

Journal of Elder Law and Capacity

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Journal of Elder Law and Capacity

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The **Journal of Elder Law and Capacity** is a source of information for a range of practitioners dealing in all aspects of elder law and capacity. Published by the Law Society of Northern Ireland, it aims to have UK and international appeal with coverage on legal issues relevant to elder clients, clients with capacity issues, their families and carers.

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Advance Directives: quality of life versus sanctity of life?

**Linda Johnston, TEP, Solicitor
Francis Hanna and Co.**

In this article Linda Johnston outlines the purpose and practicalities of drawing up an Advance Directive, and provides guidance on how to ensure it has the desired result.

Introduction

Advance Directives are effectively medical choices, made in advance, on a “just in case” basis. Confusingly they have accumulated a number of titles and may be known to many as “Living Wills”. In reality they are about dying rather than living and they speak about medical matters, not property and assets. For this reason, my preference is the term “Advance Directive”.

They remain uncommon and many practitioners will never have seen one or have been asked to draft one. Yet, in essence, they are straightforward in language and intent, and there is no doubt they are legally enforceable.

In Northern Ireland we rely on the common law to give legal effect to an Advance Directive whereas other jurisdictions have placed such directives on a statutory footing as in England and Wales under the Mental Capacity Act 2005.

The seminal case remains *Airedale NHS Trust -v- Bland* [1993] 1 ALL ER 821. This case arose out of injuries sustained by a young man at the Hillsborough Stadium tragedy. Whilst he did not have an Advance Directive (and the issue before the Law Lords was whether life-sustaining treatment could be withdrawn as his family requested), the Law Lords took the opportunity to consider in-depth the legal implications of a person’s right to withhold consent to life-prolonging treatment with particular regard to persons no longer able to give or withhold their consent. This led to the setting up of a House of Lords Select Committee on Medical Ethics which in turn led to various developments including the publication by the British Medical Association of Advance Statements About Medical Treatment Code of Practice, published in 1995. In the introduction to that Code it is acknowledged that there are both benefits and dangers to making treatment

decisions in advance. The view is expressed that health professionals and patients should be aware of both.

“Nevertheless, carefully discussed Advance Statements have an important place in the development of a genuinely more balanced partnership between patients and health professionals. The Code considers the importance of Advance Statements as well as the refinement of an Advance Statement to an Advance Directive which has directive force and which almost always would amount to a refusal of medical treatment.”

Typical clients

In my experience, clients seeking advice on Advance Directives fall into three categories;

1. Clients with a specific diagnosis which may be a terminal illness or a diagnosis of a long-term debilitating medical condition through which they anticipate losing the ability to communicate and/or their mental capacity.
2. Clients who have watched and, most probably, cared for a loved one who, over an extended period of time endured debilitating and diminishing health conditions which they would not wish to endure themselves. These clients in particular will have seriously considered if life must have some perceptible quality to be valuable.
3. Clients who have no specific anticipation of illness, but are thoughtful forward planners, and are keen to put their affairs in order. Typically they will be reviewing or making a new Will and considering an Enduring Power of Attorney at the same time.

Undoubtedly, the most difficult conversations are likely to arise with the first category of patients who are actively preparing for a distressing future. However, with serious and predictable medical conditions such as Motor Neurone Disease, one tends to find that a Consultant would at least understand and most likely positively engage with their patient in discussing the development of their illness and if and when a patient may no longer wish to be treated. In this situation the lawyer will have the benefit of much more specific guidance from the client via the Consultant as to the particular medical conditions likely to develop and that can be specifically identified in an Advance Directive.

Terminology

Increasingly I have become aware of the importance of appreciating medical terminology. When I first became interested in this area of law many years ago, I felt one of the most important points to grasp was the need for certainty and clarity in the drafting of an Advance Directive. Experience has taught me that there is a tension between this approach, and the extent of medical knowledge which lawyers have as to the implications of certain medical descriptions. Research has suggested that some medical practitioners may balk at what they deem to be overly directive language. Professional Celia Kitzinger¹, in research conducted with the York – Cardiff Chronic Disorders Consciousness Research Centre, reflected on the reactions of consultants and GPs to a set of 8 different Advance Directives and commented :-

“An Intensivist who reported feeling “bullied” into acting against his better judgement by the legalistic tone of these documents said that he would be more likely to do as the documents requested if patients used the words “please” and “thank you”.

A participating retired GP, recognising that doctors are sometimes antagonised by what they experience as legal coercion used in an attempt to override their clinical judgement, had written his own Advance Directive in deliberately personal language.

Reflecting on these reactions and the continued conundrum as to why lawyers and doctors too often seem to be facing in opposite directions, I have changed my practice to encourage clients to personalise their Advance Directives. Whilst I still seek to identify specific medical circumstances, I also encourage clients to express in broad terms deeply held values and beliefs. Professor Kitzinger makes the very practical point that if the intention is to make an Advance Directive effective then it needs to be written in terms which speak to the people responsible for honouring its terms, typically a refusal of treatment.

There are many available legal precedents to refer to. In particular, I have found the various editions of *'Elderly Clients Precedent Manual'* particularly helpful.² Additionally, charities also provide a lot of information and direction. The first template I saw many years ago was from the Terence Higgins Trust. Interestingly, it now seems to offer those enquiring a link to Compassion in Dying, as does the NHS website page on Advance Decision (Living Will). Note however that these organisations focus particularly on

¹ <https://cdoc.org.uk/wp-content/uploads/2015/11/Advance-Decisions-Do-they-work-523258.pdf>

² Bielanska: Elderly clients: a precedent manual. 5th edition, Jordans, 2016.

the position in England and Wales where Advance Directives are now on a statutory footing as a result of the Mental Capacity Act 2005. That aside, there is a lot of very useful guidance and assistance, particularly with explanations of key medical words or phrases which lawyers and laypeople may not fully appreciate in the medical context. For example, all clients I have spoken to about Advance Directives are keen not to be sustained in a permanent vegetative state. Do they however appreciate that a diagnosis of “permanent vegetative state” may mean waiting six months after a non-traumatic injury or a year after a traumatic injury for such a diagnosis to be confirmed? The refusal of life-sustaining treatment to a medical practitioner would include;

- Ventilation – which may be used if one cannot breathe for oneself.
- Cardio Pulmonary Resuscitation (CPR)
- Antibiotics – which can help your body fight infection.

I suspect many people would not consider antibiotics as “life sustaining treatment”, thinking more readily of aggressive invasive intrusive treatment such as CPR.

Clients should always be advised to discuss the terms of their Advance Directive with a doctor and, if possible, a specific medical practitioner treating a particular condition which causes them concern. The examples above illustrate the opportunities for misunderstanding in the interpretation of language between a medical practitioner and layperson. When I have settled the terms of an Advance Directive with a client I advise that they discuss it with their doctor before signing, and come back to me with any queries raised. This has the double effect of ensuring that the client fully appreciates how a medical practitioner would interpret the Advance Directive and also generates a medical record of the client’s engagement and understanding as to the Direction being given.

Drafting the Advance Directive

A mentally capable adult can make an Advance Directive. The client making the Advance Directive (P) sets out circumstances in which treatment is **refused**. P cannot use an Advance Directive to **require** treatment to be undertaken. P must be able to understand, retain and weigh the information relevant to their decision and communicate such decision.

Drafting Guidance:

The following should be noted when drafting the Advance Directive:

1. There is no prescribed form for an Advance Directive in Northern Ireland. [See precedent on pages 10 and 11.]

It is strongly advised that the Directive is in writing, as one would not wish to rely on an oral directive unless in exceptional circumstances.

In jurisdictions where Advance Directives are on a statutory footing, one would anticipate a statutory requirement that they are in writing. In the case of *HE V A Hospital*, Munby J, as he then was (prior to Mental Capacity Act 2005), summarised the position in England when making it clear that whether there is a continuing valid Directive is a matter of fact and the burden of proof is on those who seek to establish the existence and continuing validity and applicability of the Advance Directive;

“Where life is at stake, evidence must be scrutinized with special care. Clear and convincing proof must be clearly established by convincing and reliable evidence. If there is doubt, that doubt falls to be resolved in favour of the preservation of life.”

2. The nature of the document should be identified with the heading “Advance Directive”.
3. The name, address and date of birth of P should be stated.
4. The document should be dated.
5. The medical circumstances which would trigger the operation of the Advance Directive, should be specified.
6. The nature of the treatment refused should be set out.
7. A brief expression of P’s values may be useful. This may include a reference to quality of life versus sanctity of life.
8. A request that any doctor or nurse with a conscientious objection to the operation of the Advance Directive transfer P’s care to other medical practitioners may be valuable.
9. A revocation of earlier wishes, if relevant.
10. A signature clause, including provision for at least one witness.

To be effective, an Advance Directive must :

- be available when the relevant circumstances arise;
- be relevant to the condition in hand;
- clearly reflect P's wishes.

As there is no central registrar of Advance Directives, it is essential to highlight to a client the importance of ensuring the document can be produced when needed. This may seem obvious but often it is not appreciated. Time will often be of the essence, and P's nearest and dearest, whether friends or family, need to have a copy of the Directive to be able to produce it when needed. Otherwise it has no value.

My own practice is to advise my client to ensure copies are with the following:

- their GP notes and records;
- any current treating Consultant in respect of which it may be relevant;
- several close family members or friends who are likely to be at P's bedside in the event of a medical emergency or profound illness.

Typically we hold original Advance Directives in our strong room providing clients with certified copies to give to their key relatives or friends.

A client should also be advised that they should retain a record of the people who have a copy of the Advance Directive, should they wish to revoke the Directive or revise it. The custodians of the original Advance Directive would obviously have to be notified in such circumstances to avoid any doubt or misunderstanding.

All is not lost

However much thought and care is given by the person expressing choice through their Advanced Directive, and any advisor assisting, one cannot cover all eventualities. Clearly the advice must be to frequently review, and if necessary, update Advance Directives, but in reality we know good intentions are not always acted on. If a medical situation arises which was unforeseen and not covered by the specific terms of an Advance Directive, the fact that a Patient had taken time to deliberate on end of life issues and express wishes can provide extremely valuable guidance to a medical team and, if in doubt, to a Court.

In *Westminster City Council -v- Manuela Sykes* [2014] EWHCb B9 (COP), although the terms of an Advance Directive written by the Patient were not strictly

applicable to her current condition, the views expressed in it were used with other evidence to rule in her favour with the Judge commenting:

“The existence and terms of the Living Will are relevant to the Court’s consideration of her best interest. This is because it is an expression of her wishes, feelings, beliefs and values made by her when she had capacity. The document indicates in general terms that she prioritises quality of life over prolongation of life.”

I witnessed a similar situation which thankfully did not require Court direction as the Patient remained mentally capable, but struggled to be heard.

Richard’s Story

Over 20 years ago I acted for Richard, a very intelligent 75-year-old retired lecturer who was profoundly angry and at odds with the hand he had been dealt in later life. He had been a strident independent individual who had become almost entirely dependent on teams of carers and considered himself a prisoner in his own home as a result of his diagnosis of Multiple Sclerosis. Friends had drifted away exhausted by his moods and cantankerous behaviour. I am confident he had tried to commit suicide on more than one occasion but “the damned illness” meant he was mechanically unable to do the deed.

We wrote an Advance Directive together. He waited and hoped a medical condition would develop which left untreated would cause his death. A year later a carer phoned me to let me know he was in hospital and wanted to see me. He had respiratory problems and additionally had contracted a chest infection. It was treatable - however when he refused treatment he was ignored and I was called. The Advance Directive we had written did not apply. The terms did not cover the medical condition prevailing at the time and in any event he was still mentally capable and able to make treatment choices, albeit he was being disregarded. Explaining why I wished to speak to his treating Consultant it became clear that the nursing staff at that time did not know what an Advance Directive was. Ultimately the Consultant talked with me, read the Advance Directive, and began to appreciate Richard’s often expressed wish that his life would end and he would be free of the “damned illness”.

I watched from a distance as the Consultant gathered a medical team around Richard’s bed and outlined the treatment he proposed. He was now listening respectfully to the grumpy septegenarian when he declined medical intervention. Richard was kept comfortable and hydrated until his death four days later. Without the Advance Directive, I have no doubt Richard’s

determination not to be treated would have been ignored and with it, his autonomy denied as the medical team, with every good intention would have engaged in treatment they considered to be in his “best interests”.

The significant legislative changes in the area of mental capacity introduced across the various jurisdictions of the United Kingdom in the last 20 years all have as a central principle the aim to respect and support the decisions of incapacitated adults about their own lives. Whilst the right to make an Advance Directive and for this to be honoured predated this legislation, “the right to choose” as referred to by Lord Donaldson in *Re T (Adult:- refusal of treatment)* [1992] 4 ALL ER 649 is more widely appreciated and accepted than it was at that time. In his words;

“Prima facie every adult has a right and a capacity to decide whether or not he will accept medical treatment even if a refusal may risk permanent injury to his health or even lead to premature death. Furthermore, it matters not whether the reasons for the refusal were rational or irrational, unknown or even non-existent. This is so notwithstanding the very strong public interest in preserving the life and health of all citizens.”

Reflections

As a much younger practitioner I tended to view Advance Directives as choices made in advance, in the event of a traumatic injury or for the minority living with a daunting medical diagnosis due to a degenerative disease. As the years have passed and I have aged, my perspective has changed. Each generation is living longer than the last but for increasing numbers of the population there are questions about quality of life. Many more people are kept alive by advances in medicine and an expectation of medical intervention. There are many ethical and social debates to be had in this area. We live in an age where individualism and personal rights are strongly advocated. The ability to make choices at the end of one’s life in certain circumstances is entirely consistent with our rights-based society. Advance Directives are not about extending life or hastening death, they are about respecting choice.

Choice is also something that may be exercised by some practitioners who prefer not to become involved in this area of work if they place the sanctity of life above personal choice. Some may draw a parallel to the ethical choice given to doctors in relation to abortion. Given that the exercise of one’s choice through an Advance Directive is a legally recognised right, I would urge such practitioners to not simply decline, but to refer clients elsewhere or least make them aware of the opportunity to put an Advance Directive in place.

As practitioners dealing in Elder Law and Capacity issues, the spectre of undue influence and the alarming vulnerability of clients with capacity issues dependent on others who may not be entirely wholesome, does cause concern. However, I have yet to meet a client who wanted to talk to me about an Advance Directive who was anything other than clear and determined about their wishes. On the contrary, my experience has been that these clients are focused and do not cause me concern in relation to capacity. I suspect that vulnerable adults who could be encouraged to commit to an Advance Directive without properly appreciating its implications will be invisible to the legal profession. Unfortunately, the vulnerability of such clients will probably be even greater in relation to their finances than their end of life choices.

Through writing this piece, I have finally worked through my own Advance Directive, which has been on the To-Do list for many years. It is largely in the form of the draft (shown on pages 10 and 11) simply as an example to those who may not have seen an Advance Directive, but it is shared without any encouragement or recommendation.

PRECEDENT FORM OF AN ADVANCE DIRECTICE

I ***name and address*** make this Advance Directive after much thought and consideration over a period of years.

I have not been influenced by any single event or anyone in the making of this Directive.

I am making and expressing my decision to refuse certain medical treatments in the event that the state of my health means I cannot have a meaningful quality of life and can no longer express wishes through mental incapacity at a later date.

I have discussed my wishes with my nearest relatives, my and my..... I am confident that they will respect my medical wishes and I ask that those responsible for my medical care do likewise. If any of the medically qualified persons treating me are unwilling to comply with my wishes due to a conscientious objection, I request that they take steps to transfer my care to other suitably qualified persons who will respect my wishes. I do not consider that the sanctity of life is paramount. I believe that I have the right to make choices as to my medical care.

I refuse life sustaining treatment if any of the Medical Circumstances set out below affect me, even if my life is at risk and may be shortened as a result.

When I say I refuse life-sustaining treatment I mean:-

- Cardiopulmonary Resuscitation (CPR).
- mechanical or artificial ventilation.
- clinical assisted nutrition or hydration.

but I do consent to being fed orally and to any treatment which may relieve pain or be considered necessary for the health and safety and protection of others.

Medical Circumstances

1. I am suffering from severe Dementia and for example some or all of the following apply:-

- I do not recognise my family and friends.
- I am unable to have a meaningful conversation.
- I cannot feed myself.
- I no longer have bladder and bowel control.
- I need to be cared for day and night.

2. I have a brain injury as a result of which I am in a minimally conscious state or vegetative state and I am unlikely to regain the ability to make an informed medical decision.
3. I have a disease of the central nervous system causing damage to the cells of the brain or spinal cord and I cannot make and communicate decisions about my medical treatment and I am unlikely to regain the ability to do so.
4. I have terminal cancer and I am unable to make or communicate decisions about my medical treatment and I am unlikely to regain the ability to do so.
5. Any other medical condition from which I am unlikely to regain the ability to make and communicate a medical decision which renders me:-
 - persistently unaware of my surroundings, and/or
 - persistently unable to recognise friends and family, and/or
 - persistently anxious or agitated.

I do not consent to my organs being used for transplantation or experimentation.

If any part of this Advance Directive is invalid or unenforceable it can be severed from the parts which are lawfully valid and enforceable.

I am well aware of the implications of the Statement I am making and the decision to refuse treatment in certain circumstances having discussed these implications with a Medical Practitioner.

I have asked my GP to place a copy of this Advance Directive with my medical notes.

Signed.....

Date

Witness..... (name and address)

Discretionary Variation: The use of the variation of trusts regime to substitute discretionary disabled persons' trusts for fixed provision

William T Gowdy, M.A. (Oxon), T.E.P., QC¹

This article reviews the conditions involved in the Court's jurisdiction to vary trusts for the benefit of a person who lacks capacity, and considers the circumstances in which those conditions will allow the substitution of discretionary trust provision in place of vested interests.

Introduction

Practitioners acting in the sphere of property and capacity will often encounter the difficult scenario where a well-meaning relative has sought to make trust provision for a disabled person, but has done so in a manner which is far from ideal. Scenarios encountered include the grant of a lifetime interest, which produces a negligible income in current conditions, or a gift of capital to someone entitled to means-tested benefits. Such a gift may deprive the beneficiary of his or her entitlement to means-tested benefits, such that the capital is exhausted in replacing the benefits income, and so does not serve to make extra provision for the beneficiary.

These difficulties are compounded when the beneficiary lacks capacity. A beneficiary with capacity can require the termination of the trust,² or can enter into a deed of variation of a will, but a beneficiary who lacks capacity cannot do so. In many jurisdictions which recognise trusts, there is legislation³ which addresses this issue, by empowering the Court to grant its consent to the revocation or variation of a trust on behalf of certain persons, including those who lack capacity.

¹ Bar Library, Belfast.

² If he or she joins with all other beneficiaries in requiring that termination under the Rule in *Saunders v Vautier* (1841) 4 Beav 115.

³ In Northern Ireland, section 57 of the Trustee Act (NI) 1958. This provision corresponds to the Variation of Trusts Act 1958 in England and Wales.

The question then arises whether the variation of trusts regime poses an answer to the problems faced by the practitioner advising the family of a disabled person who is the beneficiary of an “*inappropriate*” trust gift. This article will attempt to address this issue, with a particular focus on the question as to whether, and if so, when, the variation of trusts regime can be used to introduce discretionary provision⁴ for a disabled beneficiary.⁵ This article will analyse, first, the essential elements which have to be satisfied under the variation of trusts regime, and will then consider how they apply if a variation is sought to introduce discretionary provision.

The variation of trusts regime

The statutory provision empowering the court to vary trusts is section 57 of the Trustee Act (NI) 1958. Such a statutory provision was necessary in light of the decision of the House of Lords in *Chapman v Chapman*⁶ which identified clear limits on the Court’s equitable power to authorise a variation of a trust. The Court had no equitable power to sanction a variation of a trust simply where that variation was to the benefit of an infant beneficiary who could not give his own consent. The equitable power was limited to authorising a variation by way of a compromise to a genuine dispute about the terms of the trust, or to sanctioning a variation where it was needed by way of “salvage” to respond to a real and unforeseen emergency.⁷

Section 57(1) of the Trustee Act (NI) 1958 provides that:

“... where property is held on any trusts or settlements arising under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of [various classes of person,⁸ including a person who as a result of mental incapacity is unable to assent] any arrangement ... varying or revoking all or any of the trusts or

⁴ I.e. provision under a discretionary trust where the beneficiary does not have a fixed entitlement to income or to capital, but where the trustees have power to pay income to the beneficiary and to advance capital to him or her. The trust fund will not be treated as part of the beneficiaries resources in assessing the beneficiary’s entitlement to means-tested benefits, only the income actually paid to the beneficiary or the capital advanced to him.

⁵ Such as a disabled person’s trust recognised under section 89 of the Inheritance Tax Act 1984.

⁶ [1954] AC 429.

⁷ Such as consenting to a Scheme of Arrangement for shares in a trading company held in trust: *Re New* [1901] 2 Ch 534, or an increase in capital or maintenance provision for an infant beneficiary where the provision which had been made turned out to be inadequate: *Re Tollemache* [1903] 1 Ch 457, *Re Walker* [1901] 1 Ch 879.

⁸ These are:

a) any person having, directly or indirectly, an estate or interest, whether vested or contingent, under the trusts or settlements who by reason of infancy or other incapacity is incapable of assenting; or

settlements, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts or settlements.”

The first point to note is that the statutory power is limited to varying a trust or settlement. It therefore cannot assist where the difficulty is that a disabled person has become entitled to a capital sum on the intestate death of a relative because no trust is imposed under Northern Ireland law.⁹ Secondly, the Court’s role is only to provide the consent to the variation on behalf of the person who cannot consent. It is therefore necessary that all *sui juris* beneficiaries affected by the arrangement have agreed to the variation, as the Court does not have power to override the wishes of a beneficiary with capacity.

In addition, the power given to the Court is discretionary – it may be exercised “if it thinks fit”. The power is limited to approving “an arrangement ... varying or revoking ... the trusts or settlements”, which has been held to mean that the Court does not have power to approve a “resettlement” of the property.¹⁰ Under section 57(2), an arrangement may only be approved on behalf of a beneficiary who lacks capacity if it is for his or her “benefit”. These three issues merit more detailed consideration.

No resettlement: “an arrangement ... varying or revoking ... the trusts or settlements”

The wording of section 57(1) empowers the Court to give effect to an arrangement “varying or revoking” trusts or settlements. On its face, the power to vary does not seem to be constrained, particularly as the Court is given the radical power of revoking the trust. However, the variation of trusts regime has been held to be limited, in that it does not apply to

(b) any person (whether ascertained or not) who may become entitled, directly or indirectly to an estate or interest under the trusts or settlements as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court; or

(c) any person unborn; or

(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined.”

The focus of this article is on category (a) as it applies to persons lacking mental capacity to assent to the variation.

⁹ No trust is imposed under Part II of the Administration of Estates Act (NI) 1955, in contrast to the statutory trust under section 46 of the Administration of Estates Act 1925 for England and Wales, which is susceptible to variation under the variation of trusts regime. See *S v T1* [2006] WTLR 1461 and *Wright v Gater* [2011] EWHC 2881 (Ch). In such a case in Northern Ireland, it may be necessary to consider whether a settlement could be authorised under section 99(1)(b) or (d) of the Mental Health (NI) Order 1986.

¹⁰ *Re T’s Settlement Trusts* [1964] Ch 158. Also reported as *Re Towler’s Trusts* [1963] 3 All ER 759.

an arrangement which goes beyond a variation of the existing trust, but amounts to an impermissible resettlement of the trust.

In *Re T's Settlement Trusts*,¹¹ a beneficiary (aged 20) would become entitled to a life interest in possession at age 21. Her mother had concerns about her spending, so applied to have the settlement varied to provide for a protective trust in place of the absolute life interest. The Court declined to approve the arrangement as initially proposed. One of the reasons on which the application initially was unsuccessful was that Wilberforce J considered that the proposed arrangement went beyond a variation of the settlement, and amounted to a resettlement. In coming to that conclusion, Wilberforce J rejected a broad interpretation of the Court's jurisdiction to vary a trust, holding that that statutory jurisdiction was not intended to encroach on the principle that the Court had no power to direct a settlement of a minor's property:

*"This argument, based on the language of the Act, has much force, but it seems to me necessary to bear in mind the following considerations. The Court of Chancery has never claimed for itself a power to direct a settlement of an infant's property. Indeed, it has more than once been stated authoritatively that it cannot do so (see, for example, In re Leigh). It acquired in 1855 under the Infant Settlements Act a limited jurisdiction to settle an infant's property on marriage, but this has not been extended to other cases. There is no reason to suppose that the absence of the wider jurisdiction was part of the mischief which the Act of 1958 was intended to remedy, and, in view of the well-accepted limits upon the Court's jurisdiction laid down by statute and authority, it seems unlikely that it was. I am certainly reluctant to suppose that a whole new jurisdiction has been incidentally conferred by the use of general words."*¹²

Wilberforce J considered that the nature of the arrangement before him was a resettlement, not a variation:

*"But I am satisfied that the proposal as originally made to me falls outside it. Though presented as "a variation" it is in truth a complete new resettlement. The former trust funds were to be got in from the former trustees and held upon wholly new trusts such as might be made by an absolute owner of the funds. I do not think that the Court can approve this. Alternatively, if it can, I think it should not do so, because to do so represents a departure from well and soundly established principles."*¹³

¹¹ *Ibid.*

¹² *Ibid.*, 161.

¹³ *Ibid.*, 162.

Thus, the key factor which led Wilberforce J to conclude that the arrangement was a resettlement, not a variation was the fact that the trust funds were to be removed from the existing trustees, and then to be held on “wholly new trusts”.

It could be argued that the proposition that an arrangement can only be approved under the variation of trusts regime if it is a “variation” but not a “resettlement” is unnecessary and unhelpful. The decision that the arrangement in *Re T’s Settlement Trusts* was a resettlement was not the sole reason that Wilberforce J declined to approve the arrangement, as he concluded both that the original proposed arrangement did not benefit the beneficiary, and that it was not something which he could approve in the exercise of his discretion. This distinction between a variation and a resettlement does not appear on the face of the statute, which, after all, was introduced to provide a jurisdiction which had been found not to be enjoyed by the Court. It could equally well be said that the words of the statute showed Parliament’s intention to permit any revocation or variation of the trust, provided the Court found that variation was to the benefit of the beneficiary in question, and that the Court considered that consenting to the variation was an appropriate exercise of its discretion. Furthermore, as shall be seen, the dividing line between a variation and a resettlement is not easily identified, posing difficulties to the practitioner in determining whether or not an arrangement is liable to fail on this ground.

Nevertheless, the distinction between a variation and a resettlement is now an accepted limiting factor on the Court’s jurisdiction.¹⁴ However, later decisions have applied the distinction in a flexible manner, allowing various complex forms of arrangement to be approved under the variation of trusts jurisdiction.

Megarry J took a broader approach to the question of what might amount to a variation in *Re Holt’s Settlement*.¹⁵ That case concerned an arrangement to alter a trust where a beneficiary had a life interest, with the remainder held in trust for her children provided they reached the age of 21. The proposed arrangement involved the surrender of the life interest, but a deferral of the children’s absolute interest to age 30. This was to be achieved by a revocation of the original trusts, and their replacement with new trusts. Megarry J considered that the form of the arrangement was irrelevant, provided what was proposed was in substance a variation:

¹⁴ See, e.g. *Wyndham v Egremont* [2009] EWHC 2076 (Ch) at [21]; *Wright v Gater* [2011] EWHC 2881 (Ch) at [16] and *Tracey v McCullagh* [2018] NICH 15 at [25].

¹⁵ [1969] 1 Ch 100.

"As a matter of principle, however, I do not really think that there is anything in this point, at all events in this case. Here the new trusts are in many respects similar to the old. In my judgment, the old trusts may fairly be said to have been varied by the arrangement whether the variation is effected directly, by leaving some of the old words standing and altering others, or indirectly, by revoking all the old words and then setting up new trusts partly, though not wholly, in the likeness of the old. One must not confuse machinery with substance; and it is the substance that matters. Comparing the position before and after the arrangement takes effect, I am satisfied that the result is a variation of the old trusts, even though effected by the machinery of revocation and resettlement."¹⁶

Megarry J considered that the facts of the application before him were different from those in *Re T's Settlement Trusts*.¹⁷ He considered that there was sufficient similarity between the original trust and the proposed variation such that the proposed arrangement could be considered to be a variation, rather than a resettlement.

Megarry J further considered the distinction between variation and resettlement in *Re Ball's Settlement Trusts*. In that case, a settlor enjoyed a life interest in a trust fund, with a testamentary power of appointment, and with his sons becoming entitled absolutely to the trust fund on his death. He proposed a variation of the trust whereby his sons' interests were replaced with life interests, with interests in remainder for their children. Although this arrangement was described by the settlor as a resettlement, and amounted to a rewriting of all the substantive trusts in the settlement, Megarry J considered that it was in truth merely a variation and could be approved.

Megarry J considered that "variation" and "resettlement" were not exclusive terms, and that it was possible for an arrangement to be a resettlement, but still a variation of the original trust:

"But it does not follow that merely because an arrangement can correctly be described as effecting a revocation and resettlement, it cannot also be correctly described as effecting a variation of the trusts. The question then is whether the arrangement in this case can be so described."¹⁸

Megarry J also considered that a resettlement could be a variation even if it could not be said that the proposed arrangement was sufficiently similar to the original settlement. In this case, Megarry J preferred to look at the

¹⁷ [1968] 1 WLR 899.

¹⁸ *Ibid*, 903.

underlying purpose to be served by the trust – making provision for each of the settlor’s sons and their families. Megarry J expressed the test in the following terms:

*"If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed."*¹⁹

The distinction between variation and resettlement was again considered in *Wyndham v Egremont*.²⁰ In that case, Blackburne J considered an arrangement, which, *inter alia*, sought a lengthy extension of the trust period. Blackburne J accepted that the variation of trusts regime did not permit a resettlement of the trust.²¹ He noted, but critiqued, the approach taken by Megarry J in *Re Ball's Settlement Trusts*,²² commenting that this approach meant that there was no bright-line test for determining whether an arrangement was a variation or a resettlement,²³ and stated:

*"[Megarry J's approach] does rather beg what is meant by "the substratum" of the trust or "the purpose of the original trust" or how one is to distinguish these elements."*²⁴

Blackburne J did find assistance in distinguishing a variation from a resettlement from the decision of the House of Lords in *Roome v Edwards*,²⁵ which considered the question whether a new settlement had been created for the purposes of Capital Gains Tax. Blackburne J cited with approval²⁶ the following passage from the speech of Lord Wilberforce in *Roome v Edwards*:

"There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another settlement, exists. One might expect to find separate and defined property; separate trusts; and separate trustees. One might also expect to find a separate disposition

¹⁹ *Ibid*, 905.

²⁰ [2009] EWHC 2076 (Ch).

²¹ *Ibid*, [21].

²² [1968] 1 WLR 899.

²³ Though, perhaps in light of *Re Ball's Settlement Trusts*, the appropriate question is not whether the arrangement is a resettlement or a variation, but whether an arrangement which is a resettlement is not a variation, or is an impermissible resettlement.

²⁴ [2009] EWHC 2076 (Ch), [22].

²⁵ [1982] AC 279.

²⁶ [2009] EWHC 2076 (Ch), [23].

bringing the separate settlement into existence. These indicia may be helpful, but they are not decisive. For example, a single disposition, e.g., a will with a single set of trustees, may create what are clearly separate settlements, relating to different properties, in favour of different beneficiaries, and conversely separate trusts may arise in what is clearly a single settlement, e.g. when the settled property is divided into shares. There are so many possible combinations of fact that even where these indicia or some of them are present, the answer may be doubtful, and may depend upon an appreciation of them as a whole.

Since “settlement” and “trusts” are legal terms, which are also used by business men or laymen in a business or practical sense, I think that the question whether a particular set of facts amounts to a settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common-sense manner to the facts under examination, would conclude. To take two fairly typical cases. Many settlements contain powers to appoint a part or a proportion of the trust property to beneficiaries: some may also confer power to appoint separate trustees of the property so appointed, or such power may be conferred by law: see Trustee Act 1925, section 37. It is established doctrine that the trusts declared by a document exercising a special power of appointment are to be read into the original settlement: see Muir (or Williams) v Muir [1943] AC 468. If such a power is exercised, whether or not separate trustees are appointed, I do not think that it would be natural for such a person as I have presupposed to say that a separate settlement had been created: still less so if it were found that provisions of the original settlement continued to apply to the appointed fund, or that the appointed fund were liable, in certain events, to fall back into the rest of the settled property. On the other hand, there may be a power to appoint and appropriate a part or portion of the trust property to beneficiaries and to settle it for their benefit. If such a power is exercised, the natural conclusion might be that a separate settlement was created, all the more so if a complete new set of trusts were declared as to the appropriated property, and if it could be said that the trusts of the original settlement ceased to apply to it. There can be many variations on these cases each of which will have to be judged on its facts.”²⁷

Thus, the focus is to be on a number of indicia or badges, none of which is conclusive in itself. Factors to be considered are whether or not the trust property remains the same, whether or not the trustees are the same, and the extent to which the trusts remain the same. These factors are to be

²⁷ [1982] AC 279, 292.

considered in a “*practical and common sense manner*”. Thus, the focus is not on the technicality of the form of the arrangement but on its practical purpose and effect.

The question as to whether an arrangement was an impermissible resettlement was considered in Northern Ireland in *Tracey v McCullagh*.²⁸ In that case, a will created two will trusts. One created a trust of the testatrix’s home and lands, under which a life interest was created for a disabled relative of the testatrix. The second was a trust of the residue of the estate, which again created a life interest for the disabled relative. The proposed arrangement involved a partitioning of the land trust, with the capital sum thus released being added to a revised residue trust which contained a power to accumulate income and so would take effect as a disabled person’s trust under section 89 of the Inheritance Tax Act 1984.

In determining that this was not an impermissible variation, McBride J resorted both to the purpose or substratum approach adopted by Megarry J in *Re Ball’s Settlement Trusts*,²⁹ and to the indicia taken from *Roome v Edwards*³⁰ by Blackburne J in *Wyndham v Egerton*.³¹ On the former, McBride J considered that both the will trusts and the proposed arrangement satisfied the testatrix’s overall intention to provide for her disabled relative’s comfort and well-being, such that the arrangement served the original purpose of the testatrix.³² On the latter front, McBride J noted that the proposed arrangement involved the same property, the same trustees and the same beneficiary, and so was not a resettlement.³³

As has been seen, the proposition that the variation of trusts regime does not permit the Court to approve certain forms of resettlement remains relevant. However, there is no clear guidance as to what forms of arrangement will fall to be treated as impermissible resettlements. Neither the purpose or substratum test nor the badges or indicia approach provides a clear distinguishing line for more radical proposed arrangements.

Benefit: “... unless the carrying out of the arrangement would be for the benefit of that person.”

As has been noted, the Court cannot approve a variation unless the arrangement is for the benefit of the person in question.³⁴ The starting

²⁸ [2018] NICh 15, [2020] NIJB 308.

²⁹ [1968] 1 WLR 899.

³⁰ [1982] AC 279.

³¹ [2009] EWHC 2076 (Ch).

³² [2018] NICh 15 at [25], [2020] NIJB 308.

³³ *Ibid* at [26].

³⁴ Trustee Act (NI) 1958, s.57(2).

point is that such benefit should usually be financial in nature.³⁵ However, benefit is not limited to financial benefit, and the Court may nevertheless approve an arrangement which appears to have financial disadvantages for the beneficiary in question, if there are sufficient non-financial sources of benefit.

In *Re CL*,³⁶ Cross J considered an application to vary trusts in favour of a woman who lacked mental capacity. The trusts provided her with an income vastly in excess of her needs, and which was subject to significant tax and surtax. The proposed variation involved her surrendering her interest in part of the trusts, which would lead to a loss of income, though not affecting her needs, and a significant saving in estate duty. Cross J held that the transaction was one into which she would have been advised to enter, had she been capable of managing her affairs, and approved the arrangement. Cross J commented on the question of benefit in the following terms:

"But if and so far as the judge [in Re Tinker³⁷] was saying that there must always be some element of financial advantage to the infant or otherwise incapable person in question before an arrangement can be said to be for his benefit, I think that he went too far. Suppose a young man of 18 to be entitled to a great fortune; suppose some comparatively small part of it to have come to him by reason of some such blunder in drafting as occurred in the Tinker case; suppose the persons to whom that part ought to have come to be in straitened circumstances; and suppose finally that the young man feels a strong moral obligation to right what he considers to be a wrong as soon as possible and says to his trustees "Cannot something be done for these cousins of mine now? Must I really wait until I am 21?" In such circumstances, the trustees could properly pay part of the trust fund to the cousins as an advancement for the young man's benefit (see In re Clore's Settlement Trusts), and if it was more convenient to achieve the desired result by an arrangement under the Variation of Trusts Act, I see no reason why the carrying out of the arrangement could not be considered as being for his benefit although it was financially to his detriment. It would be odd if the word "benefit" had a narrower meaning in the context of a variation than it has in the context of an advancement."³⁸

Thus, Cross J considered that the concept of benefit was broader than merely financial benefit, and could include other forms of non-financial benefit,

³⁵ *Re Tinker's Settlement Trusts* [1960] 3 All ER 85.

³⁶ [1969] 1 Ch 587.

³⁷ [1960] 3 All ER 85.

³⁸ [1969] 1 Ch 587, 586.

such as giving effect to wishes or moral obligations, even if those were to the beneficiary's financial detriment. So, in that case, Cross J considered that the tax planning advantages of the arrangement meant that it was to the beneficiary's benefit.

In *Re Remnant's Settlement Trusts*,³⁹ Pennycuik J took a very broad approach to the question of benefit, approving a scheme which had clear financial detriment to a class of minor beneficiaries. The settlement in question contained a forfeiture provision for any beneficiary who was a Roman Catholic or who was married to a Roman Catholic. The principal beneficiaries were two sets of cousins – one of which were Protestant, and one of which, while originally baptised as Protestants, attended a Roman Catholic church. The proposed arrangement involved the removal of the forfeiture provision, which clearly benefitted the Roman Catholic cousins financially, but had the converse financial detriment to the Protestant cousins. Pennycuik J considered the question of benefit in the following terms:

"I have not found this an easy point, but I think I am entitled to take a broad view of what is meant by "benefit," and so taking it, I think this arrangement can fairly be said to be for their benefit.

On that last point I was referred to In re Weston's Settlements [1969] 1 Ch. 223, where Lord Denning M.R. said, at p. 245:

"But I think it necessary to add this third proposition: (iii) The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit."

I do not think Lord Denning intended to use the words "educational" and "social" in any restrictive sense. I think the court is entitled and bound to consider not merely financial benefit but benefit of any other kind."⁴⁰

On the facts, Pennycuik J considered that there was benefit to the Protestant cousins on the basis that their freedom to marry a Roman Catholic would not be restricted, and that the possibility of family disharmony would be avoided.

It could, perhaps, be said that Pennycuik J's statement of the requirement of benefit goes too far. He does not engage with the proposition that financial benefit is usually required. Nor does he consider in any detail the facts and outcome of *Re Weston's Settlement Trusts*.⁴¹ In that case, the

³⁹ [1970] Ch 560.

⁴⁰ *Ibid*, 566.

⁴¹ [1969] 1 Ch. 223.

Court of Appeal refused an arrangement the effect of which was to export the trusts (and family) from England to Jersey to avoid Capital Gains Tax. Lord Denning MR adopted the broad approach to benefit, including the reference to educational and social benefit to find that the removal of the children from England to Jersey was not in their benefit, and so that the proposed variation as a whole was not to their benefit. Harman LJ, however, refused approval of the arrangement, holding that Stamp J, the judge at first instance, had been entitled to refuse the variation in his discretion, which was perhaps the more appropriate way to deal with a proposed variation driven solely by aggressive or artificial tax avoidance.

In *Wright v Gater*,⁴² Norris J reviewed the various authorities on the question of benefit, in the context of an application to vary a child's absolute entitlement by deferring that absolute entitlement until the age of 30, and in the interim to make discretionary provision for the child beneficiary. Norris J emphasised that benefit was generally financial in nature, but recognised that there were cases where an arrangement could be to a beneficiary's benefit, even though it was to his or her financial detriment. Norris J suggested the following question in determining whether or not non-financial benefit factors justified a variation to a trust:

*"Would a prudent adult, motivated by intelligent self-interest and after sustained consideration of the proposed trusts and powers and the circumstances in which they may fall to be implemented, be likely to accept the proposal?"*⁴³

On the facts of the case, Norris J held that a postponement of absolute entitlement to age 30 was not to the benefit of the child, but considered that a deferral of vesting of entitlement to income to age 18 and 10% of capital to age 21 and the balance capital to age 25 was to the child's benefit, given the risks and temptations likely when a child whose father has died becomes entitled to a large sum at an early age, before he has the knowledge and maturity to deal sensibly with that wealth.⁴⁴

Norris J's test of the hypothetical prudent adult was taken from case law on the variation of trusts regime in Ontario.⁴⁵ It does correspond well with the approach taken by Cross J in *Re CL*,⁴⁶ where he noted that the arrangement

⁴² [2011] EWHC 2881 (Ch).

⁴³ *Ibid* at [11].

⁴⁴ *Ibid* at [20].

⁴⁵ *Re Irving* (1975) 66 DLR (3d) 387. Although Norris J referred to the decision as being on "different legislation" in *Wright v Gater* at [20], there do not seem to be any material differences between the Ontario legislation and s.57(2) of the Trustee Act (NI) 1958 (or, for that matter, the Variation of Trusts Act 1958).

⁴⁶ [1969] 1 Ch 587.

under consideration was one into which an adult with capacity would likely have been advised to enter. However, the question can be artificial⁴⁷ in contexts where the transaction in question is one, such as that in consideration in *Wright v Gater*, the terms of which are inappropriate for an adult with capacity, but which might be appropriate for a child, or for a person with some form of disability.

Thus, while the statutory test of benefit focusses primarily on financial benefit, it is not so confined. The Court exercising its jurisdiction can consider the question of benefit in broad terms to allow it to consider other forms of benefit, which means that arrangements can be approved even if they appear to be to the financial detriment of the beneficiary provided that they carry other forms of benefit, such as assisting with tax planning,⁴⁸ or avoiding the potential pitfalls of a young person becoming entitled to a large capital sum at too early an age.⁴⁹

Discretion: “... may if it thinks fit ...”

The final issue to consider is the exercise of judicial discretion. Even if the proposed arrangement is not an impermissible resettlement, and even if it is to the benefit of the beneficiary in question, the Court is not bound to approve the variation. Rather, it exercises a discretion as to whether or not the arrangement is to be approved.

In *Re T's Settlement Trusts*,⁵⁰ Wilberforce J indicated, in the alternative to his views that the original proposal represented an impermissible resettlement, that the original proposal was not an arrangement which he would have exercised his discretion to approve. His reasoning on that point, however, does not readily segregate the separate issues of resettlement, benefit and discretion, so the decision provides little by way of guidance on the exercise of the judicial discretion.

As has been seen above, the Court of Appeal in *Re Weston's Settlement Trusts*⁵¹ refused to approve an arrangement which had the effect of exporting a trust from England to Jersey with the intention of avoiding Capital Gains Tax. Lord Denning MR noted that there was no statutory guidance as to the exercise of the judicial discretion, and commented that “*no one has ever suggested that [a variation motivated by tax avoidance] is undesirable or contrary to*

⁴⁷ A factor which may have been recognised by Norris J in his reference to “*mental contortion*” in *Wright v Gater* at [21].

⁴⁸ As in *Re CL* [1969] 1 Ch 587.

⁴⁹ Such as in *Re T's Settlement Trusts* [1964] Ch 158 or *Wright v Gater* [2011] EWHC 2881 (Ch).

⁵⁰ [1964] Ch 158.

⁵¹ [1969] Ch 223.

public policy”⁵² Lord Denning MR did not, as noted above, rely solely on judicial discretion in his judgment refusing the application, but found that there was no benefit to the infant beneficiaries. In contrast, Harman LJ relied on judicial discretion, holding that the judge at first instance had been entitled in the exercise of his discretion to refuse the application.⁵³ Harman LJ expressed some doubt that concerns about the nature of the tax avoidance would have justified the refusal of consent on their own, but considered that doubts as to the extent to which the trust would have been recognised under the law then applying in Jersey, and as to whether the child beneficiaries would become permanently resident in Jersey justified the refusal of consent in the exercise of discretion.⁵⁴

Some further guidance as to the exercise of the Court’s discretion was given by McBride J in *Tracey v McCullagh*.⁵⁵ McBride J considered that the Court should take relevant public policy issues into account in the exercise of its discretion.⁵⁶ On the facts of that case, McBride J considered whether it was against public policy to approve an arrangement in circumstances where if the arrangement were not approved, the beneficiary would lose existing entitlements to means-tested benefits and public funding of residential care fees, but where the approval of the arrangement would preserve those entitlements. McBride J considered that, on the facts of that case, such an arrangement did not offend against public policy. In the first instance, the preservation of means-tested entitlements was not the sole purpose of the arrangement, such that the scheme was not designed solely to deprive the beneficiary of income in order to satisfy means tests.⁵⁷ Secondly, the form of the trust proposed in the variation was a disabled person’s trust of the form recognised by Parliament in section 89 of the Inheritance Tax Act 1984.⁵⁸ As the form of trust had received Parliamentary sanction, the Court could not treat a variation to create such a trust as contrary to public policy.

There remains little guidance on the exercise of discretion. It seems, however, that questions of public policy loom large in that exercise. The Court may

⁵² *Ibid*, 245.

⁵³ *Ibid*, 248. It seems that a key factor in Stamp J’s exercise of discretion was that the arrangement was “a cheap exercise in tax avoidance which I ought not to sanction, as distinct from a legitimate avoidance of liability to taxation” (*Ibid*, 234). In more modern parlance, it might be said that Stamp J considered that the apparent move of the family to Jersey was not genuine, such that the transaction was an exercise in artificial tax avoidance.

⁵⁴ *Ibid*, 248.

⁵⁵ [2018] NICH 15, [2020] NIJB 308

⁵⁶ *Ibid* at [46].

⁵⁷ *Ibid*, at [50]. There were other effects of the arrangement, such as the making available of a capital fund which could be appointed to the beneficiary at the discretion of the trustees, and the clarification of certain provisions in the trust which gave rise to differences of interpretation.

⁵⁸ *Ibid* at [51].

also resort to the exercise of discretion where there are conflicting issues of financial benefit or detriment and non-financial benefit or detriment.

A variation to introduce discretionary provision?

As has been noted, there are three key factors which have to be considered in the exercise of the variation of trusts jurisdiction, namely whether the arrangement is an impermissible resettlement, whether the arrangement benefits the beneficiary in question, and whether the Court should exercise its discretion to approve the arrangement. All three merit careful consideration if an attempt is made to seek to introduce discretionary provision by way of a trust variation.

The first question to be considered is whether the arrangement is an impermissible resettlement. In *Re T's Settlement Trusts*,⁵⁹ the revocation of the original life interest trust and its replacement with a protective trust was considered to be an impermissible resettlement – though it may be that part of the problem with that arrangement was the introduction of new trustees. In *Re Purves*,⁶⁰ the Supreme Court of British Columbia considered that the replacement of a bare trust for children with protective trusts was an impermissible resettlement, not a variation. In *Wright v Gater*,⁶¹ Norris J expressed considerable doubt that the replacement of a bare trust with one whereby vesting was deferred to age 30, albeit with a power of advancement, was not an impermissible variation. However, Norris J did approve a more modest transaction, where the beneficiary became entitled to income at age 18, 10% of the capital at age 21, and the balance of the fund at age 25. That rather suggests that Norris J's concerns were not so much that the original proposed arrangement was an impermissible resettlement, but that the original proposed arrangement was not to the beneficiary's benefit. In *Tracey v McCullagh*,⁶² McBride J considered that an arrangement partitioning one life interest trust, and using that capital fund to augment another trust, which would be varied from a life interest trust to a discretionary disabled person's trust, was not an impermissible resettlement, relying on the continued underlying purpose, and the fact that the trust property, principal beneficiary and trustees remained the same.

In light of these cases, there will be a danger that arrangements which seek to replace absolutely vested provision with discretionary provision will fail as impermissible variations. This danger will be more marked

⁵⁹ [1964] Ch 158.

⁶⁰ (1984) 14 DLR (4th) 738.

⁶¹ [2011] EWHC 2881 (Ch).

⁶² [2018] NICH 15, [2020] NIQB 308.

where the original provision is particularly simple, such as a bare trust, than where the original trust is more complex, such as where there is a life interest. Practitioners can mitigate the risk that an arrangement will be an impermissible variation by ensuring that the trustees and trust property remain the same, and minimising the number of additional discretionary objects in the varied trust.

The question as to whether the removal of an absolutely vested interest and its replacement with a discretionary provision is difficult, given the weight placed on financial benefit. The concerns raised in *Re T's Settlement Trusts*⁶³ and in *Wright v Gate*⁶⁴ that long deferral of absolute vesting was not to the benefit of minor beneficiaries would apply with additional weight where that absolute vesting is entirely removed and replaced with a discretionary power of advancement. However, those cases are not the end of the matter. In *Re Elizabeth K Gates Estate Trust*,⁶⁵ the Royal Court of Jersey approved a variation which substituted entirely discretionary provisions for a vested interest. The Royal Court found that there was benefit in the introduction of the discretionary provision. It relied on the argument that it was undesirable for the child beneficiary to come into a large capital sum at a young age, and further on the significant fiscal advantages of the discretionary provision, such that the beneficiary would be taxed only on the income she actually received from the trust, not the income received by the trust. The Royal Court placed significant reliance on the trustees to exercise their discretions in favour of the beneficiary if any particular needs arose. There was a similar outcome in *Tracey v McCullagh*.⁶⁶ There, McBride J found that there was benefit, notwithstanding that the beneficiary lost his right to the income of the trusts. McBride J considered that there was benefit in preserving the beneficiary's entitlement to means-tested benefits and accommodation, which enabled the trust fund to be used to meet the beneficiary's other needs, rather than to replace his lost benefits.

In light of these principles, it may not be straightforward to show that the replacement of an absolutely vested interest with discretionary provision is to the benefit of the beneficiary. However, if a strong enough case about the detriment to the beneficiary from the existing provision is made, perhaps by showing that the income payable from a life interest trust is of limited value when compared to the partitioned capital value, or that the trust fund would be exhausted within a comparatively short period of time in replacing lost benefits, a good argument can be made that a discretionary trust is to the benefit of the beneficiary, provided that the Court has sufficient comfort

⁶³ [1964] Ch 158.

⁶⁴ [2011] EWHC 2881 (Ch).

⁶⁵ (2000) 3 ITEL 133.

⁶⁶ [2018] NICH 15, [2020] NIJB 308.

that the trustees will exercise their discretions in favour of the beneficiary favourably, having regard to the fact that the trust fund was originally vested in the beneficiary.⁶⁷

The final issue to consider is the exercise of the Court's discretion. In *Tracey v McCullagh*,⁶⁸ McBride J gave careful consideration to the question as to whether the variation which had the effect of protecting means-tested benefits and assistance with accommodation ought to be approved. In that case she approved the variation, but it is clear from her reasoning that the fact that the avoidance of care charges and preservation of means tested benefits was not the sole purpose of the scheme loomed large in the exercise of her discretion. It is therefore very possible that an arrangement which does not have any benefits or justifications other than the protection of means-tested benefits, such as providing access to capital to a beneficiary with an interest in possession, or avoiding a difficulty in the drafting of the trust, could fall foul of public policy concerns. This will be of particular concern in cases where the original trust is a simple bare trust for the beneficiary. McBride J also relied on the fact that the arrangement complied with the form of a disabled person's trust under section 89 of the Inheritance Tax Act 1984 in concluding that it was not contrary to public policy. Again, that may well suggest that if the proposed arrangement does not comply with the criteria for a disabled person's trust, it might not be approved.

If a variation is approved, will it be effective to preserve benefits?

We have seen that in certain circumstances, a Court may well approve a variation which has the effect of protecting means-tested benefits or provision of accommodation which would otherwise be lost because the beneficiary succeeds to a vested trust interest. However, we also need to consider whether such a variation will be successful in protecting such benefits. This requires consideration of the concept of notional capital, as applied in article 25 the Health and Personal Social Services (Assessment of Resources) Regulations 1993.⁶⁹ Under that provision, a resident is deemed to have capital of which he has deprived himself for the purpose of decreasing the amount he might be liable to pay for his accommodation. Thus, there

⁶⁷ As was the case in *Re Elizabeth K Gates Estate Trust* (above) and *Tracey v McCullagh* (above). Note that in *Tracey v McCullagh*, the Judge noted a slight concern in that one of the trustees was also a default beneficiary under the trust, and so had a personal interest which conflicted with the interests of the disabled beneficiary. On the facts of the case, the Judge was satisfied that the trustee's personal interest would not cloud his judgment. However, in other cases it may be more prudent to ensure that trustees are not also default beneficiaries of any discretionary trust.

⁶⁸ [2018] NICH 15, [2020] NIJB 308.

⁶⁹ This provision applies to public funding for residential care. There are similar provisions relating to means tested benefits.

are two issues to consider – whether the Court order approving the variation is a deprivation of capital by the beneficiary, and whether it has the purpose of decreasing the amount of capital the beneficiary has.

The established view is that the effect of the Court order approving the arrangement varying the trust makes the arrangement binding on those who are unable to assent.⁷⁰ Thus, it will be readily arguable that the arrangement is not a deprivation of capital effected by the beneficiary, as the action depriving the beneficiary of his interest is a Court order in proceedings to which he is a Defendant. The point is not free from argument, as at the interface between matrimonial law and insolvency law, a property transfer order made against a spouse is treated as a disposition by the spouse⁷¹ if it became effective after presentation of a bankruptcy petition against the spouse in question.⁷² Nevertheless, the wording and context of the relevant provisions is different. Much of the reasoning in the insolvency context turns on the fact that the matrimonial order is an order requiring the spouse to transfer property, rather than an order effecting an immediate transfer or vesting. This contrasts with the immediate effect of the approval of an arrangement under the variation of trusts regime. Thus, there is a good argument that the approval of an arrangement is not a deprivation of capital by the beneficiary on whose behalf the arrangement is approved.

The second issue is whether the arrangement has the purpose of depriving the beneficiary of his capital. This will be a significant risk for arrangements which have no purpose other than the preservation of means-tested benefits and assistance. However, there is a well-recognised distinction between the purpose and effect of a transaction, and the mere fact that a transaction has a certain effect does not mean that it had that purpose. Indeed, in the insolvency context, a transaction defrauding creditors will only be liable to be set aside if the transaction had a real substantial purpose of prejudicing creditors: a by-product or mere result is not enough.⁷³ If the arrangement passes the public policy test – particularly if there is a finding by the Court that the other advantages of the arrangement are such that it is not designed to deprive the beneficiary of income or capital to reduce accommodation charges⁷⁴ - it is unlikely that the trust fund would be treated as notional capital.

⁷⁰ *Re Holt's Settlement Trusts* [1969] 1 Ch 100.

⁷¹ For the purposes of art.257 of the Insolvency (NI) Order 1989, which renders void dispositions of property made by a bankrupt after presentation of the bankruptcy petition.

⁷² *Re Flint* [1993] Ch 319.

⁷³ See *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489 at [24] – [25].

⁷⁴ As in *Tracey v McCullagh* [2018] NICH 15, [2020] NIJB 308

Conclusion

We have seen that the variation of trusts regime can, in appropriate circumstances, provide a means of introducing discretionary provision into a trust with the effect of preserving a beneficiary's entitlements to means-tested benefits and assistance. However, the requirements that the arrangement is not an impermissible resettlement, that there is benefit to the beneficiary, and the Court's discretion to refuse consent to the arrangement on public policy grounds all pose hurdles which such schemes must cross. In addition, a successful variation could be open to being challenged as a deprivation of capital.

It has been seen that all these risks are lesser, the more complex the original trust is. It will be easier to argue that the introduction of a disabled person's discretionary trust is not an impermissible resettlement where the original trust is a life interest or other more complicated settlement than where it is a bare trust. Similarly, the partitioning of a life interest settlement to create the fund for such a discretionary trust with powers of advancement can more easily be said to provide financial benefit to the beneficiary than can the transfer of an absolute vested interest on to discretionary trusts. Finally, it will be easier to identify and rely on additional advantages and purposes in an adjustment of beneficiaries' rights in a more complex original trust than it will be in a case where the original trust is a bare trust. The latter case will be particularly vulnerable to public policy concerns in the exercise of the Court's discretion, or to falling foul of the deprivation of capital provisions.

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

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

Introduction

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

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

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

The caselaw: a framing

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

Nonetheless, we have what we have, and if judgments reflect the definitive statement as to the best interests of the individuals in question, we are entitled to examine what those judgments have to say about the conception of those interests. Through a search of Bailii and Westlaw, we identified 43 cases between January 2015 (i.e. the point at which the previous article had stopped) and September 2020⁴ from which it is possible to glean some substantive idea of the person's wishes and feelings (out of a total number of 281 judgments from the Court of Protection which appear on Westlaw for the same period). Parenthetically, we note that it might be thought somewhat surprising that the number of cases where it is possible to glean some substantive idea of the person's wishes and feelings is so low; in part this may be explained by the fact that the Court of Protection Judges may also be required to consider questions of the person's decision-making capacity alone, or other matters where there is no requirement to focus upon their best interests. But the fact that it is not possible to glean a sufficient sense of the person's wishes and feelings save in such a relatively small number of cases is undoubtedly striking.

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

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

⁴ Listed in the Appendix to this article.

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

Appellate level decisions

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

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

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

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

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

First instance decisions

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

Charles J was Vice-President of the Court of Protection. His successor, Hayden J, has adopted a stance in relation to medical treatment cases⁸ which, on one view, might be said to be further away from substitute decision-making. He has, for instance, repeatedly adverted to the observations made prior to his appointment in *M v N* [2015] EWCOP 9 (at paragraph 28) that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *King's College Hospital NHS Trust v FG* [2019] EWCOP 7, concerning a man with schizophrenia, who had sustained a fracture and dislocation to his shoulder, which required treatment under general anaesthetic. He did not consent to the operation. His reasons included that he was worried about the effect of the general anaesthetic on his heart, its potential interplay with the medication clozapine which he was taking, and that the surgery had been ordered by MI5. Having found that he lacked capacity to make the decision about the case, Francis J therefore had to decide what was in the man's best interests. Featuring heavily in his analysis (at paragraph 18) was that, without treatment, he would be unable to participate in activities he enjoyed in the future such as fishing and wood chopping;
4. *NHS Trust v JP* [2019] EWCOP 23, concerning birth arrangements for a woman with learning disability. She strongly wished a natural vaginal birth, wishing (as put at paragraph 41) to retain autonomy over what happens and her body. In determining that a caesarean section (and covert medication) was in her best interests – as a “least worst option” (paragraph 44), Williams J identified that the woman was “*likely to experience distress, distrust, anger, frustration at both the deception that may be necessary and the carrying out of a surgical procedure against her will in respect of such a profoundly important matter. This is likely to be all the greater because it is proposed that the baby will be removed from her care*” (paragraph 43(i)). However, immediately prior to this, Williams J undertook an interesting exercise, pursuant to s.4(6) MCA 2005,

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

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

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

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

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

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

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

1. *Manchester University NHS Trust v DE* [2019] EWCOP 19, concerning a Jehovah's Witness who was expressly saying that she did not wish to die but could not countenance receiving blood products. As the woman lacked capacity to make the decision, it fell to be made on a best interests basis. In doing so, it was of note that Lieven J expressly identified (at paragraph 28) that *"the evidence even at the oral hearing was that although DE described herself as a Jehovah's Witness she was not someone for whom those beliefs were central to her personality or sense of identity. During the oral hearing I did not get any sense that she would feel deeply upset if an order was made in the form sought, or that she would feel a deep conflict with her religious beliefs;"*
2. *East Lancashire Hospitals NHS Trust v PW* [2019] EWCOP 10, concerning a man with schizophrenia who urgently required his foot to be amputated to prevent sepsis spreading and endangering his life. Although PW was strongly opposed to the operation, Lieven J found that he did not want to die, and was labouring under a delusion that there was an alternative, namely IV antibiotics, which the medical evidence showed would not solve or materially alleviate the condition. In CRPD terms his will – to live – could therefore be seen in tension with his preference – not to have the operation;
3. *Re AB* [2016] EWCOP 66, a decision of Mostyn J relating to an HIV-positive woman who, when she had had capacity, had demonstrated that her wishes were to receive HIV treatment, but was now making it clear that

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

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

4. *University Hospitals of Derby & Burton v J* [2019] EWCOP 16, concerning the question of whether it was in the best interests of a woman with autism and a severe learning disability to undergo a hysterectomy, salpingo-oophorectomy and colonoscopy while she was sedated to relieve P of extreme distress caused by her menstrual cycle. She was unable to express a clear view about the operation, and had a strong dislike of travel, which would be necessary to get her to hospital for the operation to be carried out. However, Williams J considered (at paragraph 38 (vii) that the evidence demonstrated that she “*approves of medical treatments which relieve her of pain and distress; her overcoming her dislike of travel to attend to her dental problems and her support for an ambulance being called when recently in severe pain illustrate her approach.*”
5. *Guys and St Thomas’ NHS Foundation Trust v X* [2019] EWCOP 35, concerning birth arrangements for a woman in mental health crisis who was unable to reconcile her conflicting religious beliefs (on the one hand of wanting a natural birth – which was considered to be clinically too risky – and also wanting a live, well and safely born baby). In that case, and perhaps somewhat controversially, the court made declarations as to her best interests on the basis of an interim declaration (i.e. on the basis of “reason to believe”) as to her lack of capacity in the relevant domains, but it was clear that Theis J did not consider she was in a position where she was faced with a frank refusal of a Caesarean section (whether capacitous or otherwise);

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

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

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

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

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

4. *London Borough of Hackney v SJF & Anor* [2019] EWCOP 8, in which the central question was whether it was in the best interests of a 56 year old woman with a complicated matrix of physical and mental health issues to return home to live in her rented flat with her son. It was clear that she wished to do so, but Senior Judge Hilder found that this was *“not now impracticable to give effect to those wishes, even on a trial basis. The imperative towards implementing SJF’s clear preference is outweighed by the equally clear potential for detrimental effect to her health. Were she to return to [to the flat] without services from healthcare professionals at home, and with extremely restricted ability to leave that property, it seems to me inevitable that care arrangements would break down very quickly and, at best, SJF would be back in hospital again”* (paragraph 71).
5. *Royal Borough of Greenwich v EOA* [2019] EWCOP 54, in which Williams J was considering where the young man in question should live pending the final hearing of welfare applications under the MCA and the inherent jurisdiction. The only accommodation which was available was a residential placement, so the choice was between that accommodation and having nowhere to live and no one to care for him. The man told Williams J *“passionately and forcefully”* that he did not wish to go there (paragraph 9), but Williams J considered that there *“really is no other alternative;”* whilst he hoped that the man would accept that he should go to live there for the short term until the court could consider matters again, it would necessary to ensure that he did so. It is more than usually frustrating that there is no further judgment available in this case because it appears from the (short) judgment summarised here that there was a realistic prospect that the man in fact **did** have capacity to decide where to live, which would have changed the complexion of the case considerably.
6. *Re AM* [2019] EWCOP 59, a s.21A MCA challenge to a deprivation of liberty authorisation, the key issue being whether the man – who had very complex physical healthcare needs – should return and be cared for at home, as he strongly wished. In a judgment lacking in paragraph numbers, District Judge Eldergill sought to find a way to give *“practical expression to his wishes in a way that is not self-defeating. By that I mean that there is no benefit to him and his wife in authorising a return home if it is likely that he will suffer unduly and be back in hospital, and then a nursing home, within a short period - and in a worse position from the point of view of their family life, because it is not X Nursing Home but somewhere less good and less accessible.”* Ultimately, however, he found that this was simply not possible

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

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

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

Drawing the threads together

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

APPENDIX

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

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

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

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

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

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

The Solicitor Executor: Some Reflections from Practice and Some Pitfalls

Part One

**Sheena Grattan, TEP, Barrister
(and various anonymous solicitor contributors)**

Introduction

As it is often the case that the most valuable lessons are learnt from lived experience (and, no doubt, from the occasional 'near-miss'), the Editorial Board invited solicitors in Northern Ireland to recount their own most memorable experiences when acting as executors. Those reminiscences are shared in this first part of a two-part article. The concluding part will consider some of the specific legal issues and problems that solicitor executorship presents, including discussions with the testator prior to appointment, the scope of exemption clauses and when a solicitor executor might (and should) consider renunciation.

Memorable Solicitor Executorships

Interestingly, but perhaps not surprisingly, virtually all of the contributions received concerned either the disposal of the deceased's mortal remains or the distribution of personal effects of relatively limited monetary value.

Disposing of the testator's remains

The orthodox legal principles are that 'there is no property in a dead body'¹ and that it is the duty of the executor to dispose of the Testator's mortal remains.

Several solicitors recounted occasions on which this duty presented a difficulty or, at least, an unusual experience:

A number of years ago a call came through to the office from a local nursing home. One of the home's residents, a Mr A had passed

¹ See generally Heather Conway [2016] *The Law and the Dead*, Routledge.

away and the home had been provided with our contact details by a neighbour as the solicitor who acted on behalf of the deceased. Mr A had appointed a Solicitor in the firm to be his sole Executor and the Nursing home required the Solicitor to organise the funeral as soon as possible to avoid upsetting the other residents. Our records confirmed that Mr A had a funeral plan in place. The Undertakers were contacted and arrangements made for the Funeral Director to come to the office for the purposes of having the Solicitor sign off on the necessary documentation in order to allow the body of Mr A to be removed from the home and his burial to proceed.

Mr B was a single man who liked to travel in his retirement. He had distant cousins up the country and whilst he was on friendly terms with these relations, he was a very private man and was reluctant for his cousins to know his personal business. Mr B advised that he wished to appoint us as solicitors to be Executors to his estate. In his Will, Mr B donated his body to medical science for research and provided instructions for the interment of the remains of his body thereafter. It was agreed that Mr B would inform his Minister that he had appointed our firm to be Executors to his estate to ensure that we would be contacted immediately in the event of his death. Mr B deposited with us a key to his property and the code to his alarm and pin code for his safe with all of this being placed in safekeeping for and on his behalf. Despite his best intentions when Mr B passed away his funeral remains were buried intact in accordance with the directions contained within his Will; the medical facility named within his Will having politely declined to accept his body or any part of it.

Mr C had been married twice and had outlived both of his spouses. He had a grown-up son and daughter from his first marriage, no children from his second marriage, and had advised that as such his Will was going to be very straightforward. He did not require any directions to be put into his Will about his funeral and left all of his estate to his children in equal shares. In passing, however, Mr C mentioned that he was going to be buried in one of the local parish graveyards in a grave occupied by one of his two wives. Despite Mr C's assurances, things did not go as smoothly as he had envisaged. Mr C's children's initial squabble arose as to where their father should be buried. The written attendance note containing the father's remarks in relation to the particular parish graveyard was produced to resolve this issue. The family continued to argue throughout the administration with heated emotions in relation to a Lambeg drum and a Hoover, but at least Mr C was able to rest, if not in peace, in the place of his choice whilst his children fought over his worldly goods.

The solicitor involved in all three of the above cases offers the following sage advice:

If the solicitor/firm is appointed by the client to be sole executor, it is likely that you shall require a level of personal information and detail from the client over and above that which would be required in those circumstances where a family member has been appointed. Whether inserted in the Will or kept separately by way of memorandum placed with the Will, it would be prudent to hold not only instructions in relation to the funeral arrangements for the client but also along with this all relevant personal details and information which would be necessary to organise the funeral and to commence the administration process thereafter.

The 'ownership' of graves or, more accurately, the scope of an exclusive right to burial, is very fraught legal territory, as anyone who has been involved in the management of a local church which has the privilege of its own graveyard will confirm.² The regulations governing public cemeteries present no less of a legal quagmire, particularly when they have to be navigated as a matter of urgency. Another solicitor contributor recounted a difficulty which arose, as Murphy's Law so often has it, on the cusp of annual leave:

As a private client lawyer, it is rare to receive a call from the PSNI asking if a name is familiar. In this instance, the name was unfamiliar, but we did hold a Will for the lady concerned. Sadly, the testator had died of natural causes in her home and, through a few unlikely connections and ultimately, her minister, our name was mentioned.

Two unnamed partners in the practice were appointed as Executors and the estate was left to charity, with no hint of family or friends to contact which was consistent with PSNI enquiries. Consequently, it fell to us to make funeral arrangements. No one currently in the practice knew this lady. Did she have religious beliefs and, if so, what faith, and where might her family be interred, or might she prefer to be cremated?

On the off chance of a pre-paid funeral plan, we set about calling local undertakers. On the third call we struck lucky. Every aspect of the funeral was planned and paid for, and the cemetery and burial plot noted. What a relief – until the undertakers called the next day to say the name on the grave papers did not match the deceased's, so the Council would

² Those with the misfortune of having to research the law governing grave disputes might start with Alan Dowling, *Exclusive Rights of Burial and the Law of Real Property* [1998] *Legal Studies* 438.

not open the grave. Desperate to unlock this problem, we checked the title deeds to the home and discovered death certificates for both the lady's mother and father. We felt sure if they were in the grave we would be sorted. Yes, the Council agreed both parents lay in the grave, but they still needed the signature of the owner of the grave, bought some twenty-five years ago, before opening it. There was nothing to suggest the grave owner was related, and not much chance he still lived at the address given when the grave was purchased.

Two days before my two-week summer holiday, I cannot get a grave opened to bury a client I have not met, and over whose remains I have control. The Parks and Cemeteries department of the relevant Council chose to write to the "grave owner's" address. As anticipated, he was no longer at that address. The current resident happened to know where the previous owner had moved to and made contact, which prompted a call to the Council. Yes, against all odds, the original owner had been found and would sign to open the grave.

It seems plots in this particular graveyard were much sought after when it opened, and the local Council stipulated only residents in the Borough could buy. As a consequence, many plots were bought for people outside the Borough in the names of other people.

One business call I was only too pleased to take, as I queued for the Rosslare-Cherbourg ferry, was the call from the terribly nice lady in the Parks and Cemeteries department, giving me clearance to bury... and to go on holiday!

However, once bitten, twice shy:

Henceforth if we act as a sole executor and there appear to be few or no close family members, we require details from the testator as to their religious preferences, their funeral wishes, and whether they wish to be buried or cremated. We do not put this in the Will, but we hold this information alongside to facilitate smooth departures.

The most recent edition of this journal included a review of Patricia Bryon's *Last Orders – The Essential Guide to Your Last Wishes*.³ This excellent and user-friendly text guides prospective testators through all matters which will have to be addressed by their executors in the fulness of time. There will be few professional executors who have not encountered the nightmare

³ Patricia Byron, reviewed at *Journal of Elder Law and Capacity* 2020, 1, 103

of a probate with virtually no paperwork and/or no-one knowing anything definite as to the testator's preferences, with the grieving family at loggerheads as to their differing perceptions of the deceased's likely wishes. One of the potential disputes mentioned in the earlier scenarios was resolved when the family agreed to observe the testator's (non-binding) wishes as to his burial arrangements and often such a note will be the touchpaper that persuades the bereft to reach a consensus even in the most acrimonious of disputes. Those who have not yet had an opportunity to read Ms Byron's work are encouraged to do so.

Funeral disputes generally

More generally, it would appear that disputes between the family of the deceased as to the place of burial and/or who takes control of the ashes are increasing year on year, no doubt precipitated in part by ever more complex family relationships.⁴ Legal advisers can be involved in these emotive disputes whether or not they are the actual executors and it is arguable that it is actually less difficult if one can at least yield a modicum of control in the capacity of executor.

Intestate deaths present a peculiar difficulty. An executor at least takes title from the will,⁵ whereas prospective administrators strictly have to await a grant of representative to confer authority. Works of humanity and necessity are generally permitted, but the individual in question may be particularly cautious about not being taken to have intermeddled and considered to have accepted office if there are likely to be other difficulties with the administration of the estate.

A burial dispute on a Friday afternoon in an intestate death, particularly one with a complex family dynamic is one that tests a lawyer's diplomatic and conciliatory skills to the maximum, if an emergency application to the court for an injunction or directions is to be avoided. The most classic scenario in the writer's experience is the premature sudden death of an unmarried man in which the statutory next of kin is his minor child, represented by the infant's mother and now ex-partner of the deceased, where the ex-partner and the deceased's parents have at least two different ideas as to what the intestate would have wanted. All involved should do what they can, if necessary through a third-party mediator such as a member of the clergy, to broker a satisfactory resolution. The legal remedies, such that they are

⁴ For an account of recent English and other common law decisions see Heather Conway, *First Among Equals: Breaking the Deadlock in Parental and Sibling Funeral Disputes* [2018] *Liverpool Law Review* 151.

⁵ Cases in which the validity of the last will is also being disputed are more problematic and are discussed by Professor Conway in her article.

under the existing law, are costly and will inevitably fall short. In practice, the 'he who pays the piper' principle has generally been determinative.

Difficulties with personal effects and other assets with little monetary value

The developed world has supposedly reached 'peak stuff', with 'experiences' apparently becoming more significant to the younger generations than the collecting material possessions. Marie Kondo is the best known of many decluttering gurus. Should this trend to purge oneself of physical possessions continue, it should make the lot of future solicitor executors a rather happier one, although one suspects that any void will be filled with disputes arising out of the 'new property' of digital assets, many of which likewise are of little monetary value.⁶

In the meantime, disproportionately costly disputes about 'stuff' will continue to exhaust the limits of the solicitor executor's patience. As any experienced probate practitioner will confirm, it is axiomatic that the degree of heat and hostility generated by a dispute about the distribution of estate assets is inversely proportionate to their monetary value. It does not require a degree in psychology to know that there is something much deeper going on or that the grieving process produces a range of complex and often unexpected emotions.⁷ Research from Australasia has confirmed that disputes between siblings are the most costly and intractable of all family inheritance litigation⁸ and this experience of a solicitor executor will strike a chord with many practitioners:

I once had an estate where there were four residuary beneficiaries who clearly loathed each other. These siblings were so determined to obstruct each other that literally every step of the process involved some form of disagreement. The low point for me was when it came to the division of the chattels. Since none of them trusted any of the others, it was agreed that I would attend at the deceased's house and the beneficiaries would take it in turns to identify which items of contents they wanted. This was to be accomplished with the use of different coloured stickers – one colour allocated to each beneficiary.

⁶ See generally Leigh Sagar, *The Digital Estate*, Sweet and Maxwell, 2018 and Andrew Kirkpatrick, *Estate Planning for digital assets on incapacity and death*. *Journal of Elder Law and Capacity*, 2020, 1, 1. It is imperative that all personal representatives keep abreast of the fast changing position of the digital estate.

⁷ The issues are charted in Heather Conway, *Where There's a Will: Law and Emotion in Sibling Inheritance Disputes* in H Conway and John Stannard, *The Emotional Dynamics of Law and Legal Discourse*, Hart Publishing.

⁸ Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria*, *Australasian Institute of Judicial Administration* (2011).

The agreement was that, if only one beneficiary wanted an item then it was theirs but if more than one sticker was affixed to an item, it went to auction. As each beneficiary came to the house for their turn I followed them around with a clipboard, making a note of who wanted what. I don't think that I have ever, since my schooldays, had to try so hard to resist the urge to laugh. Each of them clearly took the sight of one of the other's stickers as an encouragement, so that by the end of the process nearly everything had four stickers on it. I believe that in the end they all had to head off to the auction house and bid against each other in person.

All too often the last clause to be agreed in the terms of settlement of an estate dispute is either about costs or 'contents'. The parties to such disputes seem to share an uncanny knack of requesting items which they know fine well no longer exist (with the explanation from the opposing party variously being that the item was buried with the deceased, stolen or given to the charity shop). Sometimes the parties have their eye on items which they had given to the now deceased, which obviously reflect their own exemplary taste in gifts ('the only decent jewellery she had was given to her by us'). This solicitor executor encountered a beneficiary seeking the return of her own art:

After having the contents valued, I invited friends and family members to the deceased's house to allow them to pick mementos or items they would like to keep. A very cantankerous friend of the deceased complained loudly and bitterly that the paintings she had done for the deceased were missing from the house. I felt like she was accusing me of taking them myself. I was willing to accept the accusatory looks, rather than run the risk of her reaction if I suggested the deceased may have thrown them out!!

This beneficiary's delusions about her artistic merit has echoes of the hapless Arthur Pinion, the self-acclaimed artist who attempted to leave his life's work collection to create an educational museum. The epitaph of the English Court of Appeal was that said collection was a 'load of old junk'⁹ while the expert witness twisted the knife with the observation that it was odd that such a voracious collector could not have managed to stumble on at least one piece of value.

Some personal effects require particularly urgent or careful handling and the classic items rehearsed in practitioner texts include pets, more dangerous

⁹ *Re Pinion* [1965] Ch 85. The case is used on undergraduate Equity syllabi as authority for the principle that there is a value judgment as to what advances education. The trust was held to be non-charitable.

livestock and firearms. This contributor recounts the embarrassment caused by his deceased testator:

I once had a client who passed away leaving my firm as his sole executors. On arriving at the deceased's property in order to secure it, I discovered that his neighbours were already picking their way through his belongings and I had to threaten them with the police in order to get them to leave. Subsequently, whilst sorting through his personal effects I discovered that he had an unusual taste in a particular film genre and he had several large drawers filled with VHS videos which were, as I recall, unsaleable when I showed them to the auctioneer. My colleagues found the entire thing rather amusing and the hilarity continued once I had arranged for the deceased's post to be redirected to the office. Despite my best efforts to remove the deceased from various mailing lists, I continued to receive an undesirable catalogue from an address in Amsterdam once a month for the rest of the year. Strangely, it always managed to end up on the top of my pile of post when our correspondence was distributed throughout the office. I can only assume that the new owners of the deceased's property were taken by surprise when the redirection ended and they began to receive those mailings direct.

Personal effects generally

The standard precedent manuals suggest various solutions to the problem of disposing of chattels, including mechanisms for governing the order of choice (such as eldest first, or "A,B,C,C,B,A"). It is certainly prudent to include a provision for dealing with disagreement, such that the decision of the executor is final (although when faced with the most emotive of personal litigant as opposition no amount of drafting is going to prevent a dispute). There has also been an increased use of precatory trusts whereby if the executors distribute an asset within two years of death the asset is regarded for inheritance tax purposes as having being left to the recipient.

The Downright Difficult beneficiary

Difficult clients are an occupational hazard and difficult residuary beneficiaries are an occupational hazard for the solicitor executor. The particular residuary beneficiary takes the concept of 'being ready with one's accounts' to another level:

As a relatively newly qualified solicitor I was dealing with a modest estate. I had been delighted to get the accounts balanced, the legacies paid and the final distributions sent to the residuary beneficiaries. I was not quite as pleased however when the signed receipts came back from

the beneficiaries. One of them was under cover of a letter in which the beneficiary queried what had become of the leftover food and drink which had been laid on after the funeral, as she could see no reference to those significant assets in my accounts. I showed the letter to the firm's senior partner and we agreed very quickly that, whilst it would be tempting to send the lady a ham sandwich by recorded delivery, no response was in fact required.

Nightmare Solicitor Executorships

It was perhaps telling that none of our contributors volunteered illustrations of what might truly be described as the nightmare executorship. It was anticipated that there would be a healthy crop of illustrations of solicitor executors being embroiled in third-party estate litigation, or of being threatened with bankruptcy by HMRC on the basis that they were personally liable for unpaid Inheritance Tax (some of which may be attributable to gifts with reservation of benefit, settled property or foreign assets over which the executor has no control). One suspects that these truly horrendous 'white knuckle ride' experiences gave so many sleepless nights that they are memories that will never be dredged up voluntarily again. But such scenarios have occurred and will continue to do so. The aftermath of the 2007 property crash resulted in a toxic mix of probate values plummeting, sluggish sales making loss-relief ineffective or very unattractive, and the more aggressive approach of HMRC to Business Property Relief on lands set in conacre: a perfect storm which left several solicitor executors looking down the barrel at bankruptcy proceedings. Traditionally, the personal representative's rather open-ended liability for leases was the primary concern of neutral non-beneficiary executors, solicitors or otherwise. More recently, executors have been encountering claims in respect of contaminated land owned by the deceased and personal injury claims for historic sexual abuse allegedly committed by the deceased. It is imperative that all executors (not least professional insured executors) exercise due diligence before accepting office and when they are still entitled to renounce, a subject which is considered in more detail in the second part of this article.

Summary

The writer's research (albeit entirely non-empirical) would suggest that solicitors are not being appointed as executors as often as they were in the past. This may in part be due to the diminishing respect for the professions among the public. Society has moved a long way from the days when Sir Frederick Pollock described the family solicitor as

¹⁰ F Pollock, *The Land Laws* (1894) at 114-115.

...the real possessor of the secrets of the estate, the real familiar spirit at whose bidding magical powers of the settlement are called forth, and without whose aid nothing of weight can be undertaken.

It may also be due to the fact that the profession itself has awakened to the reality that executorship (even with the benefit of a charging clause) is a thankless task. However, the well-documented demographic changes including smaller families and the growing number of individuals, particularly women with third level education, who do not have children may mean that solicitors will be asked to be executors (and attorneys) more frequently again in the future.

Finally, it should be remembered that article 35 of the Wills and Administration Proceedings (NI) Order 1994 introduced the facility to remove executors and administrators and replace them with a substituted personal representative (complete with the authority to charge, if a professional). There is a plethora of article 35 applications issued before the Chancery Master every year. Hardly any run to full hearing¹¹ but the parties are generally prodded to reach agreement (eventually) that a neutral solicitor is appointed as the substitute personal representative. By definition it is already a difficult administration, with the protagonists often being the warring siblings referred to above. It is particularly important that any solicitor accepting such an appointment is familiar with the precise detail of the estate and progress to date, and in the writer's experience the Court will facilitate an opportunity for the prospective candidate to review the files in advance of acceptance. While the Court is generally amenable to assisting those whom it appoints to the role with whatever directions are prudent from time to time, inheriting an already fraught partly completed administration is not one that any professional should, to quote the words of the old marriage ceremony, undertake unadvisedly, lightly or wantonly.

As noted, Part Two of this article will develop the themes introduced above with a more detailed review of a miscellany of matters of particular relevance to the solicitor executor. In the meantime, if any of the readership wish to share their experiences, memorable or truly forgettable, they should send them to Heather Semple at heather.semple@lawsoc-ni.org

¹¹ The only reported decision is that of the former Chancery Judge, the then Deeny J. in *Re Hoey* [2014] NICh 11.

Revisiting decision-making: A case for new legislation?

Professor John Williams¹

This article explores the approaches to capacity and decision-making throughout the various UK jurisdictions, now enshrined in Statute, and which overtook the principle of inherent jurisdiction

Introduction

It is trite to say decision-making is part of living, but that does not make it less the case. Daily we make hundreds of decisions, some are trivial but others serious including decisions on medical treatment, social care, and financial matters. For most people, we do not challenge their ability to decide; for example, rarely are people asked whether they possess the capacity to sign a lease or consent to surgery. Much of the discussion of decision-making concentrates on mental capacity. All four nations in the United Kingdom have legislation on mental capacity which builds upon the judicial development of the law. There are two parts to the legislation. First, how do decision-makers determine whether an adult has relevant mental capacity? What test is used? The second imposes duties on the decision-maker where the adult is assessed as lacking mental capacity; on what basis should they decide, assuming it is right to decide for the person?

Although legislation is essential given the powers decision-makers have where an adult is assessed as lacking mental capacity, it addresses only one component of decision-making. One criticism of the legal discourse is the impression that mental capacity is the only factor when deciding if an adult can decide. Herring and Wall recognise an adult can have capacity under the mental capacity legislation, but not be autonomous. Autonomy extends beyond possessing the mental capacity to decide and requires a wider level of capacity outside of mental capacity legislation, although they feature in other legislation and the common law.²

¹ Emiritus Professor, Department of Law and Criminology, Aberystwyth University.

² Jonathan Herring and Jesse Wall, 'Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the Mental Capacity Act' (2015) 35 *Legal Studies* 698 <https://www.cambridge.org/core/product/identifier/S026138750000221X/type/journal_article> accessed 28 September 2020.

Mental capacity legislation across the four nations

Scotland was the first of the four nations to introduce mental capacity legislation using its new powers under the Scotland Act 1998.³ The Adults with Incapacity (Scotland) Act 2000 was a 'ground breaking' reform which repealed the previous law based on a 'paternalistic, substitutive, model' and removed all decision-making to curators, tutors, or guardians if the person lacked mental capacity. There was no duty on any of these to consult with the person. The 2000 Act was based on the report and draft Bill published by the Scottish Law Commission which found much of the law to be archaic.⁴ The Scottish Executive recognised the need for a new law. They made the case for change in the 1999 Making the Right Move report.⁵

In England and in Wales the Mental Capacity Act 2005 followed a report by the Law Commission in 1995 which referred to the legal context as one of *'incoherence, inconsistency and historical accident'*.⁶ A Joint Committee of the House of Lords and House of Commons considered a draft bill on mental incapacity and reported in 2003. The Committee concluded new legislation was required but recognised that legislation can only go so far. It also required a change in attitudes which recognises the rights of those lacking mental capacity.⁷ The government introduced the Mental Capacity Bill which became law in 2005.

Northern Ireland was the last of the four nations to introduce mental capacity legislation. Of the four nations, Northern Ireland adopted a more radical approach to mental capacity law and mental health law. The Mental Capacity Act (Northern Ireland) 2016 is based on the Bamford review of mental health and learning disability. The Act fuses mental health and mental capacity law for those aged sixteen years and over. The Bamford review recommended that,

"... Government should adopt a coherent and coordinated approach to legislative provision. This should be through the introduction of

³ Margaret L Ross, 'The Adults with Incapacity (Scotland) Act 2000: A Long and Winding Road' (2003) 7 Edinburgh Law Review 226 <<https://www.eupublishing.com/doi/abs/10.3366/elr.2003.7.2.226>> accessed 28 September 2020.

⁴ Scottish Law Commission, 'Report on Incapable Adults (Scots Law Commission No 151)' (1995) <https://www.scotlawcom.gov.uk/files/5013/2758/0994/rep151_1.pdf> accessed 28 September 2020.

⁵ Scottish Executive, 'Making the Right Moves: Rights and Protection for Adults with Incapacity' (1999) <<https://web.archive.org/web/20030310113938/http://www.scotland.gov.uk/rightmoves/docs/mrmm.pdf>> accessed 28 September 2020.

⁶ Law Commission, 'Mental Incapacity' (1995) 231 Law Com 33, para 2.45

⁷ House of Lords and House of Commons Joint Committee on the Draft Mental Incapacity Bill, 'Draft Mental Incapacity Bill', vol 1 (2003).

*comprehensive provisions for all people who require substitute-decision-making. A single legislative Framework is proposed for interventions in all aspects of the needs of people requiring substitute decision-making, including mental health, physical health, welfare or financial needs*⁸

This reflects article 12(2) of the Convention on the Rights of Persons with Disabilities which requires state parties to ‘recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.’ The reference to legal capacity goes beyond mental capacity.

All three pieces of legislation are welcome, not least because they respond to the human rights deficit under the preceding legal frameworks. The tests for mental capacity vary but are rooted in a functional approach. Principles help ensure greater consistency and the involvement of those whose capacity is being assessed.⁹ However, mental capacity is only one, albeit important, aspect of decision-making. To possess legal capacity to decide, yes or no, requires two other elements. Kennedy and Grubb, discussing decision-making in a medical context, said that a decision must be,

1. made by an adult with mental capacity;
2. be real – that is, based upon adequate information; and
3. be voluntary and not made under the undue influence of another.¹⁰

Despite its medical pedigree, this description of legal capacity has wider application. It is helpful in social care and adult safeguarding. Consent and refusal are important issues in adult safeguarding. In financial abuse cases, the question often arises whether the person, for example, voluntarily transferred their property to a family member. Whether, and if so the extent to which a victim cooperates with safeguarding and the criminal justice system depends upon their ability, or their legal capacity, to consent. Legal capacity is essential in deciding where an adult wants to live. They may be assessed as having the relevant mental capacity, but are they making a real decision? Have they been given the information about the financial implications, the culture of the home, and facilities available? There is no clear and easily accessible legislative framework in any of the four nations that allows for anything other than mental capacity to be considered. A legislative framework is desirable. There is a limit to which the judiciary can

⁸ David Bamford, ‘The Bamford Review of Mental Health and Learning Disability (Northern Ireland): A Comprehensive Legislative Framework’ (2007) para 8.7.

⁹ Penny Letts, ‘Mental Capacity Act 2005: The Statutory Principles and Best Interests Test 1’ (2005) <<http://www.dca.gov.uk/menincap/mcbdraftcode>> accessed 29 September 2020; Carolyn Johnston and Jane Liddle, ‘The Mental Capacity Act 2005: A New Framework for Healthcare Decision-making’ (2007) 33 *Journal of medical ethics* 94.

¹⁰ Andrew Grubb and others, *Principles of Medical Law* (Oxford University Press 2010), para 8.68.

develop necessary safeguards. Is new legislation required that looks more holistically at decision-making by those referred to as ‘vulnerable adults’? Use of the word ‘vulnerable’ is fraught with difficulties and raises concerns, particularly if defining it is left to the incremental process of the common law.¹¹ This point is discussed below.

A new approach to decision-making.

The legislation across the four nations provides clear criteria, safeguards, and definitions when assessing an adult’s mental capacity and, if they lack capacity, how decisions are made in their best interests. Understandably, the legislation has not escaped criticism. Wilson’s interesting study on the working of the Adults with Incapacity (Scotland) Act 2000 and the Mental Capacity Act 2005 presents a mixed picture. The legislation was favourably received as families and carers can manage decisions for those lacking mental capacity on a legally valid basis. However, Wilson also found that adults lacking mental capacity sometimes resented the powers exercised over them. For some there was a feeling of a lack of empowerment. He notes that the paradigm of disability rights has changed since the Convention on the Rights of Persons with Disabilities.¹² The relationship between the Convention and the legislation in England and Wales, and in Scotland is conflicted, particularly in the light of the interpretation of article 12 by the Committee on the Rights of Persons with Disabilities General Comment No 1. Drawing upon the General Comment No 1 Donnelly argues it may be appropriate to revisit the best interest principle, difficult though that may be. She suggests that using the terminology of respecting the rights of the person would realign decision-making to afford greater recognition of will and preferences, whilst recognising the complexity. This is like a proposal put to the House of Lords and House of Commons Joint Committee but rejected because,

"...it would be too onerous on relatives, carers and other informal decision-makers to require an understanding of human rights legislation when determining best interests. The Codes of Practice and any Departmental

¹¹ Michael C Dunn, Isabel CH Clare and Anthony J Holland, ‘To Empower or to Protect? Constructing the “Vulnerable Adult” in English Law and Public Policy’ (2008) 28 Legal Studies 234 <https://www.cambridge.org/core/product/identifier/S0261387500002890/type/journal_article> accessed 30 September 2020.

¹² Sam Wilson, ‘Mental Capacity Legislation in the UK; Systematic Review of the Experiences of Adults Lacking Capacity and Their Carers’ (2017) 41 BJPsych Bulletin 260 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/3FCD8AA3BE68B9611BFC650924F6549F/S2056469400003818a.pdf/mental_capacity_legislation_in_the_uk_systematic_review_of_the_experiences_of_adults_lacking_capacity_and_their_carers.pdf> accessed 30 September 2020.

guidance issued to the general public should explain the relevant human rights considerations."¹³

Arguably rights have greater clarity for decision-makers than the rather nebulous term 'best interests'. The rejection of the idea may have more to do with the inaccessible language used in the human rights discourse rather than the complexity of the rights.

The Convention's inclusion of supported decision-making resulted in countries reviewing their mental capacity laws through law reform agencies. The Law Commission for England and Wales addressed this in its 2017 report on deprivation of liberty and proposed the introduction of a formally appointed person known as a 'supporter' to assist the person in decision-making. He or she would not be an advocate in the traditional sense. This would build on the second principle in the Mental Capacity Act 2005, namely the requirement to take all practicable steps to help the person decide for him or herself.¹⁴ Although the Commission's recommendations were not adopted in the Mental Capacity (Amendment) Act 2019, the Report identified a need for reform in order to move closer to the expectations of the Convention. However, they recognised that there would be situations where it would be necessary to overrule the ascertainable wishes and feelings of the person. This has been challenging for many countries seeking to implement the provision.¹⁵ The Scottish Law Commission in its 2014 report addressed the implications of *HL v United Kingdom*;¹⁶ it made only passing reference to supported decision-making.¹⁷ More widely, Then *et al.* undertook an international study of law reform agencies that considered supported decision-making. Although they identify a 'noticeable trend' of law reform agencies making recommendations on supported decision-making, no clear model emerges.¹⁸

¹³ House of Lords and House of Commons Joint Committee on the Draft Mental Incapacity Bill (n 6) para 91.

¹⁴ Law Commission, 'Mental Capacity and Deprivation of Liberty Law Com No 372' (2017) paras 14.51-56.

¹⁵ See Donnelly, Mary. "Deciding in dementia: The possibilities and limits of supported decision-making." *International journal of law and psychiatry* 66 (2019): 101466; Pritchard-Jones, L. G. "Exploring the potential and the pitfalls of the United Nations Convention on the Rights of Persons with Disabilities and General Comment no. 1 for people with dementia." *International journal of law and psychiatry* 66 (2019); Hall, Margaret Isabel. "Situating dementia in the experience of old age: Reconstructing legal response." *International journal of law and psychiatry* 66 (2019): 101468.

¹⁶ *HL v UK* (2005) 40 EHRR 32.

¹⁷ Scottish Law Commission, 'Report on Adults with Incapacity' Scots Law Com No 240' (2014).

¹⁸ Shih Ning Then and others, 'Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64, p 74.

A review of mental capacity legislation in England, Wales, and Scotland is necessary. Supported decision-making is one issue that needs addressing, although it is likely that any reforms would recognise the power to overrule wishes and feelings in some cases. Northern Ireland's legislation is more compliant with the Convention and the European Convention on Human Rights.¹⁹ Section 5 Mental Capacity Act (Northern Ireland) gives a significant nod towards supported decision-making, particularly in relation to the provision of information.²⁰ Whether it meets the full expectations of the Convention is unclear. Of the three pieces of legislation it is the most compatible.

A debate on reforming current legislation would provide a timely opportunity to consider mental capacity as one part of legal capacity. Broadening legislation to include the need for free will and real consent would address some concerns raised by practitioners and others that safeguarding decisions fail to consider them or are unable to do anything when coercion is apparent. Raised awareness of the existence of coercive and controlling behaviour, and the developments in medical law on the duty to provide information, provide a context for this debate.

The inherent jurisdiction

Mental capacity law prior to the introduction of legislation depended on the judges and it is right to say that they did a good job. Much of their thinking on mental capacity and best interests found its way into the legislation. Prior to the legislation the inherent jurisdiction was used to protect those who lacked mental capacity where significant decisions had to be made. In *Re F* (1990)²¹ the House of Lords carefully distinguished between the treatment for F's mental health, which was within the Mental Health Act 1983, and her ability to consent to, in this case, sterilisation. Sterilisation was not treatment for a mental disorder so did not fall within the 1983 Act. However, so far as mental capacity was concerned there was a gap in the law. Not to do anything because she could not consent would leave her exposed to harm. Lord Bridge emphasised the importance of the use of the inherent jurisdiction.

"It would be intolerable for members of the medical, nursing and other professions devoted to the care of the sick that, in caring for those lacking

¹⁹ Gerard Lynch, Catherine Taggart and Philip Campbell, 'Mental Capacity Act (Northern Ireland) 2016' (2017) 41 BJPsych Bulletin 353 <pmc/articles/PMC5709686/?report=abstract> accessed 29 September 2020.

²⁰ Colin Harper, Gavin Davidson and Roy McClelland, 'No Longer "Anomalous, Confusing And Unjust": The Mental Capacity Act (Northern Ireland) 2016' (2016), p 63 <<http://www.legislation.gov.uk/nisi/1986/595>> accessed 2 October 2020.

²¹ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1

*capacity to consent to treatment they should be put in the dilemma that, if they administer the treatment which they believe to be in the patient's best interests, acting with due skill and care, they run the risk of being held guilty of trespass to the person, but if they withhold that treatment, they may be in breach of a duty of care owed to the patient."*²²

The case was a milestone in the law's development of incapacity.²³ Such cases are now decided by the Court of Protection under the Mental Capacity Act 2005; this displaced the use of the inherent jurisdiction in mental capacity matters.

Another case decided before the Mental Capacity Act 2005 was *Re F (2000)*²⁴. Although its applicability to mental capacity has been overtaken by the 2005 Act, it has wider significance for the use of the inherent jurisdiction. The dilemma for the local authority and for the courts was how, in the absence of mental capacity legislation, to protect a vulnerable and incapacitated adult from abuse. The Court of Appeal held that, in the words of Sedley LJ, 'no humane society would leave her adrift and at risk' because she was eighteen years and no longer within the Children Act 1989. A declaration was granted in favour of the local authority that she should remain in its care with limited family contact. Clearly, that was the right result. But the court identified problems. Although it defended its development of the jurisdiction, it pointed out the limitations of a case-by-case approach. Butler-Sloss LJ said,

*"The assumption of jurisdiction by the High Court on a case-by-case basis does not, however, detract from the obvious need expressed by the Law Commission and by the Government for a well-structured and clearly defined framework for the protection of vulnerable, mentally incapacitated adults, particularly since the whole essence of declarations under the inherent jurisdiction is to meet a recognised individual problem and not to provide general guidance for mentally incapacitated adults. Until Parliament puts in place that defined framework, the High Court will still be required to help out where there is no other practicable alternative."*²⁵

Sedley LJ noted that although the local authority had the legal power to provide accommodation for F under the old community care law, the power to keep her there relied on 'moral or physical restrictions'.²⁶ Although the

²² n19, p 53.

²³ Alison J Stansfield, AJ Holland and ICH Clare, 'The Sterilisation of People with Intellectual Disabilities in England and Wales during the Period 1988 to 1999' (2007) 51 *Journal of Intellectual Disability Research* 569.

²⁴ *Re F (Adult Patient)* [2000] EWCA Civ 3029.

²⁵ n 22, p 9.

²⁶ n 22, p 12.

best that could be done in the then circumstances, it shows the weakness of having to rely on the inherent jurisdiction. It also raises the courts' understandable unwillingness to assume responsibility for ongoing supervision of the order. In this respect the inherent jurisdiction is more suitable for single medico-legal decisions characterised by the 1990 *Re F* case.²⁷ As already mentioned, the Mental Capacity Act 2005 would now address the facts of *Re F* (2000) and, importantly includes safeguards and criteria for intervention. It also provides an infrastructure for decision-making, grounds for challenge, and access to the Court of Protection.

The High Court has continued to develop the inherent jurisdiction beyond mental capacity to include vulnerable people who may need protection not available under legislation. It was recognised in *Re F* (2000) that the doctrine of necessity, the basis for intervention under the jurisdiction, is not limited to medical emergencies such as that in *Re F* (1990). It has a much wider role to play. Lord Goff in *R v Bournewood NHS Trust* clarified that,

"The concept of necessity has its role to play in all branches of our law – in contract...in tort...in restitution...and our criminal law."

Several cases illustrate the use of the inherent jurisdiction where the adult has mental capacity but is vulnerable. In *Re SA (Vulnerable Adult with Capacity: Marriage)*²⁹ Munby J was asked to use the jurisdiction to protect a deaf and mute young woman who had just become eighteen. Prior to this, measures had been put in place including the wardship jurisdiction to protect her from being forced into a marriage. She had the mental capacity to consent to marriage. She had borderline intellectual disability, was deaf, and had no verbal communication. Munby J held that the inherent jurisdiction could be used despite her mental capacity as she was vulnerable.³⁰ Her vulnerability was inherent, but also situational as there was the possibility she would be taken to Pakistan by the parents and be forced into a marriage. Bennett J in *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)*³¹ faced a similar dilemma. Continued contact with G's father had an adverse effect on her mental health and mental capacity. The judge asked what the situation would have been if G were a child; as she is an adult, she should be no worse

²⁷ John Williams, 'State Responsibility and the Abuse of Vulnerable Older People: Is There a Case for a Public Law to Protect Vulnerable Older People from Abuse?' in Jo Bridgeman, Craig Lind and Heather Keating (eds), *Responsibility, Law and Family* (Ashgate 2008) <<http://books.google.com/books?id=d7gg5YMeZu0C&pg=PA81&lpg=PA81&dq=State+responsibility+and+the+abuse+of+vulnerable+older+people:+is+there+a+case+for+a+public+law+to+protect+vulnerable+older+people+from+abuse?&source=bl&ots=Bui8AG9pBJ&sig=jXFZJvJcUaKZB344w>>.

²⁸ *R v Bournewood Community and Mental Health NHS Trust, Ex p L* [1998] UKHL 24 p. 10

²⁹ *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam)

³⁰ n 27, p.2.

³¹ *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* [2004] EWHC 2222 (Fam).

off. Another marriage case is *Re SK*.³² In this case the court used the inherent jurisdiction to provide declaratory relief in order to ascertain whether she had exercised her free will in relation to decisions affecting her civil status and her country of residence. Here the vulnerability was solely situational, unlike *Re SA* and *Re G*, but the jurisdiction was used.³³ In all three cases it was recognised that the jurisdiction could only be fettered by statute. They fell outside the Mental Capacity Act 2005 as the incapacity is for a reason other than impairment of, or disturbance of the functioning of the mind or brain. However, they lacked legal capacity.

Confirmation of the use of the common law doctrine of necessity is found in the Court of Appeal case of *A Local Authority and others v DL*.³⁴ The local authority was concerned that a son was exercising undue influence and duress over his elderly parents. The parents had mental capacity – there was no impairment in the functioning of the mind or brain. But they were under his control. The son argued that using the inherent jurisdiction regarding people with mental capacity was contrary to article 8 of the European Convention on Human Rights. The local authority argued the Convention required the court to keep the jurisdiction as the common law must develop in order that the positive obligations imposed by the Human Rights Act could be given effect. A new ‘Bournewood gap’ would be created if this was not the case. The son argued that the cases relied on by the local authority involved either children or incapacitated adults.³⁵

In the Court of Appeal McFarlane LJ said that the use of the inherent jurisdiction which adopted a facilitative rather approach was ‘on all fours’ with the re-establishment of the individual’s autonomy of decision-making. This enhanced rather than breached the article 8 of the European Convention on Human Rights. Reliance was placed on *LBL v RYJ and VJ*, a decision of Macur J. She stressed the need to restore autonomy rather than imposing a decision on the person.

“.. I reject what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-

³² *Re SK* [2004] EWHC 3202 (Fam).

³³ Michael C Dunn, Isabel CH Clare and Anthony J Holland, ‘To Empower or to Protect? Constructing the “Vulnerable Adult” in English Law and Public Policy’ (2008) 28 *Legal Studies* 234.

³⁴ *A Local Authority and others v DL* [2012] EWCA Civ 253.

³⁵ n 35, para 25.

making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions."³⁶

This makes the point, accepted by the Court of Appeal in *A Local Authority v DL*, that the inherent jurisdiction cannot be used to impose decisions; rather it is designed to 'facilitate the process of unencumbered decision-making' by the person. This is an important limitation of the jurisdiction.

On another issue, Macur J said,

*"If I were to have found that her vulnerability was exceptional/greater by reason of her limited intellectual functioning and age, these factors would need to have been considered in reaching my decision concerning capacity. If she is unable to withstand external pressure of "normal/everyday" degree, whether emotional or physical, it seems to me that it would necessarily inform the answer to the question posed at section 3(1)(c) of the [Mental Capacity Act 2005]."*³⁷

The second quotation raises an interesting point about the relationship between the Mental Capacity Act 2005 and the inherent jurisdiction. It suggests that those matters relevant to the engagement of the inherent jurisdiction, may, in effect, be issues in deciding mental capacity under the Act.³⁸

Vulnerability and the inherent jurisdiction

As noted above, Butler-Sloss in *Re F (2000)* whilst supporting the use of the inherent jurisdiction in pre-Mental Capacity Act 2005 capacity decisions, recognised the need for a well-structured and clearly defined framework. The 2005 Act provided structure, in particular the definition of incapacity and the statutory principles. Definitions are an important safeguard against inconsistent use of powers. In the absence of legislation covering vulnerable adults outside of the Act, the courts have developed indicators of vulnerability. Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)*³⁹ disavowed any attempt to define vulnerable adult for the purpose of the inherent jurisdiction. He summarised the authorities as follows,

"...the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness,

³⁶ *LBL v RYJ and VJ* [2010] EWHC (Fam) 2665.

³⁷ n.37, paras 62 and 64.

³⁸ See 39 Essex Chambers, 'LBL v RYJ & VJ' (22 September 2010) <https://www.39essex.com/cop_cases/bl-v-ryj-and-vj/> accessed 17 November 2020.

³⁹ *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam).

*is, or is reasonably believed to be, either: (i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent."*⁴⁰

Helpfully he expanded on the terms 'constraint' and 'undue influence'. On constraint he did not feel incarceration was necessary. It is sufficient that there is some 'significant curtailment of the freedom to do those things' free men and women are entitled to do. 'Coercion or undue influence' he illustrates by the case of *Re T (Adult Refusal of Treatment)*.⁴¹ Here the will of the person was 'sapped and overborne' by the improper influence of another. He continued,

*"...the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others."*⁴²

The inherent jurisdiction to protect a vulnerable adult, if mental capacity is unimpaired, was exercisable on an interim basis where there were reasonable grounds to believe that the adult's legal capacity or will to decide was 'sapped and overborne by the improper influence of another'.⁴³

In summary, the inherent jurisdiction allows the court to disregard the stated opinion of an adult who has the required mental capacity because he or she is 'vulnerable'. This requires the word 'vulnerable' to do a lot of work if it is to prevent an unacceptable intrusion into the person's private life. Not that in any of the cases cited, the court acted improperly. In *Re F (2000)*, the courts faced a legislative lacuna so, as Sedley LJ noted no humane society would leave her adrift and at risk.

Vulnerability in guidance and legislation – 'adults at risk'

In its consultation paper published in 1997, the Lord Chancellor's Department defined a 'vulnerable adult' as a person,

⁴⁰ n.40, para 77.

⁴¹ *Re T (Adult: Refusal of Medical Treatment)* [1992] EWCA Civ 18

⁴² n. 40, para 78.

⁴³ See *Mazhar v Birmingham Community Healthcare Foundation NHS Trust & Ors* [2020] EWCA Civ 1377

"Who is or may be in need of community care services by reason of disability, age or illness; and is or may be unable to take care or unable to protect him or herself against significant harm or exploitation."⁴⁴

This definition was incorporated into the protecting vulnerable adults' statutory guidance in Wales and in England.⁴⁵ The Law Commission in its Adult Social Care report identified concerns,

"... that the term vulnerable adult appears to locate the cause of abuse with the victim, rather than placing responsibility with the actions or omissions of others. It can also suggest that vulnerability is an inherent characteristic of a person and does not recognise that it might be the context, the setting or the place which makes a person vulnerable. We, therefore, proposed that the term vulnerable adults should be replaced by adults at risk."⁴⁶

Responses to the consultation identified the term 'vulnerable adult' as stigmatising, dated, negative, and disempowering.⁴⁷ Much of the problem with the definition is its reliance on inherent vulnerability. Vulnerable people are defined 'first and foremost by their inherent vulnerability.'⁴⁸

Although on the recommendation of the Law Commission 'vulnerable adult' was replaced in the Social Services and Well-being (Wales) Act 2014, and the Care Act 2014, the thresholds for adult safeguarding are still predicated on inherent vulnerability. Section 126 of the Welsh legislation specifically adopts the term 'adults at risk'. The English Care Act 2014 does not use the term, but it is used in the statutory guidance.⁴⁹ The definition of adult at risk in the Welsh and English legislation requires that, besides experiencing or being at risk of abuse or neglect and the inability to protect self, the person 'has needs for care and support' regardless of whether the authority is meeting those needs.⁵⁰ In both nations the inability to protect self must arise out of the need for care and support rather than the abuse or neglect.

⁴⁴ Lord Chancellor's Department, *Who Decides: Making Decisions on Behalf of Mentally Incapacitated Adults* (Lord Chancellor's ed, HMSO 1997) para 8.7.

⁴⁵ See Department of Health, 'No Secrets: Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults from Abuse'; National Assembly for Wales, 'In Safe Hands' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/194272/No_secrets_guidance_on_developing_and_implementing_multi-agency_policies_and_procedures_to_protect_vulnerable_adults_from_abuse.pdf>.

⁴⁶ Law Commission, 'Adult Social Care', vol Law Com 326 (2011) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc326_adult_social_care.pdf>, para 9.21.

⁴⁸ See n. 32.

⁴⁹ Department of Health and Social Care, 'Care and Support Statutory Guidance' (2020), paras 14.121, 14.29, 14.30, and 14.99 <<https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance>> accessed 22nd November 2020.

⁵⁰ s.126(1)(b) Social Services and Well-being (Wales) Act 2014 and s.42(1)(a) Care Act 2014.

The effect of this is to restrict adult safeguarding to inherent vulnerability, when for many people they experience harm or the risk of it because of situational vulnerability. Pritchard-Jones summarises the position as follows.

"Within both pieces of legislation and their supporting documents and instruments, the first conceptual criticism of vulnerability – the idea that the inability to protect oneself from abuse because of a need, which is generated by an impairment or a disability – therefore remains, despite the terminological shift to "adult at risk". Moreover, the fact that the adult has a disability or impairment which generates needs, which then means they are unable to protect themselves, does nothing to remove the idea that the adult themselves is "to blame" for their abuse, which ... was a key concern of the terminology "vulnerable adult."⁵¹

This tethering of safeguarding intervention to status partly undermines the improvements in adult safeguarding found in both pieces of legislation. For example, some cases of domestic abuse are excluded from safeguarding because of this; the harm is situational rather than inherent. Robbins argues domestic abuse is already marginalised in social work; the 2014 legislation consolidates this.⁵²

The Scottish Adult Support and Protection Act 2007 adopts a different approach when defining 'adults at risk'. Section 3(1) uses the following definition: a person is an adult at risk if they,

- (a) are unable to safeguard their own well-being, property, or other interests,
- (b) are at risk of harm, and
- (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

This is a softer approach, although inherent vulnerability still features in deciding the level of vulnerability to harm. Vulnerability is determined by

⁵¹ Laura Pritchard-Jones, "Adults at Risk": "Vulnerability" by Any Other Name? (2018) 20 The Journal of Adult Protection 47.

⁵² Rachel Robbins and others, 'Is Domestic Abuse an Adult Social Work Issue?' (2016) 35 Social Work Education 131 <<https://www.tandfonline.com/doi/abs/10.1080/02615479.2016.1140733>> accessed 3 July 2020; Kristin Heffernan, Betty Blythe and Paula Nicolson, 'How Do Social Workers Understand and Respond to Domestic Violence and Relate This to Organizational Policy and Practice?' (2014) 57 International Social Work 698; Sarah Wydall and others, 'Domestic Abuse and Elder Abuse in Wales: A Tale of Two Initiatives' (2018) 48 British Journal of Social Work.

the situational requirements of being unable to safeguard themselves and being at risk of harm.

This brief account of the term 'vulnerable adults' and its transformation into 'adults at risk' identify two issues. First, the term 'vulnerable adults' is demeaning and should have no place in adult safeguarding. As noted above, respondents to the Law Commission's adult social care consultation paper regarded it as stigmatising and demeaning. Whether adult at risk as defined in Welsh and English social care legislation is an improvement is debatable. Second, it is based on the inherent vulnerability of the person; their need for care and support rather than exposure to abuse and neglect triggers safeguarding duties.

Vulnerability is also used extensively in other areas of law. In criminal law, special measures are made available for vulnerable and intimidated witnesses when giving evidence as a victim or a witness. In the case of an adult a witness is vulnerable if the quality of their evidence is likely to be diminished because they are suffering from a mental disorder under the Mental Health Act 1983, have a significant impairment or intelligence and social functioning, or have a physical disability or are suffering from a physical disorder.⁵³

Discussion

The above raises several issues concerning adults who are prevented or unable to decide. Inability to decide alone is not a justification for legal intervention unless it is beyond the control of the person and there is a sound human right's compliant reason to justify intervention. Any such intervention must be in accordance with the law.⁵⁴ The inherent jurisdiction has successfully been used to intervene where a 'vulnerable adult' needs to have their autonomy restored. As with the courts' work developing the law of mental capacity pre 2005, the judiciary have used the power wisely in the interests of humanity and a need to act. To argue that the cases cannot, in the absence of relevant legislation, be decided under the inherent jurisdiction would be to condemn many adults to abuse and neglect because of a gap in legislation. Whilst the judges have acted with compassion as they did with mental capacity pre-2005, this does not preclude a different way of doing things. The concerns raised in *Re F (2000)* are compelling. Although made in the context of mental capacity, they are of wider application. Butler-Sloss LJ's call for a 'well-structured and clearly defined framework'⁵⁵ equally

⁵³ s. 16 Criminal Evidence Act 1999.

⁵⁴ Article 8(2) European Convention on Human Rights.

⁵⁵ See n.23.

applies to other adults needing protection. The European Court in *HL v UK* when discussing article 5 of the European Convention on Human Rights, held that detention based on common law was too arbitrary and lacked sufficient safeguards, such as those found under the Mental Health Act 1983. Legislation was required.⁵⁶ This is an equally compelling argument when considering intervening in the private life of adults whose ability to decide has been compromised.

A proposal was put to the Joint Committee of the House of Lords and House of Commons considering the draft Incapacity Bill that its scope should be extended to include inability to make a free choice because of undue influence. Drafting would be complex and would involve safeguards to prevent unnecessary and disproportionate interventions in people's private life. The Committee did not feel confident in recommending such an approach.⁵⁷ However, the relatively unchecked ability of the courts to extend the inherent jurisdiction, without the structure referred to by Butler-Sloss LJ, necessitates a reconsideration of this. Yes, drafting legislation would be difficult, but not impossible. Much more is known about undue influence or what is now referred to as coercive or controlling behaviour. It is now a criminal offence in certain circumstances.⁵⁸ It is also worth noting that Munby J referred to the case of *Re T* to support the inclusion of undue influence. There are also statutory definitions, although they cannot be indiscriminately incorporated into legislation. Legislation would ensure a well-structured framework with workable definitions and procedural safeguards.

Definitions are challenging. Munby J's explanation in *Re SA* is helpful. It is interesting to note that it anticipates vulnerability being inherent and situational, or situational. This distinguishes it from the approach taken in the 2014 reforms of social care law in Wales and in England, which still rely on inherent vulnerability. 'Vulnerable' must be replaced. A new definition could be built around an inability to decide because of:

1. Inherent factors that seriously inhibit decision-making on significant matters. These may include:
 - a. Mental incapacity (based on the definitions in the 2005 Act).
 - b. Physical disability.
 - c. Mental health.

⁵⁶ See n.14.

⁵⁷ n.6, para 270.

⁵⁸ See s.76 Serious Crimes Act 2015; McMahon, Marilyn, and Paul McGorery. "Criminalising controlling and coercive behaviour: The next step in the prosecution of family violence?" *Alternative Law Journal* 41, no. 2 (2016): 98-101.

2. Situational factors that seriously inhibit decision-making on significant matters.
 - a. Coercive or controlling behaviour.
 - b. Curtailment of the freedom to decide.

3. Inherent and situational factors that seriously inhibit decision-making on significant matters.

Powers under new legislation would in the case of mental capacity include powers to make decisions, although subject to any commitment to partially or fully implement the Convention on the Rights of Persons with Disabilities right for people to decide. In all other cases the purpose of intervention would be to restore autonomy, a principle taken from the inherent jurisdiction. Donnelly's suggestion that using the terminology of respecting rights would afford greater recognition of will and preferences should be the basis upon which decisions are made under new legislation. It has greater resonance with the Convention on the Rights of Persons with Disabilities.

As discussed, the Convention on the Rights of Persons with Disabilities includes the right to supported decision-making. Information is one of the three components of decision-making. A duty on decision-makers in public authorities to provide information would be a starting point. The duty could also be extended beyond disability and include those whose capacity has been compromised through coercive or controlling behaviour. In identifying the level of information required, legislation could draw upon medical law principles and the guidance given to doctors.⁵⁹

Conclusion

Although in a different context, the Bamford Review⁶⁰ highlighted the need for a 'coherent and coordinated' approach to legislation. This principle should apply to adults where it is thought necessary to intervene on their behalf where their decision-making ability has been seriously compromised by inherent and/or situational factors and their human rights are at risk. Such interventions must be carefully structured and ensure that they achieve an appropriate and proportionate human rights-based response. Interventions, as seen in the inherent jurisdiction cases, protect human rights. However, that does not mean that greater protection is not required to achieve clarity of definitions, and procedural and other safeguards. The

⁵⁹ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; General Medical Council, 'Ethical Guidance for Doctors: Decision Making and Consent.' (2020) <<https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/decision-making-and-consent>>, para 10-13.

⁶⁰ See n. 7.

incremental approach of the common law is no longer a sufficiently robust way of achieving this, despite the good work that has been done by the judiciary. A holistic review of decision-making involving those whose legal capacity has been compromised is needed. Any such legislation could also help align our approach to the Convention on the Rights of Persons with Disabilities, particularly in relation to supported decision-making. It is unlikely that legislation would anticipate all eventualities and the inherent jurisdiction would still have a residual role, but it would be significantly reduced in favour of a clear statutory framework.

Supportive decision making and Easy Read Guides for solicitors

**Caroline Bielanska, TEP, Solicitor,
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In this article the author discusses the concept of writing in Easy Read format, designed for people who have difficulty processing information.

The Mental Capacity Act 2005 of England and Wales (the Act) aims to empower people to make their own decisions, if needed with support. The Act marked the dawn of a new era, where those who had previously been treated as unable to make decisions, primarily because of a diagnosis or condition, would now be able to make those decisions for which they were able.

The creation of a Lasting Power of Attorney (LPA) is one form of supported decision making, where the donor can plan ahead for a time when they may lack capacity, which allows people they trust to make decisions on their behalf in relation to their property and financial affairs, and/or for their health and welfare.

Obstacles to making a Lasting Power of Attorney

The reality for many people with intellectual disabilities, is that they are prevented from making an LPA: not because they lack mental capacity but due to the format of the lasting power.

The Act is underpinned by the Lasting Powers of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007 (as amended) which contains two prescribed forms, extending to 20 pages, in addition to prescribed continuation sheets. It refers to the Act's Code of Practice, which comprises of 295 pages- not all of which is relevant to the person making an LPA. In addition, the Office of the Public Guardian (OPG) has published supporting guidance which runs to 48 pages.

It is easy to see the obstacles which exist to making an LPA. The English and Welsh LPA is hard to navigate, containing guidance within the form, at times in font size 8. The terminology within the power is unfamiliar to non-lawyers: it might as well be written in a foreign language. The donor must make numerous choices, beyond who they want as their attorneys

and how they are to act, for example, choosing an independent person (the certificate provider) who will confirm that the donor understands what they are doing; whether to give the attorney authority to give or refuse consent to life sustaining treatment; and whether to tell anyone that they have made the power.

On top of this, the power must be completed for the donor's needs and wants. Following this the power requires other people to be involved, including attorneys, witnesses, and the certificate provider, all completing their function in line with such detailed Regulations, that there is a high rejection rate by the OPG when the power is sent for registration.

The Act requires that the donor must have mental capacity and not be acting under the undue pressure of another, and provides the necessary balance between empowerment and protection against abuse. Some parents of adults with learning disabilities, may automatically assume their adult child does not have capacity to make a power, because there is too much inaccessible information which they would have to explain, which they themselves do not understand. A quick Internet search provides little help. Prior to the Act coming into force in 2007, the then Department of Constitutional Affairs commissioned an Easy Read guide on the Act, but it contained only one page on LPAs.¹ It is believed to have cost in excess of £20,000 to produce, has not been updated and is not available from the Gov. uk website. The most useful general guide on the Act has been published by NHS England with the Local Government Association, but omits any reference to LPAs.² It gives the appearance that there is an unjustified assumption that people with learning disabilities would not be able to make an LPA, and is counter to the Act's requirement not to make such assumptions.³

The need for Easy Read legal guides

Professor Rosie Harding of Birmingham Law School at the University of Birmingham has published research, *'Everyday Decisions: Interrogating the interface between mental capacity and legal capacity'*, which explores the place of law in the everyday lives of people with intellectual disabilities, in order to generate new approaches to better support their everyday legally-relevant decision making.⁴ She has since built on her findings to explore

¹ https://www.thh.nhs.uk/documents/_Patients/PatientLeaflets/general/MCA_Act-EasyRead-DoH.pdf

² <http://www.careengland.org.uk/sites/careengland/files/Mental%20Capacity%20Act%202005%20easy%20read%20guide.pdf>

³ MCA 2005, s.2(3).

⁴ <http://www.legalcapacity.org.uk/>

socio-legal dimensions of supported will-making.⁵ Some of her key findings include:

- Intellectually disabled people would like to be supported to make a will that reflects their wishes and preferences.
- Intellectually disabled people say that solicitors were not always good at communicating information about wills in accessible ways.
- Intellectually disabled people rely heavily on trusted relationships for support.
- Intellectually disabled people would like more Easy Read and accessible information to help them access legal services.
- Appropriate and effective safeguards are required to protect intellectually disabled people from financial abuse.

Health and Welfare Lasting Power of Attorney Easy Read Guide

These could apply to many areas of law, but in particular for health and welfare decision making, where LPAs could make a significant difference to people's lives.

In 2019, the Court of Protection made clear in *Re Lawson, Mottram and Hopton (appointment of personal welfare deputies) (Rev 1)*⁶ that the appointment of a welfare deputy would always be a best interest decision, but in practice was likely to be rarely needed. Unless solicitors can facilitate and support decision making, adults with intellectual disabilities, including those with learning disabilities will never be in a position to choose someone they want to be their voice and make decisions when they cannot.

There are specialists who write Easy Read guides, but they are not cheap, meaning that the only way in which a suitable guide could be written, would be to do so myself, with the assistance of the Mencap Trust Company who provided pictures, feedback and found willing volunteers to be part of a users' workshop.

The Supporter's Guide

It was clear that the donor would still need support in understanding the Easy Read LPA guide, and the involvement of a trusted supporter was key to its success. Not everyone has the financial resources to pay for legal advice, and even if they did use a solicitor, not all would have the necessary skills to provide meaningful support.

⁵ https://www.legalcapacity.org.uk/wp-content/uploads/2019/09/SupportedWillMaking_FinalReport_2019_web.pdf

⁶ [2019] EWCOP 22.

The supporter is likely to be an advocate or a trusted family member, but could be a solicitor. They would assist the donor in understanding the choices to be made; taking instructions and drafting the power; organising witnesses and the certificate provider; enabling the execution; and registering the power. This requires a significant time commitment, as the donor will need time and space to understand new terms, consider choices and express what they want. It is also necessary to reduce the risk of undue pressure being exerted on the donor to make the power.

Guidance for the Certificate Provider and Attorneys

The OPG does not have any published guidance for Certificate Providers. The Regulations require that they must be either a professional with appropriate skills and expertise, such as a solicitor, doctor or social worker, or a person who has known the donor for at least two years. The Regulations contain restrictions on who can take on the role, to ensure they are independent and to prevent members of the donor or attorney's family from acting as Certificate Provider. The Act sets out how the donor will be deemed to lack mental capacity, if they are unable to understand, retain, use or weigh relevant information, or be unable to communicate by any means.⁷ The Act,⁸ its Code⁹ and case law¹⁰ establish the relevant information required of the donor to possess to be able to make an LPA.

As a donor with recognised intellectual disabilities may be at risk of a challenge, that they did not fully understand what they were signing, guidance for the certificate provider was drafted, as an important safeguard for the donor, and provide some reassurance for anyone taking on the role. The prescribed form requires that one page must be read by or to the donor before signing, and the donor must confirm choices made on the page which they sign. This also needed to be translated into an Easy Read format.

As a health and welfare LPA can only be used by an attorney, when the donor cannot make a particular health and welfare decision, the attorney needs upfront guidance about the role they would be taking on. It is important to ensure that the attorney does not assume control of decisions, and recognises the need to continue to support the donor to make those decisions they can. Guidance would steer attorneys to behave in the way the Act intended and would ensure the correct balance between empowerment and protection is maintained.

⁷ MCA 2005, s.3(1).

⁸ MCA 2005, s.3(4).

⁹ Para 4.16.

¹⁰ *Re Collis* (27 October 2010)(unreported), *The Public Guardian v XR*, [2020] EWCOP 65.

Writing Easy Read

Easy Read is an accessible format of providing information designed for people with a learning disability, but may also be beneficial for people with other conditions which affect how they process information. The Easy Read format is easy to understand because it uses simple, jargon free language, shorter sentences and supporting images. The main features for drafting Easy Read, are set out below.

1. Distinguish between 'nice to know' information from 'need to know' information

We live in an age of information overload, and this is very noticeable with legal information. By distilling the salient information which a donor needs to understand to make a choice, so as to draft the power, means that the length of information can be reduced.

2. Keep it simple

Text is broken down into short sentences of between 15-20 words, written in simple language as if you are speaking. Language is personal, and the donor is addressed as 'you'. Emphasising a point is made by highlighting the word in bold, but underlining is avoided. Numbers are not written as words, for example, '8' not 'eight'. There is no punctuation: speech marks, full stops, brackets, or abbreviations are omitted. Acronyms should not generally be used, but as the LPA prescribed form uses LPA throughout, the term had to be used and explained.

3. Explain hard words

There are many complex terms within LPAs, such as the meaning of mental capacity, attorney, certificate provider, which all required an explanation. Terms are highlighted in bold, and when it required a significant choice to be made, in colour as well.

4. Layout

Text should always be aligned on the right hand side of the page, and pictures appear on the left, with a different picture for each paragraph of text. Information should be grouped together, so choosing your attorney was separated from choosing your certificate provider. Each change in theme had a heading, and would start on a new page. The layout should be the same throughout the document.

5. Images

It is not necessary to have a picture for each bullet point, so long as there is one for the main point. Pictures can be obtained via various suppliers of images and picture banks, such as photosymbols.com, choicesupport.org.uk and shutterstock.co.uk, but these are only available for a subscription. There are some freely available, and pictures on the Clipart function of Word software may be sufficient. Alternatively, it is possible to commission an artist or designer to produce bespoke images, but this is more expensive. Each picture must be large enough to clearly see, which is about 4 cm in size, and there should not be more than four per page. Pictures must be relevant and not have too much detail, as it can detract from the information you are trying to relay.

6. Fonts

For people with learning disabilities, reading is made harder by certain fonts, and there was a lot of information available on line about the best fonts to use. Availability depends on your computer software and whether you are willing to buy a more appropriate font, but a sans serif font is preferred (such as Arial, Helvetica), at size 16 point or higher for text with bigger sizes for headings. Always use the same font across all the headings. FS Me, is designed specifically to improve legibility for people with learning disabilities. The font was researched and developed with and endorsed by Mencap, for which it receives a donation for each font license purchased. Sassoon Primary, Gill Sans Infant and Andika which is free from Google font, are aimed at primary school children, and are similar.

7. No hyphens or italics

Block text should never be hyphenated, which is easily achieved by switching off hyphenation in your computer's page layout software. Sentences and paragraphs should end on the same page. Words should never be in italics as it makes reading more difficult.

8. Contrast

The text must be clearly visibly, especially if using colours. Black on white or cream is generally best for body text.

9. Pages

Text should be presented on A4 pages where possible: any smaller and it is not accessible. Wide margins should be used with page numbers at the bottom right hand side.

10. Consult, amend and use

Following drafting of the Easy Read documents and supporting material, a workshop was run with parents of learning disabled adults, which resulted in many positive changes. Unless the forms are changed, the information is likely to have a long lifespan. However, by capturing feedback on use, the information can be regularly tweaked and improved.

In early 2021, the Easy Read LPA material will initially be available via Mencap Trust Company, in a PDF file to avoid problems with formatting. Decisions will be made as to wider dissemination, once in use, to allow for agile development. It is anticipated that video information will be made available to further support the process.

A Miscellany of Book Reviews – Part 2

Sheena Grattan, TEP, Barrister

Martyn Frost, *A Victorian Tragedy: The Extraordinary Case of Banks v Goodfellow* (Wildy, Simmonds & Hill Publishing, 2018, £19.99)

Arguably history is the discipline which is least dissimilar to academic law and there are certainly many lawyers who have studied history for A-level, at university level or simply have an interest in historical matters. Martyn Frost, previously a Senior Manager with Barclays Bank Trust Company and more latterly a consultant with Lane-Smith & Shindler LLP, is spending his retirement after 40 years in trusts and estates world ‘writing for fun’ and developing his historical interests. Mr Frost’s best-known practitioner text, *Risk and Negligence in Wills, Estates and Trusts* (co-authored with Penelope Reed QC and Mark Baxter and now in its second edition) is an excellent book which should be required reading for anyone who practises in the private-client field.

This latest project is a superbly researched account of the background to the *Banks v Goodfellow* litigation, which was set in the Lake District town of Keswick in the mid-nineteenth century. In today’s terms the testator, John Banks the Elder, would be described as a paranoid schizophrenic. For its time the decision, seeking to uphold testamentary dispositions, was an enlightened one which effectively introduced the concept of the time and function specific capacity test (previously it being sufficient to establish that the testator was mentally unsound).

Mr Frost has examined original sources, including local newspaper reports, and has produced a very human story of the life of a man from a relatively modest family who suffered with serious and enduring mental health issues. It is also a rather sobering reminder of how society dealt with such issues at that time, with vivid descriptions of medical treatments including bloodletting, blistering the skin and purging with laxatives. The appendices include family trees, the Appeal judgment in full and pen portraits of the legal personalities involved in the case, all of which add interest.

Busy practitioners generally prefer footnotes to endnotes, although the latter facilitates a text being read by the general reader. For the lawyer who wishes to get the maximum benefit from the work, it might be useful to read it first as a novel, without reference to the end notes, and then again

with the endnotes. It will be no surprise to anyone familiar with Mr Frost's legal writing that his gift for succinct expression is evident throughout, but particularly in the endnotes, which contain a deceptively detailed account of many current principles, comprising a useful 'back to basics' revision session.

How often do lawyers seek to dissuade their clients from legal proceedings by chiding that there will be no real winner? The enduring joint legacy of the Banks and Goodfellow families is a legal test that still bears their names a century and a half later. The actual lives of all the key players were sad, personal tales: the successful beneficiary ultimately would die penniless in any event; the unsuccessful challenger was ordered to pay the entirety of the costs (another reminder of the point made elsewhere in this publication that it has always been a fallacy that 'costs come out of the estate').¹

Informal Carers and Private Law (Brian Sloan, Hart Publishing, 2013, £85.00)

Yet again the long promised 'national conversation' on the provision of social care is back on the political agenda and in a few short months those who provide care for a living moved from being the 'unskilled workers' of the immigration debates in January to being the 'essential keyworkers' applauded by the nation in April. Most legal writing to date has focused on the public law dimensions of caring. The interaction between caring and private law has been relatively uncharted territory, a gap which this book fills with aplomb. With increased longevity, childlessness, fragile family and social relationships and the acknowledgment throughout the western world that public funds will not be sufficient to care for an elderly population, who will be expected to care, and what part, if any, should inheritance play in the equation? One can expect policy-makers and law reformers to grapple with this very large question for decades.

The book, which is based on Dr Sloan's Ph D thesis, covers topics such as proprietary estoppel, constructive trusts, family provision, *inter vivos* provision on the breakdown of the caring relationship and, from the other side of the coin, undue influence exerted by carers. It also looks beyond these shores at enforcement of testamentary promises in New Zealand and unjust enrichment in Canada. As one would expect of a work derived from a doctoral thesis, the text provides a thorough, comprehensive and imaginative analysis of hugely thought-provoking territory. However, when road-tested recently by the writer with the rather more mundane preparation of a skeleton argument in a 'carer' proprietary estoppel case, it

¹ Grattan: Some observations on selected aspects of wills for Northern Ireland practitioners. 2020 *Journal of Elder Law and Capacity*, 1, 20

passed with flying colours. Everything required was in the book and there was no need to supplement the material with a standard practitioner text.

Dr Sloan's book will benefit both those who wish to develop their views on this complex policy area (which will affect every citizen who needs care in the future) and those whose more modest aim is the preparation of specific client-advice.

Conclusion

The Covid-19 crisis has provided many of us with time to stop and stare, to think and reflect. It would be unfortunate if practitioners go back to being so busy that there is no time for seemingly non-essential reading and reflection. In private client circles within the British Isles, there has undoubtedly been less interaction between the legal profession and academia than is ideal. Hopefully, more practitioners will discover that there are many worthwhile sources of thought-provoking yet useful material beyond the speedily-produced perfunctory practitioner-focused case note or update (essential as those are).

**Casenotes prepared by
Samantha Jones, Barrister; Rachel Sullivan,
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Health, Welfare and Deprivation of Liberty

COVID-19 Vaccine - Capacity - Best Interests

**Between: E (by her Accredited Legal Representative, Keith Clarke)
-and- London Borough of Hammersmith and Fulham -and- W
[2021] EWCOP 7**

**High Court – Court of Protection – Hayden J – delivered on 20 January
2021**

Jurisdiction: England and Wales

The Court was asked for a declaration pursuant to section 15 of the Mental Capacity Act 2005 that it would be lawful and in P's best interests to receive the COVID-19 vaccine at the next possible date.

P is an 80-year old woman with a diagnosis of dementia and schizophrenia. She had been living in her current care home since the end of March 2020. Proceedings were ongoing to determine her residence and care; a declaration had been made by the Court of Protection on 22 October 2020 that she lacked capacity to conduct proceedings and make decisions about her residence and care. On 8 January 2021, the local authority informed P's accredited legal representative that she was scheduled to receive the vaccine on 11 January 2021 but P's son objected and the slot was missed. P's representative therefore sought a declaration in the terms outlined and sought for the vaccination to be given at the next possible date.

P's son objected to her being given the vaccine as he was "deeply sceptical" about the efficacy of the vaccine, the speed with which it had been authorized, whether it had been adequately tested on the cohort to which his mother belonged and whether his mother's true wishes and feelings had been sought.

HELD -

The declaration was granted

The Vice-President of the Court of Protection, Hayden J, first determined whether P had capacity to make a decision about whether she should be vaccinated against COVID-19. He relied upon an attendance note of a video conversation between P, her accredited legal representative and her GP.

Hayden J acknowledged that the assessment of P's capacity was short and informal but nonetheless that it was "sufficiently rigorous" to comply with sections 2 and 3 of the MCA 2005. He was satisfied that she was unable to understand information about the existence of COVID-19 and the potential danger it posed to her health. She was neither able to weigh information about the advantages and disadvantages of receiving the vaccine nor able to retain information long enough to make a decision due to her dementia. Hayden J then turned to the question of whether it was in P's best interests to receive the vaccine and in doing so he took account of P's wishes, the views of her son and the particular risks posed by COVID-19 to P. In considering P's wishes under section 4(6) of the MCA 2005 he considered that she had willingly received vaccinations in the past for influenza and swine flu, she had "articulated a degree of trust in the views of health professionals who care for her" because she had told her GP in the video conversation that she wanted "whatever is best for me". He considered this resonated with the approach she had taken in the course of her life. Hayden J considered her son's views but considered that they were "a facet of his own temperament and personality and not reflective of his mother's more placid and sociable character". He recognised that it was important for P to remain "securely in the centre of this process". Finally, Hayden J considered the particular risk that P faced in her situation because of COVID-19. He summarised that the following characteristics compounded her vulnerability to become seriously ill or die from the virus:

- "i) She is in her eighties;
- ii) She is living in a care home;
- iii) The care home in which she lives has confirmed recent positive cases of Covid-19; iv) She has been diagnosed with Type II diabetes; and
- v) She lacks the capacity to understand the nature or transmission of Covid-19 and is inevitably challenged, as so many living with dementia in care homes are, by the rigours of compliance with social distancing restrictions."

He therefore concluded that it was in her best interests to receive the vaccine.

Comment

While the case is fact-specific it helpfully illustrates a satisfactory assessment for evaluating P's capacity about whether he or she has capacity to make a decision about receiving the COVID-19 vaccination and provides guidance on the type of factors that will be considered as part of the balancing process when determining P's best interests. As to the former, it is of note that Hayden J explained that "evaluating capacity on this single and entirely fact specific issue is unlikely to be a complex or overly sophisticated process

when undertaken, for example, by experienced GPs and with the assistance of family members or care staff who know P well.”

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2021) (<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/Mental-Capacity-Report-February-2021-Compendium-Screen-Friendly-1.pdf>)

Samantha Jones, Barrister

Deprivation of Liberty - Damages

Between: London Borough of Haringey v Irene Emile (By her litigation friend and Deputy Sharon Amazigo)

[2020] MHLO (CC)

County Court – Saggerson HHJ – delivered on 18 December 2020

Jurisdiction: England and Wales

The matter concerned a contested determination of damages for a deprivation of liberty arising out of the local authority’s failure to authorise P’s deprivation of liberty for nearly 8 years.

P, who suffered with dementia, was placed in a care home in October 2008 by the local authority after her husband, who also suffered with dementia, assaulted her. Her placement was made permanent in April 2010. P spent nearly 8 years in the care home before she was moved to a nursing home in March 2016 when her condition deteriorated. Throughout that time, the local authority failed to obtain a standard authorisation of her deprivation of liberty. It was only in March 2016 when P moved to the nursing home that a standard authorisation was obtained. The local authority sought four years’ worth of unpaid care home fees, which fell to be paid by P’s family. The defendant counterclaimed for damages for wrongful detention on the basis that P lacked capacity to make decisions about her residence since 2008 and the local authority failed to undertake any proper assessment of her status or circumstances including a review under the DOLs issued in 2009.

At first instance, District Judge Beckley granted the local authority’s unpaid care fees in the sum of £80,913.38 and awarded the defendant £130,000 for damages for unlawful detention plus a 10% uplift based on *Simmons v Castle* making a total of £143,000. The sums were offset against each other.

The local authority appealed on four grounds, the most relevant of which concerned the quantum of damages. The local authority argued that the

figure was so far outside any reasonable bracket of damages for wrongful detention given the evidence available and that the District Judge should have made a nominal award of damages. Alternatively, that the award was excessive, and the District Judge committed a number of errors when assessing the evidence.

HELD -

HHJ Saggerson found that the District Judge was entitled to conclude that the case was not one of nominal damages. He was entitled to find that the local authority's failures to comply with the Mental Capacity Act 2005, particularly the best interest provisions of Schedule A1 were substantial, causative of harm and did not amount to merely technical breaches. The local authority had not proved that it was inevitable that P's care would have been the same throughout the near eight-year period. The District Judge was entitled to decide that there were options for care which had not been considered by the local authority. He was entitled to bear in mind that P's personal reflections depended on who she was talking to and so he properly bore in mind P's historical preference not to be consigned to a care home.

As to the quantum of damages, it was recognised that the District Judge "had a difficult task" when assessing a substantial damages claim because of the sparse authority and approved settlements of limited assistance. The District Judge had adopted a lump sum approach and used a "broad comparison" with cases such as *Neary* with appropriate adjustments, rather than applying a tariff or artificially subdividing the whole period into slots, for which he had not been given any assistance by the parties in any event. HHJ Saggerson found that the District Judge could not be criticised for adopting such an approach. Approving of the District Judge's approach, HHJ Saggerson's findings at paragraph 25 are worth repeating:

"In assessing the damages the District Judge was entitled to bear in mind that for nearly 8 years the local authority had been unwittingly officious and had overridden properly formulated considerations of the Defendant's best interests and the potential this yielded for trespassing on her freedom of movement more than was essential in the light of family or other supported residential options that could have been considered short of consigning her to a care home. He was entitled to bear in mind that historically the Defendant had expressed a firm preference not to live in a residential home and that for 6 years the local authority had not properly reviewed the Defendant's status; neither had the position been properly reviewed after the death of her husband in 2013. Any award would also have to take into account, as did the District Judge, the fact that in her declining years the Defendant was unlawfully subject to routine direction by residential staff, had her daily life and visits subjected to a formal regime

and contact with family subjected to official approval (however benign), or at least there was a greater degree of control than the family's evidence would have warranted. These are all real consequences of a confinement albeit falling short of being locked down or physically restrained."

Counsel for the local authority made reference to the Judicial College Guidelines for quantifying damages in personal injury claims, suggesting that the amount awarded was not the same level of severity as equivalent sums in the Guidelines and it was wrong in principle to award such a high amount when P was not significantly disadvantaged by her detention. HHJ Saggerson considered that it was not a like for like comparison. He explained (at paragraph 30):

"Comparisons with personal injury damages are only likely to be of some assistance in those cases where there has been short term incarceration where the shock element of the immediate loss of freedom is of particular importance and comparable to small personal injury claims for anxiety and distress."

Although he recognised the award was generous and at the very top end of the permissible range, he could not identify an error of law or principle with the District Judge's approach. The fact that the local authority felt "beleaguered" by the "shifting sands of guidance and continues changes", was not grounds for reducing the damages award.

Interestingly, HHJ Saggerson found that Article 5 added nothing to the quantum of damages in the event that substantial damages were awarded and so he did not consider the Article 5 point raised. The appeal was dismissed.

Comment

The case provides helpful authority on the approaches that could be adopted in quantifying damages in such cases and guidance on factors that will be relevant. It goes to show the importance of adhering to the law, no matter the shifting sands, when it comes to the authorisation of a deprivation of liberty.

For a link to the case report and further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2021) (<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/Mental-Capacity-Report-February-2021-Compendium-Screen-Friendly-1.pdf>)

Samantha Jones, Barrister

P Moving Abroad

Between: UR (by her litigation friend the Official Solicitor) v Derby City Council, NHS Derby, Derby CCG

[2021] EWCOP 10

High Court – Court of Protection – Hayden J

Jurisdiction: England and Wales

UR is a woman in her 60s who was born in Poland. She has had a ‘rich and interesting life’, but has persistent delusional disorders and comorbid depression. At times this leads her to refuse to eat and drink, which is how this case first came before the courts: on an application for insertion of a PEG tube. The medical issues were resolved, but further decisions in relation to UR’s best interests as to residence and care remained. UR wished to return to Poland and her family there. She had a strong sense of her Polish identity, as well as devout Catholic faith. The issue before the court was whether it was possible and in UR’s best interests to achieve what she plainly wanted.

HELD -

It was in UR’s best interests to return to Poland and receive care there. The court had the benefit of clear advice as to the steps that would need to be taken when UR returned to Poland and what social and health care she might be expected to receive there. The judgment also considers Covid-19 restrictions (including that any carers assisting with UR’s move to Poland would fall within the exceptions to the current restrictions on movement) as well as cross-border and habitual residence issues. Importantly, Hayden J sets out a (non-exhaustive) checklist of matters which are likely to need to be addressed in any similar case where the issue of P relocating permanently out of the jurisdiction is being considered (at paragraph 57):

- 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)

Comment

This case gives valuable guidance for authorities faced with the not-uncommon issue of a P who wishes to leave the jurisdiction, often, as in this case, to return to the country of their birth and where they still have significant family ties. This issue has come before the courts several times in recent years, often featuring less positive judicial comment than in the instant case: this is a helpful authority setting out the approach to be adopted. Hayden J's comments as to the scope of s. 21A application following his judgment in *DP v LB Hillingdon* (clarifying that while the court's task on a s. 21A application is to determine the lawfulness of the authorisation, 'once an application is made under section 21A, the court's power is not constrained to determining the question of whether P meets one or more of the qualifying requirements. The court also has power to make declarations pursuant to section 15 as to whether P lacks capacity to make 'any' decision') are also likely to be of interest to practitioners.

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2021) (<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/Mental-Capacity-Report-February-2021-Compendium-Screen-Friendly-1.pdf>)

Rachel Sullivan, Barrister

Best Interests – Medical Treatment

Between: University Hospitals of Derby and Burton NHS Foundation Trust; Derbyshire Healthcare NHS Foundation Trust and MN (by the OS)

[2021] EWCOP 4

High Court - Court of Protection – Hayden J

Jurisdiction: England and Wales

MN is a 60-year-old man diagnosed with paranoid schizophrenia, who has an obstruction in his right kidney suspected to be related to bladder cancer. MN cooperated with an ultrasound, which identified a significant dilation of the right kidney, indicating that it had been obstructed for some time (most commonly because of bladder cancer). MN has since refused to cooperate with any kind of treatment although he is not currently experiencing any pain. Bladder cancer cannot be confirmed without a CT scan and if he is left untreated, he is likely to suffer painful deterioration through blood clots forming in his bladder, which may prevent him from urinating. If he does have bladder cancer, there is the risk of the cancer metastasising and causing his death.

The applicants (the hospital trust and the trust responsible for meeting his mental health needs in the community) sought the Court's approval of an investigation plan: examining him by CT scan; if appropriate, "debulking" any tumour in the bladder by use of a wire inserted into the urethra; and for both procedures to be carried out under the same general anaesthetic, requiring an overnight admission. The "debulking" would permit painless urination and improve his quality of life.

The oral evidence established that there were too many unknowns to identify what treatment would be appropriate if MN has bladder cancer; the options would be radiotherapy; surgery removing the bladder; chemotherapy; or palliative care. Even if he has cancer and treatment is required, however, given the pressure on both the applicant trust and two neighbouring trusts arising from the COVID-19 pandemic, it was unlikely that the procedure could take place before March 2021.

MN had not been consulted about the possible investigation plan or potential treatments. His clinicians thought it unlikely that radical treatment would be in MN's best interests because he would not be willing to comply.

Hayden J. considered whether i) MN lacked capacity to litigate and make decisions about investigations or examinations or treatment relating to his obstructed kidney; ii) whether the Court should authorise emergency treatment and the likely restraint of MN that this would involve; iii) whether the final hearing should consider the lawfulness of the different treatment options arising from the investigations; iv) delaying a final hearing in the light of delays to elective surgery.

HELD -

Hayden J. was satisfied that there was “reason to believe” under s.48 MCA 2005 that MN lacked capacity to make the decisions about investigating and treatment of his kidney (although, following *DP v LB of Hillingdon*, there were no “interim declarations” that MN lacked capacity).

Crucially, because MN had not been informed about the plan, there was no evidence of his wishes and feelings about emergency treatment to relieve the pain arising from blood clots in his bladder (to which he might consent), contrasted with treating his bladder cancer (to which he probably would not consent).

It was understood that the applicants could rely on i) s.6(7)(a) MCA 2005, permitting provision of life-sustaining treatment to MN whilst a Court decision was sought; ii) s.6(7)(b), permitting the applicants to do “any act” reasonably believed necessary to prevent a “serious deterioration” in MN’s condition whilst the Court’s decision is sought; and iii) s.4B, permitting steps to be taken depriving MN of his liberty if they consisted of giving MN life-sustaining treatment or doing any vital act whilst the Court’s decision is sought. These sections therefore would permit the emergency investigation plan to be carried out before any final hearing listed.

Nevertheless, the applicants sought judicial approval of the plan because: if clinicians were concerned about the lawfulness of treating MN without an order, this might cause delay; there was an 80% chance that MN has invasive bladder cancer and so treatment was likely to be required before a mid-March hearing; it was therefore preferable to approve a plan now in a structured hearing rather than at an urgent out-of-hours hearing; the order would only permit (not require) the deprivation of MN’s liberty, initially he would be invited to attend.

Hayden J., however, held that it “it would be inconsistent with the principles of the MCA 2005 for the Court pre-emptively to authorise the deprivation of MN’s liberty in circumstances where both the nature of the potential emergency situation could be anticipated (the foreseeable impact of blood clotting related to bladder cancer), and where MN’s wishes and feelings might be sought and recorded in advance”. He therefore made the interim order sought, but subject to four conditions:

1. MN is in pain and/or discomfort and/or is unable to urinate;
2. MN’s views have been canvassed regarding having emergency treatment (it having been explained to him that such treatment would release him from pain and/or discomfort and/or would enable him to urinate);

3. The emergency treatment would include releasing any blood clots in his bladder (or other clinically indicated and operable obstruction) preventing him from urinating; and
4. MN continues to express a resistance to emergency treatment.

Hayden J. expressed profound concern about delaying a decision on MN's treatment until March 2021, given the risks that MN has an invasive cancer (which means that the "debulking" treatment would not cure him alone) and the longer this is left, the greater the risk of metastasising. The evidence, however, was that the applicant trust and neighbour trusts would remain under significant pressure over the foreseeable future, until early to mid-March 2021, and that (chillingly) this is the case despite the vaccine rollout among the 70-80+ age group, because it is younger patients who are filling the intensive care units and not those in the 70-80+ age group. The final hearing was therefore listed for March 2021.

Comment

This demonstrates the very real importance of obtaining P's wishes and feelings about the proposed treatment plans, even in urgent cases, that a court is asked to consider: where the nature of the potential emergency is clear and P's wishes and feelings can be obtained, it is "inconsistent with the principles of the MCA 2005" to pre-emptively authorise a deprivation of liberty. Without that evidence, Hayden J. felt obliged to attach the four conditions to the interim order whereas, if he had had evidence of MN's consent or even of MN's implacable opposition, he may have been able to authorise the plan without conditions. Hayden J. was also very concerned that MN may well require treatment for cancer which would not be available for some time and therefore clearly rigorously tested that evidence with the applicant's witness Mr W (see §28). If it is going to be stated that treatment or resources are not going to be available for some time, even when there is a high chance that they will be required, clearly that statement will need to have very firm foundations in the evidence and a robust witness to speak to it.

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2021) (<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/Mental-Capacity-Report-February-2021-Compendium-Screen-Friendly-1.pdf>)

Rosie Scott, Barrister

**Capacity - Engagement in Sexual Relations & Marriage -
Property & Affairs - Instruction of Experts****Between: AMDC and AG and CI****[2020] 4 WLR 166 and [2021] EWCOP 5****High Court - Court of Protection – Poole J – two judgments delivered on
18 November 2020 and 22 January 2021****Jurisdiction: England and Wales**

These two short judgments by Mr Justice Poole provide brief and helpful considerations of the practical difficulties of assessing capacity over several different domains; the case as a whole demonstrates how a thorough assessment and well-reasoned expert report on capacity can assist the resolution of difficult issues, saving time, resources and anguish.

AG is a 69-year-old lady suffering from frontal lobe dementia, residing in a care home managed by the local authority following a solo placement in the community. She formed an attachment with a fellow care-home resident, CI (who has full capacity), and they decided that they would both like to develop the relationship and considered getting married. AG is married (she has had four marriages) and has a large family of children, grandchildren and great-grandchildren.

The Court was asked to consider the local authority's application for declarations under s.15 MCA 2005 that AG lacked capacity to make decisions as to her ability to conduct litigation; her residence; her care and support; her contact with others; the management of her property and affairs; her ability to engage in sexual relations and marriage. These declarations might have significant impacts on what would be in AG's best interests under her care plan and on questions of fundamental importance for AG: marriage and sexual relations are "excluded decisions" which no one can take on AG's behalf if she lacks capacity (s.27 MCA 2005).

HELD -

In an interim judgment (in November 2020, at [2020] 4 WLR 166), Poole J set out concerns arising from the capacity evidence then available from the jointly instructed expert (concerns shared by the expert, Court and the parties). For example, the expert had not provided sufficient evidence that AG had been given the relevant information for each separate decision or how that information had been discussed with AG; over several reports, the expert had reached different conclusions on AG's capacity without sufficiently explaining why those conclusions changed; and the expert's final conclusions were reached on a "broad-brush basis" rather than identifying

specific conclusions for each separate decision (see paragraphs 9 to 25). Overall, therefore, the Court agreed with the applicant local authority that it could not rely on the expert's evidence to prove that AG lacked capacity and there was insufficient evidence otherwise available to displace the presumption of capacity (although there was sufficient reason to believe that AG lacked capacity for the purposes of interim orders under s.48 MCA 2005).

Poole J agreed that further evidence was necessary. It was not appropriate simply to dismiss the application for lack of evidence, particularly given the essentially inquisitorial nature of the Court of Protection: it is not for the parties to determine the scope of the litigation but rather it is for the court to assess whether an adult lacks capacity and, if they do, to make decisions about their welfare which are in their best interests. This is a useful reminder that the Court is not obliged to accept evidence which is accepted by the parties and the Court is always entitled to question and to probe issues which the parties may consider settled.

Poole J then set out some guidance for experts on how best to assist the court with their reports. He stressed that he could not prescribe the "form and content" of reports – this is addressed in the Court of Protection Rules 2017 and Practice Direction 15A – and that the manner in which experts interview or assess P is a matter for the expert's "professional judgment" (paragraph 26). He did, however, give eight pointers for experts when drafting their reports, by reference to how the court will use the expert's report. Of particular interest are his comments that:

- a) the report is intended to help the court to "determine certain identified issues", so the expert must pay close attention to the MCA 2005, the Code of Practice and the parties' letter of instruction;
- b) the letter of instruction should identify the domains under consideration, the relevant information for each decision, the need to consider the "functional" and "diagnostic" tests for capacity and the causal nexus between the impairment and the inability to make a decision: it therefore is helpful for the expert to reflect that structure in the report;
- c) the report must make clear that the expert has understood and how the expert has applied the fundamental principles in the MCA 2005 (the presumption of capacity, the concept of an "unwise but capacitous decision" etc.); and
- d) when assessing capacity in relation to more than one decision, experts should avoid "broad-brush" conclusions as unhelpful and should instead identify their specific conclusion in relation to each specific decision, which should also assist experts to ensure that their opinions in relation to each decision "are consistent and coherent".

Further Developments ([2021] EWCOP 5):

Further capacity evidence was obtained from Dr Mynors-Wallis and Poole J was able to reach final conclusions on AG's capacity on 22 January 2021, agreeing with the parties in accepting the expert's conclusions that AG has capacity to make decisions about engaging in sexual relations and contact with others, but that she lacks capacity in all other assessed areas (litigation, residence, care and treatment, property and affairs, marriage and divorce).

Poole J reminded himself of key general principles in sections 1-3 MCA 2005; that the bar must not be set too high (*London Borough of Tower Hamlets v PB* [2020] EWCOP 3); that the person must understand the "salient" information but this does not necessarily include the "peripheral detail" (*LBC v RYJ* [2010] EWHC 2665). He then considered the new expert's report. Of particular interest are:

- i) the clear structure of the report and the expert's acknowledgement of the fundamental principles, in particular the need to assess AG's capacity separately in relation to each decision, and his careful efforts to quote his questions and AG's answers to evidence his conclusions;
- ii) the efforts that the expert went to in establishing a rapport with AG, which was particularly important given the need to discuss her capacity to engage in sexual relations. The previous expert encountered a "brick wall" here, noting that AG displayed "superficiality, fatuous presentation and irritability" (see paragraph 20, interim judgment), but "after a reluctant start" Dr Mynors-Wallis was able to obtain full answers from AG, which allowed him to conclude that she retained capacity to make decisions about engaging in sexual relations;
- iii) although the expert concluded that AG retained capacity in relation to contact and sexual relations but lacked capacity in relation to marriage, divorce and other issues, he provided "well-reasoned conclusions" on each separate domain and on AG's overall presentation and was able to demonstrate that these conclusions were consistent and coherent.

Having accepted that AG retained capacity to engage in sexual relations, Poole J then carefully considered AG's capacity in relation to marriage and divorce. The expert considered that AG retained a "basic understanding of the marriage contract" but could not understand anything more complex, such as financial implications. Poole J cited *Sheffield City Council v E and S* [2005] 2 WLR 953: "The contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend ... (1) Does he or she understand the nature of the marriage contract? (2) Does he or she understand the duties and responsibilities that normally attach to marriage?" He identified that it was essential not to over-complicate matters, but that is now accepted that there must be a "rudimentary" appreciation "of

the financial elements of the breakdown of a marriage". It is important that AG is able to understand and weigh that information about the potential financial consequences of marriage therefore (even she may, as could a person with capacity, disregard that information); s.3(4) MCA 2005 provides that information relevant to a decision includes the reasonably foreseeable consequences of deciding either way, or of not deciding at all.

In this particular case, Poole J accepted that AG "sees marriage as a way of changing her care and residence"; she believes that getting married will result in her living independently in the community, without any care needs and able to work, as she was before when she got married. Her frontal lobe dementia meant that she was unable to understand that her marriage now would not return her previous level of functioning and independence, and she could not retain "key necessary information to make a decision". Having reached conclusions as to AG's capacity across the domains, Poole J. adjourned the matter to permit the local authority to reconsider its care plans for AG and to consider appropriate options for accommodation, care and support, particularly in light of the possibility that AG and CI may wish to reside together. The case will return before him for any consideration as to AG's best interests.

Comment

Poole J provides helpful summaries of the existing principles and the key cases on marriage. His guidance on how experts can assist the court with their reports will be very useful for those drafting letters of instruction and seeking to help experts avoid the common pitfalls of capacity reports (broad conclusions which do not address each specific domain to be assessed; a failure to reference the key principles etc.) and provides a helpful checklist for assessing those capacity reports (and preparing to cross-examine those experts!). This is also a useful example of how conclusions which might at first appear contradictory – capacity in respect of sexual relations but not marriage – can, in fact, be solid conclusions accurately reflecting a complex picture. From P's perspective, living within the limitations of institutional care, this is a timely reminder that sexual relations can still be fundamentally important and can be one of the few aspects of life still left within P's full control.

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2021) (<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/Mental-Capacity-Report-February-2021-Compendium-Screen-Friendly-1.pdf>) [uploads/2020/02/Mental-Capacity-Report-February-2020-Compendium-Screen-Friendly.pdf](https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/Mental-Capacity-Report-February-2020-Compendium-Screen-Friendly.pdf))

Rosie Scott, Barrister

Challenging the validity of a will

In the Estate of Brigid Gilhooly (Deceased)

Theresa McGarry v Kevin Murphy as the Personal Representative of Brigid Gilhooly (Deceased)

[2020] NICH15

High Court of Justice in Northern Ireland – McBride J – Judgment delivered 6th November 2020

Jurisdiction: Northern Ireland

This case involved the challenge of the will of Brigid Gilhooly dated 21st September 2011 by Theresa McGarry, a personal litigant, on the basis that:

- (a) The testatrix lacked testamentary capacity;
- (b) The will was obtained by the undue influence of the defendant;
- (c) The will was a forgery.

The testatrix had previously executed a will in 2008 and updated her will on 21st September 2011 providing for a number of relatively minor changes in bequests but did not change her gifts of her house or her residuary estate. The 2011 will changed a bequest to the plaintiff from £200 to £100.

The plaintiff argued that the testatrix did not have capacity as she was 94 years old when the 2011 will was made. She argued undue influence against the defendant by virtue of him having taken an active interest in the testatrix's care including liaising closely with social services and regularly visiting with her. The plaintiff did not appear to have visited with the testatrix for a number of years prior to her death.

The medical evidence was that concerns were first raised in relation to the capacity of the testatrix in and around June 2012, a number of months after the updated will had been executed. Evidence was taken from the testatrix's social worker and GP who had attended with the testatrix during her life and from two consultants who had reviewed the medical file after death. All of these parties took the view that the testatrix did have testamentary capacity at the time of making the 2011 will.

Evidence was taken from the solicitor and his trainee who had attended with the testatrix to take instructions and then execute the 2011 will. Evidence was also taken from a forensic scientist in relation to the purported fraudulent execution of the 2011 will.

HELD

McBride J held that none of the plaintiff's grounds had been made out. The testatrix was found to have had capacity, had not been under any undue influence and the will was not a forgery.

Capacity had not been queried by any professional until June 2012 at the earliest and therefore the testatrix was held to have had testamentary capacity at the time of execution of the 2011 will. The judge stated that the "golden rule" is not a rule of universal application and need not be slavishly followed in all cases.

The solicitor who took the instructions for the will was found however not to have taken adequate steps to ascertain his client's capacity. A number of red flags had been ignored such as the age of the testatrix, the fact she was a new client to the firm, no enquiries had been made with the testatrix's social worker or GP and no attempt had been made to obtain a copy of her previous will to ascertain the nature and extent of the changes in the 2011 will. The solicitor had also not made due enquiry to assess the testatrix's capacity when he attended with her.

The evidence of the solicitor and his trainee was sufficient to confirm that the will was properly executed and not a forgery.

COMMENT

This is a relatively rare case for Northern Ireland of a will disputed on the grounds of lack of capacity, undue influence and forgery running to a full hearing.

Whilst the arguments of the plaintiff did not succeed, there is an important reminder for solicitors of what needs to be done to ensure that an assessment of capacity is fully considered, even without a formal capacity assessment needing to be carried out. The solicitor must have regard to matters over and above simply the taking of instructions and executing the will correctly.

Andrew Kirkpatrick, TEP, Solicitor, Murray Kelly Moore.

Appointment of the Official Solicitor as Litigation Friend or Advocate to the Court

On 3 February 2021, Sarah Castle, the Official Solicitor, published two Practice Notes.¹ They contain guidance about the appointment of the Official Solicitor as a litigation friend in the Court of Protection, including serious medical treatment cases, and requestions from the court for the Official Solicitor to act as, or appoint counsel to act as, an advocate to the Court. The notes deal with health and welfare proceedings and property and affairs proceedings respectively.

The Practice Notes helpfully set out the Official Solicitor's criteria for consenting to act as a litigation friend, the directions that should be included in a court order requesting the Official Solicitor to act and the criteria, and steps that may be taken, when asking the Official Solicitor to be appointed in urgent serious medical treatment applications.

Samantha Jones, Barrister

Editorial note: at present there is no comparable Practice Note in Northern Ireland.

¹ <https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2021/02/PN-HCW-Feb-2021-Approved-.pdf>; <https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2021/02/Practice-Note.PAA-Feb-2021.pdf>

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