Mental Capacity Law Newsletter October 2016: Issue 69

Court of Protection: Practice and Procedure

Welcome to the October 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: getting tangled up in ineligibility, survey and statistical data relating to DOLS and news of a new COPDOL10 form;

(2) In the Property and Affairs Newsletter: deputies and remuneration, capacity and influence, and updates from the OPG;

(3) In the Practice and Procedure Newsletter: participation of P, extending the great safety net abroad, the limits of the coercive power of the inherent jurisdiction, and an expert beyond bounds;

(4) In the Capacity outside the COP Newsletter: a report from the World Guardianship Congress, a new Jersey capacity law and a report on what Singapore can teach us about the MCA 2005;

(5) In the Scotland Newsletter: case notes shedding light on practice in relation to adults with incapacity, new MWC reports and new supervision practices by the OPG.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

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For all our mental capacity resources, click here.

Participation of P in proceedings before the Court of Protection

A County Council v (1) AB (2) JB (3) SB [2016] EWCOP 41 (HHJ Mark Rogers)

Practice and procedure – other

Summary

In the course of welfare proceedings involving a young man, AB, a fact-finding hearing was listed to determine serious allegations against his parents, and the question arose of whether, and how, he was to participate in the hearing. The key issues for HHJ Mark Rogers to determine were framed by Counsel for AB thus:

(a) whether the decision as to whether P in proceedings in the Court of Protection should attend Court is a decision for the Litigation Friend as part of the conduct of proceedings or a best interest determination for the Court;

(b) whether the decision as to whether P in such proceedings gives evidence is a decision for the Litigation Friend as part of his conduct of the proceedings or a best interest determination of the Court;

(c) what the test of competence in Court of Protection proceedings is;

(d) whether AB is competent to give evidence according to that test;

(e) if the answer to (a) is 'the Court' whether it is in AB's best interests to attend Court and meet the Judge, although it seems to be agreed that such a meeting would be appropriate;

(f) if the answer to (b) is 'the Court' whether it is in AB's best interests to give evidence.

The Official Solicitor, on behalf of AB, contended that the key decision-maker in respect of P's active participation in the case is the Litigation Friend, with the Court having no or only a residual duty to overrule.

A further question arose as to whether or how AB should be allowed to participate, whether by attendance or by meeting the Judge, by presence in the court room or via a link, or offering direct oral input into the proceedings. As the judge noted, the use of the term "oral input" as there was an issue to whether what AB says is truly evidence. The Local Authority and the parents all opposed AB giving evidence or addressing the Court other than in an informal meeting with the judge. The parents opposed AB's attendance at Court and the Local Authority had some reservations although would support practical arrangements so long as they did not draw upon Local Authority funding or resources to any significant extent.

As regards the question of who should decide whether P should attend court, HHJ Rogers was clear (at para 49) that:

> *(1) the Litigation Friend has a pivotal role in the conduct of the litigation and should not be supervised or micro-managed by the Court;*
>
> *(2) the Court nevertheless retains the ultimate power to dismiss a Litigation Friend;*
>
> *(3) it follows in principle that a Litigation Friend can decide whether P attends a hearing and tries to participate;*

> *(4) the Court has no general power under the Rules or case management powers to exclude P. Good practice suggests that a constructive dialogue between the Litigation Friend and the Court will be helpful and almost always will achieve practical consensus;*

As regards the question of the test for competence to give evidence in the Court of Protection, HHJ Mark Rogers held that:

> *(5) the Court of Protection is governed by civil rules of procedure and evidence albeit that specific Rules in the Court of Protection have been made. As it is a dynamic jurisdiction it has immense flexibility. Whilst there are helpful parallels to be drawn between the approach in Children Act proceedings and Criminal proceedings I am not prepared to import Section 53* [*Youth Justice and Criminal Evidence Act 1999*] *into this jurisdiction; that is in the end a matter for Parliament;*
>
> *(6) the key provision however remains there already, namely, Rule 95(e), and the Court's ability to have information provided by P is wide and flexible*

Importantly, although HHJ Mark Rogers accepted:

> 46. […] *the reality is that AB has severe disadvantages and his ability to give clear and reliable answers is limited in the view of the experts although it could be said that Ms Dart is more nuanced. However, I do not accept that I am bound to accept the expert view at this stage and in effect abdicate the judicial role or at least subjugate it. It is highly likely that the expert view will prevail, but not even to attempt to give AB an opportunity to contribute even to the fact finding phase is in my judgment too restrictive. The fact that he is almost certainly not competent to give evidence is no reason not to seek with appropriate help to elicit 'information' from him via a skilled intermediary. It may well be that the net result will quickly be apparent that his information is too unclear or lacks probative value and so the exercise can gently be curtailed. In other words, using Rule 95(e) the Court may admit the information but there is no guarantee that it would accept or act upon it. If the Official Solicitor tenders AB to give 'information' I do not accept I have a general power to stop him or that a specific permission arises; it is in my judgment simply an application of Rule 95(e). Of course even if this exercise proves fruitless the position may be different at the best interests stage because it is certainly clear that AB has communicated his views as to the future.*
>
> *47. Accordingly, on the question of his attendance and the provision of evidence or information, I take the view that the Litigation Friend has generally an unrestricted power to conduct the proceedings albeit subject to the Rules and that the Court's powers to intervene or overrule the Litigation Friend are limited to extremities. Rather than create a general case management power, I prefer to characterise the Court's role as dealing with specific best interests decisions as they arise, and they* do *arise in many different circumstances.*

On the facts of the case, HHJ Mark Rogers held that there was no best interest declaration that needs to be made to prevent P's participation; that P should attend and should attempt to participate; and that he can be tendered for questioning, very probably in the context of a Rule 95(e) exercise, which can be curtailed if necessary, even at an early stage. As he noted "[s]*imply to regard AB's contribution as forensically worthless without even hearing him is not something I can contemplate.*"

HHJ Mark Rogers concluded by noting recent case-law from both the Court of Protection and care proceedings such as the *Wye Valley* case and *Re E* [2016] EWCA Civ 473 as exemplifying the modern approach to the issue of participation in its most broad sense.

Comment

[*By way of guest commentary upon the case and as a case study as to how to facilitate the participation of P in proceedings, we reproduce below, with permission, a modified version of the guest post that recently appeared on the Court of Protection Handbook website by Nicola Mackintosh QC (Hon) who acted for P by his litigation friend the Official Solicitor.*[1]]

There are a number of ways in which ways in which practice needs to change within the Court of Protection to ensure that the court and representation process is looked at through P's eyes, rather than just adding P as an afterthought. Whilst the COPR and accompanying Practice Directions may well need to be amended in due course to secure this goal, creative steps are already possible within the framework of the COPR as they stand. As a case study, we set out here those which were implemented to facilitate P's participation in a fact-finding hearing listed to determine allegations of abuse at the hands of his parents.

In the light of the judgment set out above the practical arrangements which had already been made were implemented. These steps show clearly how vital it is when securing and enhancing P's participation that each and every detail of the arrangements is planned from P's perspective and not simply limited to a meeting with the judge (important as that is). This involved the following:

1. P's lawyers meeting with P and securing appropriate Speech and Language Therapy support to prepare for the hearing by exploring concepts such as the following:

   (a) 'what is happening in court, what is a case, why is your case in court, what is the case about'?

   (b) 'what is a judge, what will the judge be deciding, why is it important to you'?

   (c) 'what will happen at the hearing, who will speak when, how long will it take etc.'?

   (d) 'how can I tell my story'?

2. Considering which court location would best meet the needs of the case, taking into account all physical facilities, travel time for P and others etc.

3. As the court's video facilities did not allow for P to be in an adjacent room viewing the proceedings from a distance so as to minimise distress, an alternative facility was found nearby which could provide a video link to the court. Arrangements were made for this between the IT specialists of the court and the other facility, and for the video link to be tested in advance to ensure it was working. In the event this facility was not used as P remained in court throughout the proceedings.

[1] It will also appear in the second edition of the Court of Protection Handbook, due out in November. Recognising the importance of this area, members of the Court of Protection team in Chambers have also recently had specialist training in arrangements for vulnerable witnesses giving evidence.

4. (With consent) taking photographs of the judge, the courtroom and all the lawyers involved in the proceedings to explain to P the physical location and the identity of all involved in advance of the hearing.

5. Before the hearing arranging a visit by P to the courtroom when the court was not sitting to see the layout, and also to meet the court clerk who was to be allocated to the hearing days.

6. Deciding where it was best for P to sit in his wheelchair in the courtroom to listen to the proceedings, taking into account the position of other parties and 'lines of sight' with others.

7. Arranging for P to be supported by staff regarding personal care, and ensuring mobile hoists were provided for P in both locations for care.

8. Ensuring that there was enough physical space in the court complex so that P had a separate room just next to the courtroom, with a fan (P being a wheelchair user had reduced temperature control).

The first day of the hearing was listed as a Ground Rules Hearing, as provided for in the Advocates' Gateway. On the first day, as planned, the judge met with P in a side room next to the courtroom. P's solicitor was present, and P's SALT also assisted by explaining to the judge that P was able to respond 'yes, no, happy and sad' through different Makaton signs. P showed the judge how he communicated each of these expressions, enabling the judge better to understand how to interpret P's wishes and reactions.

Although the fact finding hearing was listed for 9 days, after the initial part of the first day of the hearing (P being present in court with his carers and intermediary) the parties set out their updated positions which then resulted in negotiations to see if a settlement could be reached without the need for the fact finding process. This lasted the first day and the terms of an order were agreed on the second day of the hearing. P was present during all discussions between lawyers and the court, and communicated his wish to continue to be involved and to listen to the proceedings. Between updates to the court he was permitted by the judge to remain in the courtroom with his support workers, watching a DVD. This reduced the need for him to be taken in and out of the courtroom, waiting for long periods in a small stuffy side room, and was invaluable. This could not have been arranged without the court's co-operation and flexibility of the court staff.

Once agreement had been reached in principle between the parties as to the core issues in the case, it was considered vital for P's wish to 'tell his story' to be facilitated. A very careful consideration of the issues raised, and the broad themes set out in the fact finding schedule was undertaken. Questions of P were drafted by P's legal representatives with the assistance of P's SALT and intermediary. As P's communication was limited to responses such as 'yes, no' etc, it was necessary for leading questions to be posed however these were broken down into questions so that the leading element was minimised. Examples of questions included 'Do you want to talk about when you were living at home?', 'How did you feel when you were living at home?', When you were living at home did anyone do X to you?', and if the answer was affirmative, 'How did it make you feel?' These questions were devised to ensure that P's broad wishes were

communicated to the court notwithstanding the agreement between the parties, so that P felt that he had been listened to by the parties and the judge, but avoiding detailed questioning on the fact finding schedule which eventually proved to be unnecessary.

The question and answer sessions were broken down into more than one session to allow P to rest and refocus. With agreement they were filmed on a mobile phone and then played to the judge in his chambers. They were then also played to the other parties. This flexibility avoided all the delays and organisational problems associated with using the court video facilities.

By the end of the second day, agreement had been reached in the form of a detailed order. The judge held a further short hearing and again explained the outcome to P, coming into the courtroom and sitting by P to confirm what was going to happen. P was repositioned in his wheelchair to be solely in the line of sight of the judge and not the other parties.

Although this case required considerable practical arrangements to be made, forward planning was vital in ensuring that all elements of P's participation was effective in meeting the goal of P's enhanced involvement in the proceedings. Each case will be as different as each P is different. The more that proceedings in the Court of Protection are attended by P, or P's participation is secured by other creative means, the more the judiciary, Court staff, lawyers and all the parties will become accustomed to putting P at the centre of the process, and making appropriate arrangements. This is the beginning of a new era in the Court of Protection. This is only right given the role of the Court in making decisions which are of such fundamental importance to P's life.

Extending the great safety net abroad

Al-Jeffery v Al-Jeffery [2016] EWHC 2151 (Fam) (Family Division (Holman J))

Other proceedings – Family (public law)

Summary

In this case, Holman J confirmed for the first time that the High Court can exercise its inherent protective jurisdiction over a vulnerable British adult on the basis of their nationality, even if they are not habitually resident in England and Wales.

The case, which was the subject of considerable media attention whilst it was ongoing, concerned a 21 year old dual British-Saudi woman who was born and lived in Wales until just before she turned 17, at which point she travelled (in 2012) to Saudi Arabia at the insistence of her Saudi father. She had remained there thereafter and alleged in proceedings brought under the inherent jurisdiction that she was being seriously ill-treated by him, including by being kept in caged conditions in his flat, and that she was prevented from leaving Saudi Arabia and returning to Wales or England. She also sought a forced marriage protection order, although this application was ultimately abandoned during the course of a hearing listed before Holman J to consider what, if any, jurisdiction he had to make orders in relation to Ms Al-Jeffery (in respect of whom it is important to note that there was no suggestion that she was of anything other than unimpaired mental capacity). The father's refusal to comply with earlier orders (made without formal determination of jurisdiction) to

return his daughter to England and Wales or to allow her to speak privately to her instructing solicitor without fetter or fear of fetter had meant that it was not possible to proceed with a fact-finding hearing, such that Holman J proceeded in his consideration of whether he had jurisdiction on the basis of *prima facie*, rather than judicially determined facts.

It was agreed before the court by counsel for both daughter and father that the inherent jurisdiction existed and would apply if the facts alleged by the daughter were true and she were physically present in England and Wales. Holman J, relying (in particular) on *DL v A Local Authority* [2012] EWCA Civ 253, endorsed this proposition, noting that he had no doubt at all that "if all the facts were the same but occurring here in Wales or England, the inherent jurisdiction for the protection of vulnerable adults is engaged and I have a very wide range of powers" (para 42). Importantly, Holman J also noted (relying on *Re SA* [2005] EWHC 2942 (Fam)) that the trigger for this jurisdiction being engaged was that there was a reasonable belief that the person was for some reason in need of the protection of the court, such that it would be "*intolerable*" (para 41) were a failure by one party (here the father) to enable a fact-finding hearing to proceed so as to enable the court to proceed on the basis of established, rather than *prima facie* facts.

The complicating factor in the instant case was that Ms Al-Jeffery had not resided or being present anywhere in the UK since 2012, and her counsel conceded that she could no longer be considered habitually resident in England and Wales (although he did not concede that she was now to be considered habitually resident in Saudi Arabia). Holman J expressed the view that she was, in fact, in fact habitually resident there and had been so since April 2013, but that in any event he would proceed on that assumption.

The only basis for exercising jurisdiction, Holman J held, was therefore that she had British citizenship or nationality. He noted that "[i]*n the recent cases of Re A (Jurisdiction: return of child) [2013] UKSC 60 and Re B (A child)(Habitual residence: inherent jurisdiction) [2016] UKSC 4 the Supreme Court has twice reaffirmed that the British nationality alone of a child is a sufficient basis for exercising the inherent or parens patriae jurisdiction in relation to children*" (para 44), that "*the jurisdiction based on nationality alone should only be exercised with extreme circumspection or great caution and where the circumstances clearly warrant it*" (para 46), that "*the jurisdiction should only be exercised with great caution and circumspection, and particular care must be taken not to cut across any relevant statutory scheme, but that does not limit it to cases "at the extreme end of the spectrum*" (para 48), concluding that:

> *It seems to me that at para.60 of Re B Lady Hale and Lord Toulson do helpfully indicate a test when they said "the real question is whether the circumstances are such that this British child requires that protection". That has an echo in the words of Lord Sumption at para.87 where he referred to "… a peril from which the courts should 'rescue' the child …*

Holman J then turned to the question of whether that jurisdiction could be exercised in relation to an adult, and had little hesitation in concluding that it could:

> *50. The courts having clearly held that the vulnerable adult jurisdiction is indistinguishable from the parens patriae jurisdiction in relation to children, it seems to me that exactly the same approach as that analysed and discussed by the Supreme Court in Re A and Re B should inform my approach*

to the present case. The jurisdiction based on nationality must apply no less to an adult than to a child. As Bennett J asked rhetorically in Re G (an adult) (mental capacity: court's jurisdiction) [2004] EWHC 2222 (Fam) at para.111 (quoted with obvious approbation by Munby J in Re SA at para.65):

"Why then should G, now an adult, be worse off than she would have been had the matters arisen if she was a child?"

51. If it is appropriate to extend the protection of this court to a British citizen abroad when that person is 17, it cannot be less appropriate to do so just because he attains 18 or 21 or, indeed, any other age. The focus must be upon whether the citizen requires that protection and upon the peril from which he may need to be rescued; not upon whether he happens to be above or below the age of 18. Further, although there is a statutory framework (including the provisions of EU Council Regulations) which regulates the exercise of jurisdiction in relation to children, there is none in relation to adults. I do not suggest that for that reason the court should be any less cautious or circumspect in relation to its exercise of the jurisdiction to protect adults rather than children, but there is no obvious reason why it should be even more so. Mr. Scott-Manderson suggested in his final written schedule of balancing factors that the required caution is even greater in the case of an adult than of a child. When I asked why, he said because the use of the inherent jurisdiction based on nationality in the case of adults is very rare. It is; but just because it is very rare does not seem to me to require that even greater caution is required. "Great caution" or "extreme circumspection" means what it says, whether the person concerned is a child or an adult. To exhort even greater or more extreme caution or circumspection is, frankly, to succumb to hyperbole.

He therefore concluded that "*there is an inherent jurisdiction to protect vulnerable adults who are habitually resident abroad, but are British citizens; and that on the facts alleged by Amina, which include constraint and ill-treatment, that jurisdiction is engaged by this case*" (para 51).

Having held that there was a jurisdiction, Holman J had then to consider the second question – namely whether he should exercise his discretion to do so. His discussion balancing the factors for and against (the fact of her dual nationality being a particularly weighty one against) is lengthy, but he proceeded in particular by reference to the three main reasons identified by Lady Hale and Lord Toulson in *Re B* for caution: namely (1) the risk of conflict with the jurisdictional scheme between the applicable countries (there being no such scheme in place here; (2) the potential for conflicting decisions between the two countries (there being no such risk here); and (3) the risk that the orders made might be unenforceable (a real risk in the instant case, but where Holman J considered that the court had considerable moral and practical "hold" over the father). Whilst noting that there were dicta in both *Re A* and *Re B* to the effect that an assessment "in country" should take place before the jurisdiction were exercised, Holman J noted that these were in a different context, and the instant case concerned an adult aged 21 who subject to the constraints allegedly placed on her by father, could and indeed sought to speak for herself.

Holman J had then to consider what order he should actually make. On the facts of the case before him, he concluded that the appropriate order to make was one directed against the father himself personally "*that he must permit and facilitate the return of Amina, if she so wishes, to Wales or England and pay the air fare* [and that] [h]*e must at once make freely available*

to her both her British and her Saudi Arabian passports." He specified that Ms Al-Jaffery had to be enabled to return to England and Wales by 11 September 2016, and at the time of writing it is not known whether or not the father will comply. Holman J further provided for a hearing before him shortly thereafter, emphasising at paragraph 66 that he wished to make:

> *crystal clear that, apart from requiring her attendance before me at that hearing, if she has indeed voluntarily returned to Wales and England, I do not make any order whatsoever against Amina herself. The purpose is not to order her to do anything at all. Rather, it is to create conditions in which she, as an adult of full capacity, can exercise and implement her own independent free will and freedom of choice. To that end, I will give further consideration with counsel after this judgment to what mechanism can now be established to enable her freely to state, if that be her own free decision and choice, that she does not now wish to avail herself of the opportunity provided by my decision and this order to return to Wales or England.*

This is a very significant case because no previous reported judgment had explored the extent to which the nationality-based inherent jurisdiction could be exercised in relation to those over 18 (the closest of which we are aware being that of *O v P* [2015] EWHC 935 (Fam), concerning the extension beyond the age of 18 of orders made in wardship proceedings). Whilst – in this case – the 'nationality' inherent jurisdiction was deployed to protect a person falling outside the scope of the MCA, we would suggest that it would be equally possible to deploy the jurisdiction in respect of an adult who lacks capacity but who is no longer habitually resident in England and Wales. In such circumstances (and as discussed further in Alex's recent article in the Elder Law Journal *Getting Granny Back: International Adult Abduction and the courts* [2016] ELJ 152), the Court of Protection no longer has jurisdiction over the person's welfare because its jurisdiction is based upon the statutory provisions of Schedule 3 to the MCA 2005 and the limitation thereto to habitual residence (in the case of decisions relating to the welfare of the individual). However, and in line with the approach taken elsewhere by the judges where there is a statutory lacuna in relation to those lacking capacity (see, for instance, *Dr A*'s case), we would suggest that it is equally appropriate for a judge of the High Court to have recourse to the inherent jurisdiction if the circumstances warrant it. This is particularly important given that: (1) (unlike in relation to children) habitual residence is not 'frozen' in relation to adults lacking capacity by the issue of proceedings and can change even whilst they are ongoing; (2) the potential that even where removal has taken place from the jurisdiction in doubtful or outright wrongful circumstances, habitual residence can still change. Enabling the court (albeit in a different guise) to continue to exercise a protective jurisdiction over a British national in such circumstances is therefore important so as to prevent the court's ability to take measures from being stymied by an abductor simply failing to bring the person back to England and Wales for a sufficiently long period of time.

Short Note: service on litigants in person

In the Family Division case of *Re B (Litigants in Person: Timely Service of Documents)* [2016] EWHC 2365 (Fam), Peter Jackson J (with the approval of Sir James Munby, as President of the Family Division) has held that, where one party is represented and the other is a litigant in person ('LIP') the court should normally direct as a matter of course that the Practice Direction

documents under PD27A are to be served on the LIP at least three days before the final hearing, especially where the LIP is not fluent in English. The method of service, usually email, should be specified. Where time permits, the court should consider directing that the key documents are served with a translation. In cases where late service on a LIP may cause genuine unfairness, the court should consider whether an adjournment of the hearing should be allowed until the position has been corrected.

We suggest that a similar practice both should and is likely to be adopted in the Court of Protection in relation to the key documents identified in Practice Direction 13B so as to avoid the intrinsic unfairness to LIPs that may arise from late service. As Peter Jackson J noted, this will place further obligations on advocates and those who instruct them.

Short Note: no power of arrest under the inherent jurisdiction

In further confirmation that the inherent jurisdiction is both complex and an uncertain tool for the protection of those who fall outside the scope of the MCA 2005 but are vulnerable, HHJ Clifford Bellamy has recently confirmed in *Re FD (Inherent Jurisdiction: Power of Arrest)* [2016] EWHC 2358 (Fam) that – contrary to the understanding of many – that the High Court cannot attach a power of arrest to an order made under the inherent jurisdiction in respect of such a vulnerable adult.

Those who are concerned about the complexity and uncertainty of the law in this area might (we venture) consider drawing to the attention to the Law Commission that they may wish to consider as part of their 13th programme of Law Reform a codification of the inherent jurisdiction (or even a wider Vulnerable Adults Act) to bring clarity to the measures that can be taken to safeguard those who fall outside the scope of the MCA 2005. If you do, the deadline for responses to the Commission is 31 October, and the details can be found here.

Short Note: indemnity costs and the litigant in person

In *Re A*[2016] EWCOP 38, Sir James Munby took the unusual – but on the facts of the case – entirely warranted step of ordering a litigant in person to pay indemnity costs, where his "*unrelentingly pertinac*[ity] *in pursuit of what he believes to be his aunt's best interests… has become obsessive and his desire to litigate (most of the time as a litigant in person) and to correspond with all and sundry has become compulsive*." This is the first reported case of which we are aware where a litigant in person has been ordered to pay indemnity costs in the Court of Protection (and indeed, an individual as opposed to a local authority). The individual was also made the subject of an extended civil restraint order for two years.

Short note – out of hours medical treatment

In *An NHS Trust v HN* [2016] EWCOP 43, Peter Jackson J was called upon to determine an urgent serious medical treatment case out of hours in circumstances. We note the case not because of its outcome but because of the fact that it serves as a reminder that the Official Solicitor does not offer an out of hours service, and was therefore not in a position to represent P. The case should therefore serve as a reminder both to bring medical treatment cases within office hours if possible, and also to ensure that the Official Solicitor is served with papers as early as possible

to offer such assistance as he can during office hours.

COP statistics

The most recent COP statistics have now been published by the MOJ, covering the period April to June 2016.

In April to June 2016, there were 7,616 applications made under the Mental Capacity Act 2005, up 13% on the equivalent quarter in 2015. The majority of these (54%) related to applications for appointment of a property and affairs deputy. Following the introduction of new forms in July 2015, applicants must make separate applications for 'property and affairs' and 'personal welfare'. This is why there have been almost no 'hybrid deputy' applications in 2016. There were 6,700 orders made, 13% lower than the same quarter in 2015. Most (53%) of the orders related to the appointment of a deputy for property and affairs. The trend in orders made mirrors that of applications and has been steadily increasing since 2010.

Applications relating to deprivation of liberty increased from 109 in 2013 to 525 in 2014 to 1,497 in 2015. There were 743 applications made in the most recent quarter, double the number made in April to June 2015. Of the 743 applications made in April to June 2016, 528 (71%) came from a Local Authority, 179 (24%) from solicitors and 36 (5%) from others including clinical commission groups, other professionals or applicants in person. Over half (55%) of applications for deprivation of liberty were made under the *Re X* process.

Experts out of bounds

In the matter of Re F (a minor) [2016] EWHC 2149 (Fam) (Family Division (Hayden J))

Practice and procedure – other

Summary

This is an unusual case in which a high court judge was asked to make findings on the probity and reliability of a Consultant Clinical Psychologist (Dr Ben Harper) who had been instructed in public law care proceedings being heard by HHJ Wright in the Family Court in Sheffield. The mother in those proceedings had covertly recorded assessment sessions with Dr Harper and her legal team sought to use the recordings to challenge the psychologist's court report in respect of the mother.

Hayden J ordered a verbatim transcript of the recordings to be filed at court and directed that a Schedule of Findings should be prepared by the mother's legal team.

The mother's legal team prepared a 'very extensive' schedule which was summarised by Hayden J as alleging: "*false reporting*," "*inaccurate quoting*," being designed to present the mother in a "*negative light*," "*fabrication of conversations*" and "*deliberate misrepresentation*." In cross examination, leading counsel for the mother accused Dr Harper of "*lying*."

The judge first turned his mind to the standard of proof, given that the discrete issue before him involved an imputation on the reputation of a professional man which would require tight procedural compliance if brought in disciplinary proceedings. Hayden J held (following agreement from the parties) that the Civil Standard of proof applied: "*the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the*

facts" (Baroness Hale in *Re B (Care Proceedings): Standard of Proof* [2008] UKHL 35).

Hayden J did not address what he described as the "*minute allegations*" in the schedule prepared by the mother's legal team, describing them as "*of varying cogency and forensic weight*." Instead he analysed those allegations which it was necessary for him to determine in order properly to resolve the issues in the care proceedings. He then considered a further "*important question*," namely whether the findings made out against Dr Harper were sufficiently serious so as to render his evidence in these proceedings unreliable.

Hayden J held that several of the allegations made against Dr Harper were well founded and that they were sufficiently serious so as to render his evidence in the proceedings unreliable.

The first allegation that Hayden J considered was in respect of distorted reporting. In response to the mother's Schedule, Dr Harper made the following concession: "*12. There are a number of occasions where I have referred to Mother as having said something by way of italicised text within double quotes. It is quite clear to me that anyone reading my report would have interpreted these as suggesting they were verbatim quotes. I did not, however, take verbatim notes and a number of sentences attributed to Mother are inaccurate*."

Hayden J described that paragraph in damning terms as seeming designed to minimise the extent of the "*very significant failing it* [represented]." It seems that in cross examination Dr Harper accepted that the phrases in quotation marks are "*a collection of recollections and impressions compressed into phrases created by Dr Harper and attributed to the Mother.*" Hayden J was unsurprisingly highly critical of this practice and concluded: "[t]*he report is heavy with apparent reference to direct speech when, in truth, almost none of it is. Thus the material supporting the ultimate conclusion appears much stronger than it actually is. Given the forensic experience of Dr Harper and this extremely impressive academic background I cannot accept that he would have failed to appreciate the profound consequences of such distorted reporting.*" Dr Harper had adopted a similar approach when reporting to the court on the children involved in proceedings which was a cause of concern to the children's Guardian.

The second allegation considered was that (as framed by counsel for the mother) Dr Harper had "*lied*" about the content of a discussion which took place on 6 April 2016. This conversation (unlike others) had not been subject to covert recording. The judge accepted Dr Harper's account of that meeting in part (he accepted that he intended to look at the inconsistencies in the mother's various narrative accounts) but did not accept that Dr Harper had dealt with between 13 and 20 significant points of assessment in what both parties agreed was about a 15 minute meeting.

The judge concluded that "*the overall impression is of an expert who is overreaching his material, in the sense that whilst much of it is rooted in genuine reliable secure evidence, it is represented in such a way that it is designed to give its maximum forensic impact. That involves a manipulation of material which is wholly unacceptable and, at very least, falls far below the standard that any Court is entitled to expect of any expert witness*." He held it to be manifestly unfair to the mother who was battling to achieve the care of her children whilst trying to manage life with diagnosed PTSD. Dr Harper's professional failure had compromised the fairness of the process for both the mother and the children

(see *Re B-S* [2013] EWCA (Civ) 1146 and *Re A* [2015] EWFC 11).

The judge noted that the local authority had submitted that Dr Harper's central thesis was probably correct and that the report should therefore be allowed to stand with the judge hearing the case attributing weight as he saw fit. Hayden J acknowledged that the central thesis may well be right but disagreed that the report should be allowed to stand, considering that there were such fundamental failures of methodology that no judge could fairly rely on the conclusion.

The judge agreed with counsel for Dr Harper that the issue in relation to the mother's evidence was 'reliability' not 'credibility' and noted that he had found himself unable to place a great deal of weight on her evidence even where his findings were essentially in her favour.

In concluding the judge cited the observations of Dame Elizabeth Butler-Sloss P in *Re U: Re B (serious injury; standard of proof)* [2004] 2 FLR 263 at 23iv: "*The court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour-propre is at stake, or the expert who has developed a scientific prejudice.*" Hayden J did not consider that Dr Harper had developed a scientific prejudice nor that he was jealous to guard his amour-propre but he did consider that "*his disregard for the conventional principles of professional method and analysis* [displayed] *a zealotry which he should recognise as a danger to him as a professional and, more importantly, to those who I believe he is otherwise genuinely motivated to help and whom he plainly has much to offer*."

Comment

This case plainly turns on its own facts in that distorted reporting is not a usual feature of expert reports in the COP or elsewhere. Nevertheless, it contains a useful reminder of the depth and quality of scrutiny of expert reports in the High Court: a depth and quality which should be the starting point for consideration of all expert reports in the COP. In a forum where people's liberty is at stake or where decisions are being taken about a person's capacity or best interests, their medical treatment or their financial welfare we should all take heed of the caution of Dame Elizabeth Butler-Sloss P and be on guard against the over-dogmatic expert.

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Conferences at which editors/contributors are speaking

Switalskis' Annual Review of the Mental Capacity Act

Neil and Annabel will be speaking at the Annual Review of the Mental Capacity Act in York on 13 October 2016. For more details, and to book, see here.

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester, which this year has the theme 'The five guiding principles of the Mental Health Act.' For more details, and to book, see here.

Human Rights and Humanity

Jill is a keynote speaker at the SASW MHO Forum Annual Study Conference in Perth on 29 October, talking on "Supporting and extending the exercise of legal capacity." For more details, see here.

Law (and the Place of Law) at the End of Life

Alex will be speaking alongside Sir Mark Hedley at this free seminar organised by the Royal College of Nursing on 1 November. For more details, see here.

Alzheimer Europe Conference

Adrian will be speaking at the 26th Annual Conference of Alzheimer Europe which takes place in Copenhagen, Denmark from 31 October–2 November 2016, which has the theme "Excellence in dementia research and care." For more details, see here.

Jordans Court of Protection Conference

Simon will be speaking on the law and practice relating to property and affairs deputies at the Jordans annual COP Practice and Procedure conference on 3 November. For more details and to book see here.

Advertising conferences and training events

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

Chambers Details

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

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