I have heard, I find that even though KG has been able to understand the issues around his future residence and care, and can articulate/communicate reasonable objections to a proposed move from Kingsgate Hospital, he is unable to retain abstract information about his future potential residence arrangements and care needs even when encouraged to do so, and is further unable to use and weigh the information relevant to the decision about his future residence and care’. (para 45)

Capacity assessments in practice

- *A Local Authority v GP (Capacity – Care, Support and Education)* [2020] EWCOP 56 – HHJ Dodd made interim declarations in view of age of GP - 19 year old man with autism
- Approach: determine relevant decisions to be made, determine the relevant information in respect of those decisions then determine whether cogent evidence sufficient to support interim declaration that GP lacked capacity in respect of those decisions

- 'to require GP to understand and weigh the nature and extent of the social and personal development opportunities which might be available to him would be to do precisely what Macur J (in LBL v RYJ [2010] EWHC 2665 (para 58)) decided against namely placing greater demands upon him that others of his chronological age/commensurate maturity and unchallenged capacity' (para 38)

- *ZA, Re (MCA 2005)* [2021] EWCOP 39 – Cohen J
- Capacity to refuse amputation in January 2019 and August 2020. Agreed by Nov 2020 lacked capacity to make decision re amputation. In assessing cognitive impairment,
- 'Whether this is the consequence of her schizophrenia or her poorly controlled diabetes and recurrent infections giving rise to delirium. is in issue, but that her cognitive abilities are severely impaired is agreed. Much of the information given to ZA is either not understood or not believed' (para 20).

Capacity to decide to engage in sexual relations

- *Re DY [2021]* EWCOP 28 – Knowles J
- Independent expert evidence distinguished between DY's capacity to decide to engage in sexual relations within and outside a relationship. LA's view was when DY unsettled or distressed she 'may be unable to make a clear and rational decision in relation to sexual relations but when settled or in a familiar situation or surroundings then DY was able to'

- 'In A Local Authority v JB [2020] EWCA Civ 735 (hereafter "Re JB"), Baker LJ re-cast the test of capacity in respect of sexual relations (which previous judgements of the Court of Protection assessed in terms of capacity to "consent") as whether the person has capacity to *"decide to engage in sexual relations"* [93]' (para 14).

- NB *JB to be heard in UKSC on 15 July 2021*

Capacity to decide to engage in sexual relations

- *A Local Authority v C & Ors* [2021] EWCOP 25 – Hayden J
- Under s 39 Sexual Offences Act 2003 a person (A) commits and offence if he *"intentionally causes or incites another person"* to engage in a sexual activity if that person has a mental disorder and A is involved in the person's care in one of the ways set out in s 42 of the Act.

- 'I reiterate that the proposals contemplated here strike me as being far removed from the identified mischief of the relevant provisions. To interpret them as encompassing the proposed actions of the care workers, requires both a distortion of the plain language of the statute and a subversion of the consistently reiterated objectives of the SOA itself' (para 94).

- Permission to appeal to CA granted

Capacity to decide to engage in sexual relations

- *A v AG and CI (No. 2) (Rev 1)* [2021] EWCOP 5 – Poole J
- P has capacity for contact and sex but not for marriage
- (see [2020] EWCOP 58 for the adjourned decision in which guidance for expert reports was given and a new expert report ordered)

- 'Due to her inability to understand, retain and weigh information, she has fantastical beliefs that the act of getting married will result in her living independently in the community, free her of the need for care, and enable her to work. This is what married life was like for her in the past, and her impairments due to her frontal lobe dementia result in an inability to understand that marriage in the future will not return her to that same level of functioning and independence' (para 23).

- *AA (Court of Protection: Capacity to Consent to Sexual Practices)* [2020] EWCOP 66 – Keehan J: AA has capacity to litigate, make decisions as to residence, care, sexual relations. Interim declarations that AA lacks capacity to engage in AEA or make decisions as to contact with people he meets online

Capacity in pregnancy

- *East Lancashire Hospitals NHS Trust v GH* [2021] EWCOP 18 – MacDonald J
- Emergency out of hours application. GH, initially assessed as having capacity to make decisions re birth. Anxiety and agoraphobia resulted in assessment that GH lacked capacity to decide whether to agree to be admitted to hospital for treatment and possible c-section

- Functional element of the test for capacity: GH lacks the ability to use and weigh information relevant to the decision in issue. GH was able to recall and articulate some of the risks attendant on not being admitted to hospital, she was fixated on the idea that those risks would not come to pass with respect to her and could be avoided provided she was permitted to remain in her "safe space", which action would, with the support of her partner, by itself enable her body to successfully deliver the baby.

Capacity in pregnancy

- *A NHS Foundation Trust v An Expectant Mother* [2021] EWCOP 33 – Holman J
- Agreed between the parties that P lacked capacity to make decisions about location of birth due to severe agoraphobia – 'so overwhelming that it exerts a significant effect on her ability to weigh matters in the balance if the activity in point entails her leaving her home'

- 'the case illustrates, in my view, the need to anticipate problems of this kind and to face up to them as best one can in advance, even if that involves speculation and/or reliance upon statistics' (para 17).

- *University Hospitals Dorset NHS Foundation Trust & Anr v Miss K* [2021] EWCOP 40 – Lieven J – application made late; apologies are not enough

Children and Gillick competence

- *Bell and A v Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin) Respondent had proceeded on basis child was Gillick competent and therefore not necessary to ask whether the parents could also consent. Court said highly unlikely children under 16 would be able to offer informed consent – unless they were 'Gillick competent'.
  Tavistock appealed. Heard in the CA on 24 and 25 June
- 'the case is not about whether this treatment is a good or bad idea'

- *AB v CD & Ors* [2021] EWHC 741 (Fam) – Lieven J
- Different question from *Bell*: Does the parent retain the legal ability to consent to treatment whether or not the child is Gillick competent? Or does the decision as to whether child is prescribed PBs come before the court as a legal requirement or good practice? Concern GP may not continue to prescribe.
- Parental right to consent to treatment continues even when child is Gillick competent save where the parents are seeking to override the decision of the child. No BI assessment

Health & Welfare Update: Best Interests

Ollie Persey, Garden Court Chambers

29 June 2021

Introduction

- In this session, I will be reviewing some of the key points in the case law and legal developments in the area of best interests over the last 12 months:
  - COVID-19 vaccination
  - Permanent relocation out of jurisdiction
  - Removal of a relative from P's home
  - Keeping best interest assessments under review

COVID-19 vaccination

- E (Vaccine) [2021] EWCOP 7 (20 January 2021)
- SD v Royal Borough of Kensington And Chelsea [2021] EWCOP 14 (10 February 2021)
- Re CR [2021] EWCOP 19 (12 March 2021)
- SS v London Borough of Richmond Upon Thames & Anor [2021] EWCOP 31 (30 April 2021)

E (Vaccine) [2021] EWCOP 7 (Hayden J)

- When E had capacity, she chose to be vaccinated in line with public health advice.
- E's son suspicious of vaccination but this was his personality and not his mother's. He also did not object 'in principle'.
- Risk factors for E:
  - 80s
  - Living in a care home
  - Care home has confirmed positive cases of COVID-19
  - Type II diabetes
  - Difficulty in complying with social distancing due to dementia

- UK had highest death rate per capita at the time
- Vaccine highly effective
- "Not a delicately balanced risk matrix"

SD v Royal Borough of Kensington And Chelsea [2021] EWCOP 14 (Hayden J)

- Concerned welfare of V (Korsakoff's syndrome). A woman in her 70s living in a care home. SD is her US-based daughter.
- SD argued that vaccines are in preliminary trials so no reliable data, particularly on patients with dementia and organ damage.
- Did not want vaccination before February 2023. SD claimed that V would not have wanted.
- SD had influenza vaccine when capacious.
- Views of 'Mr A', care home worker for 20 years, given significant weight – 'filled a void created by the pandemic'.
- Hayden J "evaluate[d] V's situation in light of the authorised, peer-reviewed research and public health guidelines, and to set those in the context of the wider picture of V's best interests" [31]

Re CR [2021] EWCOP 19 (HHJ Butler)

- CR 31-year old with learning disability, autism and epilepsy in a care home since 31 January 2021.
- Although CR not elderly, still in a clinically vulnerable group. Risks still high and engage Article 2 ECHR.
- "So, notwithstanding that CR has the advantage of youth on his side, in my judgment CR still faces a real and significant risk to his safety if the vaccination is not administered. For the avoidance of doubt this applies to both doses."
- SR's (CR's father) "genuinely held" objections, "not intrinsically illogical" but had "no clinical evidence base" – e.g. reference to MMR vaccination and autism.
- Reasoning applies to "both doses" of the vaccine [3.8]
- "I grant the relief requested by the CCG but with the important caveat that I am **not** authorizing physical intervention in order so to" [4.8]

SS v London Borough of Richmond Upon Thames & Anor [2021] EWCOP 31 (Hayden J)

- Woman in her 80s with dementia in a care home.
- Almost 28% of residents in that care home died from COVID-19 in the first lockdown.
- SS strongly resistant to medical interventions
- This case provides *" an opportunity to evaluate strongly and consistently expressed views by P relating to vaccination and the weight they should be given, in the broader landscape of the insidious risk arising from the Covid-19 public health crisis."*
- Best interests not just about epidemiological but "requires evaluating welfare in the broader sense".
- Vaccination would require "sedation and restraint" that would require carers' involvement. SS would look to carers for help, would not be able to intervene and it would be distressing for both parties.
- Weight also given to change in balance of risk: high vaccination, and low transmission of Covid-19 (see [33]).
- Overall, not in SS's best interests to be vaccinated.

Re UR (Rev 1) [2021] EWCOP 10 (Hayden J)

- UR, 68 years old, born in Poland, been in a nursing in Derby for 9 months
- UR expressed consistent wish to return to Poland and to her family. UR's sister and niece have repeatedly offered to care for UR.
- Moving to Poland in UR's best interests
- Hayden J provided guidance and pro forma order for other cross-border cases (see [57]-[58]

Re UR (Rev 1) [2021] EWCOP 10 (Hayden J)

i. Liaison with the relevant Embassy/ Consulate (in the first instance) to ascertain what guidance and assistance can be provided;
ii. Evidence as to physical health to travel (GP);
iii. Evidence as to mental health to travel (psychiatrist);
iv. Legal opinion regarding citizenship, benefit entitlement, health and social care provision in the relevant country, and such other issues relevant to the case;
v. Consideration of any applications that need to be made as a consequence of any legal opinion provided;
vi. Independent social work evidence regarding the viability of the proposed package of care in the relevant country if such evidence cannot be provided by the parties to the proceedings or a direction under section 49 MCA;
vii. Confirmation of travel costings from the commissioners of the care package, both in relation to P and any carers that may need to travel with them (who will pay?)
viii. Confirmation that the necessary medication/ care will be available during travel from the UK/ for the immediate future in the new country
ix. Transition plan/ care plan, to include a contingency plan and how the matter should return to court in the event of an emergency in implementing the proposed plan;
x. Best interest evidence from the relevant commissioners;
xi. Wishes and feelings evidence;
xii. Residual orders to allow the plan to be implemented, including single issue financial orders regarding opening/closing of UK bank accounts, the purchasing of essential items to travel (if necessary)
xiii. Covid-19 considerations prior to travel (if applicable)

A Local Authority v TA [2021] EWCOP 21 (Cohen J)

- GA an 87-year-old woman, lived with children TA and HA
- TA presented as GA's sole carer and proprietor of a 'care home' (his mother's home)
- TA removed of P&FA LPA in December 2018 following an application from OPG.
- TA convicted of fraud and abuse of position in February 2016.
- Judgment
  1) Risk of immediate harm to GA
  2) GA deprived of basic rights
  3) GA deprived of medical attention
  4) No evidence of GA receiving medication
  5) GA cut off from at least 3 children and all of her grandchildren
  6) GA's intimate care being carried out by TA (a man) against her wishes- 'humiliating' for a woman of her faith.
  7) GA under 24-hour video surveillance

- "Draconian" order to remove TA from home and a cordon of 100 yards around GA's property
- Hopes that TA can be brought back into fold and mindful of interference with his rights.

Z v University Hospitals Plymouth NHS Trust (NO 2) [2021] EWCA Civ 22 (King and Peter Jackson LJJ)

- Appeal of order of Cohen J in which he refused their application for a declaration that it would be in RS' best interests to receive CANH
- Estranged family used visit to RS to film him for the purpose of obtaining evidence.

- Birth family argued a breach of Article 2 ECHR- plainly wrong. Welfare principle applies to all decisions, whatever the diagnosis.

- King LJ: *"The court will, if appropriate, review an earlier best interests determination. As Francis J put it in Great Ormond Street Hospital v Yates (No 2), [2017] 4 WLR 131 at para.11, such a reconsideration will be undertaken "on the grounds of compelling new evidence" but not on "partially informed or ill-informed opinion". In my judgment the evidence of both Dr Pullicino and Dr S, for the reasons given by Peter Jackson LJ, fell into the latter category [...] I would therefore respectfully endorse the observation of Peter Jackson LJ that, whilst the dissenting views of the birth family must be given every consideration, "it is the responsibility of the court to ensure that RS's best interests are not prejudiced by continued unfounded challenges to lawful decisions".*

Court of Protection Health & Welfare – Recent Developments

Bethan Harris, Garden Court Chambers

29 June 2021

Content

- Deprivation of Liberty
- Practice and Procedure
- The High Court's inherent jurisdiction for the protection of vulnerable adults

Identifying a deprivation of liberty - supported living; Guardianship Order

***A Local Authority v AB* [2020] EWCOP 39, Sir Mark Hedley, 20 August 2020**

Facts: AB, age 36, has Asperger's, had been discharged from MHA 1983 under a Guardianship Order (s 7 MHA 1983) to a supported living placement. The Official Solicitor on her behalf contended the arrangements for her accommodation and care were a deprivation of liberty (DOL). The local authority (LA) contended there was no DOL.
The arrangements:

- Guardianship Order with condition requiring residence at the accommodation
- she lived in a flat in supported accommodation where there was always support available day and night for her to take up as she pleased
- free to leave the accommodation but would be seen leaving by staff and if she failed to return the police would be called
- staff had access to her flat for inspecting, cleaning, repairs.

Held:

- The issue was the element of the "*acid test*" whether AB was under "*continuous supervision and control*" (***P v Cheshire West* [2014] UKSC 14**); the case was borderline; whilst she was free to leave the accommodation she was always subject to state control requiring her to return; there was supervision in the sense that all her movements were known and noted and whilst she could do as she pleased in the community there was inevitably some obligation to restrain or control those movements should they become seriously detrimental to her welfare. It was agreed the arrangements were in AB's best interests; there was a DOL which the court authorised, subject to annual court review.

Identifying a deprivation of liberty (***A Local Authority v AB***, *continued*)

Points to note in the judgment/comment

- The Guardianship Order with condition of residence did not of itself amount to a DOL.

- The court should look not just at what happens in practice but at what the true powers of control actually are (para 13).

- "one has to reflect how (the arrangements) would be observed by the ordinary member of the public" – they would regard them as a real deprivation of liberty (and the policy behind the "acid test" is that everyone should be treated the same) (para 14).

- An important factor was Baroness Hale's policy that because of the extreme vulnerability of the persons concerned "*we should* ***err on the side of caution*** *in deciding what constitutes a deprivation of liberty in their case*" (***Cheshire West*** (above), para 57).

- A useful case for the approach to applying the law in borderline cases.

Identifying a deprivation of liberty - in the family home

London Borough of Havering v AEL **[2021] EWCOP 9, Senior Judge Hilder, 4 January 2021**

Facts: AEL, aged 31, has a diagnosis of Trisomy 4p syndrome, resulting in severe learning disabilities and other impairments. She lived at home with her parents. The court determined a dispute between AEL's father and the other parties, as to whether AEL was being deprived of her liberty in the family home requiring authorization by the court under s 4A MCA 2005. The father regarded the contention that the care arrangements for his daughter were a deprivation of her liberty as "*palpably nonsense*" referring to the fact that parents and carers would facilitate her wishes unless her safety was compromised giving the example of AEL wanting to leave the family home at night and being driven to All night McDonalds. However, the facts were that AEL had 24-hour care and supervision and was accompanied at all times, and although she was facilitated to do what she wanted, her activities were risk assessed and so she was allowed/not allowed to do things accordingly.

Held:

- "*acid test*" applied of whether "*was under continuous supervision and control and was not free to leave*" (***Cheshire West***, para 49); "*free to leave*" means removing themselves permanently to live where and with whom he chooses (***Birmingham CC v D*** **[2018] PTSR 1791, Sir James Munby**)

- it was clearly a case where there was continuous supervision and control and the acid test was made out.

Identifying a deprivation of liberty (**London Borough of Havering v AEL**, *continued*)

Points of interest in the judgment

- includes the approach set out in ***A Local Authority v AB*** (above): consider matters in the round and ask how would an ordinary member of the public consider these arrangements if applied to them (as P should be treated the same as everyone else would be) (para 49)

- although a clear case, it was held that if there was room for doubt the court should err on the side of caution in finding that there was a deprivation of liberty (per Baroness Hale in *Cheshire West*).

Whether it was in P's best interests to order authorization of a DOL contingent on loss of capacity at a future date? (which requires invoking the inherent jurisdiction of the High Court)

A County Council v KK, SK and JK [2020] EWCOP 68, Lieven J, 18 December 2020

Facts: JK, aged 18, has diagnoses of diabetes, eating disorders and mental health issues. JK spent January – October 2020 deprived of her liberty in a psychiatric hospital and was discharged to a supported placement where she had 24/7 1:1 support. A capacity assessment found she now *had* capacity to make decisions about the care and treatment of her diabetes *except* when under considerable distress and has overwhelming emotions. She could develop her capacity by developing skills to cope with extreme emotion.

The LA's concern was that if her diabetes was mismanaged JK was at risk of death. The court had authorized in October 2020 that in the event of a medical emergency reasonable force could be used to transport her to hospital and prevent her leaving hospital. The LA sought the continuation of this order.

Held: There may be times when JK may loose capacity even though the vast majority of the time she had capacity. However the was not be made, based on the interests analysis: JK did not want the DOL order to continue, she wanted an opportunity to show she could work with the LA, the court process caused her stress, a DOL order could impact detrimentally on her future work plans; the judge referred to the well-known passage in ***Local Authority X v MM and Anther*** **[2007] EWHC 2003 (Fam)** "*A great judge once said, all life is an experiment….*"; JK had grown in maturity; the DOL order would undermine her determination to take control of her life: it would say the court and wider community do not trust her; the judge also doubted the order would serve a useful purpose (para 37).

A County Council v KK, SK and JK, *continued*

Comment:

- The case was decided on best interests principles (refusing an order authorising a DOL in the event of a future loss of capacity)

- The fact of the DOL order itself would have a significant negative impact on JK

- The appropriate jurisdiction for a prospective order to authorise a DOL in the event of future loss of capacity (not identified in the judgment in ***KK***) is the High Court's inherent jurisdiction for the protection of vulnerable (or incapacitous) adults. See ***Guys and St Thomas' NHS Foundation Trust (GSTT) and South London and Maudsley NHS Foundation Trust (SLAM) v R*** **[2020] 4 WLR 96; [2020] COPLR 471 in which** Hayden J held:
  - whereas s 16 MCA 2005 applies where a person currently lacks capacity, under s 15 (1) (c) MCA 2005 the court can make a declaration that is contingent on a person losing capacity in the future, declaring that the anticipated relief will be lawful when and only when P becomes incapacitous (para 36)
  - but s 15(1)(c) MCA 2005 cannot be relied on to authorize a deprivation of liberty (on the basis of incapacity whether current or future) because of the restrictions in s 4A MCA 2005 on when a DOL can be authorized under the MCA. Therefore in order to authorize a DOL in the event of future loss of capacity the court must invoke the inherent jurisdiction.

S 21A MCA 2005 – role of the court is to review the standard authorization

S 48 MCA 2005 – nature of the power and what is required when exercising it

DP (by his ALR) v LB Hillingdon [2020] EWCOP 45, Hayden J, 28 September 2020

Facts: Application under s 21A MCA 2005 in respect of DP, a resident in a care home, challenging the mental capacity and best interests requirements. The Deputy District Judge made interim declarations under s 48 MCA 2005 that DP lacked capacity to decide on whether to be accommodated in the care home to be given the relevant care or treatment and ordered a report on capacity under s 49 MCA. DP appealed contending (among other things) that the judge wrongly approached the question of making a declaration of incapacity.

Held on the appeal

(i) The approach of making a declaration of incapacity under s 48 MCA was incorrect. When the court determines a question relating to the authorisation (under s 21A MCA) the extant authorisation remains in force without the need for a positive decision by the court. The court does not become responsible for authorising the DOL; its function is to review it (paras 34, 45- 46).

(ii) It was undisputed between the parties that s 48 does not provide for making a declaration so the finding under s 48 ought, strictly, not be phrased in declaratory terms (paras 40, 49). COP Rules 2017 r 10 provides for interim remedies (para 30).

(iii) Obiter guidance given on the exercise required under s 48 MCA, including: that the words of the statute require no gloss; the entire canvas of available evidence is to be scrutinised; there is balancing exercise to confront (autonomous adult decision making v safety and well-being) (para 62).

DP (by his ALR) v LB Hillingdon, *continued*

Points to note in the judgment

- Confirms the court's duty to determine whether the mental capacity requirement is met; and if uncertain to investigate and do so "speedily" (para 41).

- It was open to the judge to permit questions to be put to the doctor who carried out the assessment under Schedule A1 or arrange for him to revisit his assessment (para 41) (Comment: this may/may not be a useful approach in a given case.)

- Confirms the need for scrutiny of the strength of the evidence on incapacity when exercising the power s 48 (neither restrictive nor a "perfunctory gateway").

Whether errors on a standard authorisation invalidate it

***YC (by her ALR) v City of Westminster and SC* [2021] EWCOP 34, 27 May 2021, Senior Judge Hilder**

Facts: S 21A MCA 2005 proceedings in which an appeal was brought against the decision of the Deputy District Judge (DDJ) not to treat a standard authorisation in Form 5 (issued under Schedule A1 MCA 2005) that contained errors as invalid. YC's name was correctly stated on the form and other matters that Schedule A1 required to be specified were correctly stated but in the narrative part of the form, out of 25 references to the person subject to the DOL, the name was stated as "Ms Hull", not YC. The LA filed a witness statement of the relevant officer stating he did undertake the necessary scrutiny of the underlying assessments and there was simply a mistake in the text.

Held: Senior Judge Hilder

- dismissed the appeal: the DDJ had been entitled to conclude that the errors were merely typographical, not substantive inadequacy; the DJJ had accepted, and was entitled to accept, the LA's evidence, so the scrutiny required had been applied; but the errors should not have happened; this was poor practice
- endorsed as future practice: checking of the completed Form 5 by a second member of the DOLS authorisation team and by the RPR (but by no means delegating responsibility to the RPR)

YC (by her ALR) v City of Westminster and SC, *continued*

Comment

- Refers to and serves as a reminder of the importance of - for understanding fundamentals - the decision in ***LB Hillingdon v Neary*** **[2011] EWCOP 1377, Peter Jackson J**. Steven Neary was held to be unlawfully deprived of his liberty even when SAs were in place. There was a litany of flaws in the underlying assessments themselves including the lack of mention of the fact that Steven wanted to go home. It was held that the Supervisory Body must scrutinize the assessments with independence and care.

- Here, in contrast to the **Neary** case, the underlying assessments *had* been properly completed (although the best interests assessment was under challenge in the s 21A proceedings).

- The court will consider the substance of the exercise that has been carried out to determine whether the deprivation of liberty is lawful. However, serious errors of form may be difficult to overcome evidentially.

- Shows the perils of "*cut and paste*".

Damages for unlawful deprivation of liberty

***London Borough of Haringey v Emile* [2020] County Court at Central London, 18 December 2020, HHJ Saggerson, on appeal from DJ Beckley**

Facts: A claim for care home fees was brought against Mrs E who defended by her daughter as litigation friend and as the representative of Mrs E's estate after she died, pursuing a counterclaim for damages for unlawful deprivation of liberty. Mrs E had been placed in a care home in 2008. A standard authorisation was not put in place until 2016. It was found on the facts that Mrs E had lacked capacity to make decisions about where to live and receive care from the time of her initial placement.

At first instance DJ Beckley allowed the LA's claim for unpaid care home fees of £80,913, without interest; awarded Mrs E £143,000 on her counterclaim, including a 10% uplift (Simmons v Castle); and set the 2 sums off against teach other, ordering the LA to pay £62,086; no order for costs up to 7 May 2018 and the LA to pay Mrs E's costs thereafter.

Held on the LA's appeal: the award was generous but not manifestly excessive or disproportionate; the LA's inadequate approach to capacity was the real cause of its failure to consider alternative and less restrictive accommodation and care options and DJ Beckley had been entitled to conclude that the LA's failures were substantial and not mere technicalities warranting merely nominal damages. Likewise the refusal of interest (a matter of judicial discretion) and the costs order were upheld.

Practice and Procedure: Application to be joined as a party; withholding information from the applicant - principles

KK v Leeds CC [2020] EWCOP 64, Cobb J, 14 December 2020

Facts: P had been looked after by her aunt, KK. P alleged she had been sexually abused by KK's son and husband. KK applied to be joined as a party to the proceedings. At first instance the circuit judge had refused her application for party status after a hearing in which he adopted a partially closed procedure in which he considered information which was withheld from KK and her representatives. KK appealed against the decision contending that the closed procedure was unfair.

Held: Cobb J, dismissing the appeal:

-set out (at para 41) principles that should be considered on an application for party status, including: the general obligation of open justice; any decision to withhold information from an aspirant for party status can only be justified on the grounds of necessity; the judge should always consider whether a step can be taken to acquaint the aspirant with the essence of sensitive withheld material by providing the "*gist*" of the material or disclosing it to the applicant 's lawyers. (The last point was specifically approved of by the CA in **Re P**, para 61 (see below)).

- held that joining K would have brought about consequences that would defeat the purpose of the proceedings; this was not a case where it would have been possible to "*gist*" the material to KK and her lawyers or to employ other procedural mitigations (referred to in para 26 of the judgment) that may well be suitable in other cases.

Discharge of a party to the proceedings – the need for judicial inquiry - principles

Re P (Discharge of Party) [2021] EWCA Civ 512 , on appeal from Hayden J

Facts: Hayden J discharged the mother of P as a party without notice and subsequently adjourned her application inviting him to give a reasoned judgment. Preceding these decisions, information had been disclosed to the court and other parties but not to the mother and her solicitors, alleging sexual abuse of P by the mother's partner and a male visitor and that the mother had told P not to mention it. A hearing the mother's legal representatives were directed to absent themselves for part of it, and when called back in they were informed that contact with the mother was not in P's best interests and the mother was discharged as a party.

On the mother's appeal, the hearing bundle contained "closed material", a special advocate was appointed to consider the closed material on behalf of the mother. She was given the "gist" of the undisclosed material. The respondents and the special advocate filed both open and closed skeleton arguments.

Held: allowing the appeal

- It was not necessary to discharge the mother as a party without notice, less draconian steps could have been taken.
- There was a need to abide by the ordinary principles of judicial inquiry.

Discharge of a party to proceedings - ***Re P (Discharge of Party)*** **[2021] EWCA Civ 512**, *continued*

Points to note in the judgment:

- The CA lists the things that could have been done short of the immediate discharge of P as a party: injunction, withholding some of the evidence for a period, serve in redacted or "*gisted*" form
- A case management decision to discharge a party is **not a decision within s 1(5) MCA 2005** (on behalf of P in P's best interests). However, P's best interests are relevant: COP Rules r 1.1(3)(b) requires that the interests and position of P are considered, and this factor occupies a central position (***KK v Leeds***, para 41 (iii) and ***Re P***, para 53).
- When the court exercises its "*immense power*" under the **COP Rules r 3.3 to dispense with the requirements of any rule**, the court must have regard to the overriding objective in rule 1.1 and the ordinary principles of judicial inquiry (para 56).
- Key cases referred to: ***RC v CC*** **[2014] EWCOP 131, Sir James Munby** (on withholding documents) and ***Re D*** **[2016] EWCOP 35, Senior Judge Lush** (on dispensing with services of an application on a person otherwise entitled to it)

Injunctions – no power to compel provision of a service; Costs order for unreasonable conduct

Re JB (Costs) [2020] EWCOP 49, 2 October 2020, Keehan J

Facts: The provider of accommodation gave notice that JB must leave. The LA, unable to identify an alternative provider willing or able to meet JB's needs, sought an injunction against the provider (SG) to prevent JB being required to leave the accommodation until October 2020. The parties filed skeleton arguments opposing the application on grounds of lack of jurisdiction. The LA sought permission to withdraw its application, and, by consent, the court ordered the LA to pay SG's costs. Subsequently the other parties sought orders for their costs of responding to the application for the injunction. With reference to ***N v A CCG* [2017] AC 459,** it was argued that the application for the injunction was doomed: the COP could not order the provider to provide accommodation if it was not willing to do so.

Held: the application was totally without merit; it was unreasonable conduct justifying departure from the usual rule of no order for costs.

Comment: S 16(5) MCA empowers the court to make such further orders "*as it thinks necessary or expedient for giving effect to or otherwise in connection with*" an order under s 16(2). This power to make ancillary-type order plainly cannot be used to seek to compel the provision of a service or accommodation that a person/body is not willing to provide.

For an analysis of the law underpinning the court's power to grant injunctions to support and ensure compliance with its best interests decisions, see ***Re SF (Injunctive Relief)* [2020] EWCOP 19, Keehan J.**

Other practice & procedure cases

Re-opening of a best interests decision - principles

***An NHS Trust v AF* [2020] EWCOP 55, Poole J**: the court may revisit a previous best interests decision where there has been a material change of circumstances or there is new evidence that calls into question previous findings

Contempt of court by interference with the administration of justice (forgery of court order); sentence

***Re Griffith (Application to Commit)* [2020] EWCOP 46, MacDonald J, 2 October 2020**: forgery of a court order in order to obtain disclosure of medical records; sentence to an immediate 12-months imprisonment; warrant issued; sets out procedure for committal and principles for sentencing

Application to record hearings refused; injunction restraining communications with the court office

***A Local Authority v TA & Others* [2021] EWCOP 3, Cobb J, 22 January 2021**

TA's application to permit him to make his own recordings of hearings was refused.

An injunction was granted to restrain TA from communicating with the court office by email or telephone. TA sent 367 emails to the court office in 2019-2020; made 39 COP 9 applications over 24 months and telephoned the court office regularly spending 30-40 minutes on the phone challenging the competence of staff and accusing them of colluding with the LA against him.

The inherent jurisdiction of the High Court for the protection of vulnerable adults

- context

- **In *re SA (Vulnerable Adult with Capacity; Marriage)* [2006] 1 FLR 867** contains the leading exposition of the jurisdiction by Munby J. It was approved by the CA in **A Local Authority v DL [2013] Fam 1**.

- ***A NHS Trust v A* [2014] Fam 161, [2013] COPLR 605 :** inherent jurisdiction relied on to authorize deprivation of liberty of a person lacking mental capacity in relation to his treatment where MCA 2005 was not available.

- In ***Southend-on-Sea BC v Meyers* [2019] EWHC 399 (Fam) [2019] COPLR 202** Hayden J's interpretation of the parameters of the jurisdiction was wide (and controversial); he made orders directed to Mr Meyers, who had capacity, which required him for a period not to return to his own his own home to live with his son.

- ***Whither the inherent jurisdiction ? How did we get here? Where are we now? Where are we going?*** - A lecture by Sir James Munby to the Court of Protection Bar Association, 10 December 2020 cpba.org.uk/events/past-events/

The inherent jurisdiction of the High Court for the protection of vulnerable adults – recent cases

Misconceived attempt to rely on the jurisdiction in claim for financial support:

FS v RS and JS [2020] EWFC 63, Sir James Munby, 30 September 2020

41-year- old man sought financial relief against his parents under the inherent jurisdiction for the protection of vulnerable adults – an "*unusual*" and "*unprecedented*" case. Held that the jurisdiction was not available: the claim fell far outside its parameters (para 113); it cannot be used to compel an unwilling third party to provide money or services (para 123); and the jurisdiction would in any event be ousted by the statutory scheme for when a child/adult child can make a claim against a parent (para 137).

Lack of evidence of circumstances that trigger the jurisdiction; ex parte application wrongly made:

Mazhar v Birmingham Community Healthcare NHS Trust (CA) [2021] 1 WLR 1207 (27 October 2020)

Facts: M had Duchenne muscular dystrophy. He had a PEG tube, was on a ventilator and received a package of support. He did not lack capacity to make decisions about his care. When there was a breakdown in the care package, the Trust was concerned that without regular suctioning overnight he was at risk of severe injury or death.

Mazhar v Birmingham Community Healthcare NHS Trust (CA), continued

M's mother refused to allow the Trust to move him to an intensive care unit. An ex parte out of hours order was obtained which authorized M's removal by police and medical professionals to hospital and deprivation of his liberty in hospital for receipt of care and treatment. He was removed from his home that night. M was not given notice and stated, had he been, he would have asked his mother to seek advice from the family solicitor and to be represented at the hearing.

Held:

- There was manifestly insufficient evidence to conclude that M's will had been overborne by the influence of others so as to trigger the inherent jurisdiction, or that M was of "unsound mind" within Article 5(1) (e) ECHR: the decision to grant the injunction was wrong.
- There was also a breach of M's Article 6 rights.
- The court set out lessons to be learned including the need for notice to the individual concerned save in exceptional circumstances; the need to provide the court with the basis upon which it is contended the court has power to make the order; the order should include in a recital the basis on which the court has found/has reason to believe it has the power to make the order (para 74).
- As regards whether the inherent jurisdiction could be used to authorize a DOL, the preponderance of authority at first instance was that it could, provided the requirements of Art 5 were satisfied (paras 33 and 52), but the CA did not rule on the point.

Legislation; guidance; policy etc.

- *Rapid Consultation on remote, hybrid and in person hearings in the family justice system and Court of Protection* – June 2021
- New Code of Practice to the MCA 2005: new draft Code to be published for public consultation
- *Liberty Protection Safeguards* (to replace the Deprivation of Liberty Safeguards, Schedule A1 MCA 2005): target date for implementation is April 2022; draft regulations to be published for public consultation; draft Code will include LPS; LPS factsheets - 9 so far on GOV.UK
- Latest DHSC guidance on care home visiting: 21 June 2021, GOV.UK
- Mediation in the Court of Protection (pilot):https://www.courtofprotectionmediation.uk/
- *Domestic Abuse Act 2021*, to come into force by commencement orders; there will be pilots for the new domestic abuse orders: see Overarching Factsheet, 18 May 2021 GOV.UK

Thank you

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw