New Court News

In this issue…

New Court Blog

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New Court News: Issue 14

A very warm welcome to the readers of our 14th newsletter.

I am delighted to be able to use this space to offer our warm congratulations to a very special friend of Chambers.

Her Honour Christian Bevington, previously a Circuit Judge, formerly Head of Chambers and known to many of us simply as "CB", has recently celebrated a special birthday.

CB was our founding Head of Chambers and without doubt, but for CB, New Court would not be the chambers it is today. Both Giles and I were offered tenancies by CB and I had the privilege of being her pupil.

We wish CB all best wishes for her birthday and continued good health in the future.

Christmas is almost upon us and we wish everyone a happy and peaceful holiday season.

Enjoy the newsletter and as every many thanks to all the contributors and our editor, Jemimah.

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New Court News

by Jemimah Hendrick

Chambers and Partners 2020 and Legal 500

Chambers is delighted to once again be ranked in the 2020 edition of Chambers & Partners with it being said that: "This is a highly professional and flexible set with barristers who have the skills to deal with all areas of child protection. They always go over and above what's expected of them and provide an excellent service"

As well as a chambers ranking New Court now has 6 members of chambers who are individually ranked:
Giles Bain (Family: children)
Christopher Poole (Family: children)
Andrew Shaw (Family: children)
Sam Wallace (Family: children)
Sally Jackson (Family: matrimonial finance)
Philippa Jenkins (Family: children)

In addition, Giles and Christopher have also been ranked in the 2020 edition of Legal 500.

Machins Public Law Seminar

Chambers were delighted to be invited by Machins Solicitors to speak at their public law seminar in October 2019 in Harpenden. Andrew Shaw, Matthew Burman, Amelia Evans, Jemimah Hendrick and Meredith Major all gave presentations on a range of topics including drug testing results and DOLs.
It was great to see such a turn out from all types of professionals involved in family law and Chambers thanks Machins for organising such a great event.

Sisters in Law

Chambers Sister in Law group that was launched in November 2018 has put together a programme of events the next few being :

17.12.19	Chanukah Tea Party
January	Tu B'Shvat – Fruit Seder
February	Legal education – circumcision
March	Judaism and Islam
April	Talk on similarities of fasting
May	10 commandments and the five pillars
June	The laws of family purity
September	The laws and charitable donation

If you are interested in attending any of these events please contact Elissa (EDwaldman@newcourtchambers.com) or Raisa (rsaley@newcourtchambers.com)

LBLA conference

Members of Chambers provided a day long conference for LBLA solicitors in October 2019. Topics focused on the most current public law issues and included international cases, relinquished babies and Special Guardianships. Members Andrew Shaw, Raisa Saley, Jemimah Hendrick, Kathryn Blair, Sam Prout and Kezia Kernighan all gave presentations. Chambers enjoyed the day and thank all the attendees for their participation and for asking some challenging questions!

Welcome to Niamh Daly and Kezia Kernighan

Chambers is very happy that Niamh Daly has accepted an offer of tenancy following completion of her pupillage in October 2019. Niamh was called to the Bar in 2018 and accepts instructions in all of Chambers' areas of practice. Niamh has already proved herself to be a member of the New Court team and we wish her luck with what we are sure will be an excellent career at the Bar.

Chambers is also very pleased that Kezia Kernighan has become a tenant following completion of pupillage in October 2019. Kezia was called to the Bar in 2018 and accepts instructions in Chambers'' core practice areas. Chambers is sure that Kezia has a bright career ahead of her and looks forward to seeing her success.

New Pupils

Chambers offers a warm welcome to Katelyn Gottschling and Kiran Channa who joined us as new pupils in October 2019. We look forward to getting to know them ahead of them being on their feet in April 2020.

News continued …..

Berlin Marathon

Marathon extraordinaire Sam Wallace has run another marathon! This time Sam tackled the Berlin Marathon in September 2019. Sam again ran for HASTE - Help African Schools To Educate, a charity set up by HHJ Hughes QC which has now opened up a number of schools across the Gambia, Kenya and Uganda.

Sam raised an excellent £1930. Chambers is very proud of Sam and his achievements.

More information can be found about this worthwhile charity at https://hastecharity.org.uk/

Quiz Night

In September 2019 Chambers welcomed members of the judiciary, solicitors and friends of Chambers to a quiz night at the Devereaux pub to assist with Sam's fundraising for his Berlin Marathon. The quiz was hosted by ex-apprentice candidate Daniel Lassman and included buzzer rounds which was enough to bring out the competitive side in even the most laid back of quiz participant! Chambers thanks all those who attended this very fun evening and were pleased to raise £450.

Damian Norris Memorial Moot

This annual moot was held at the University of Law and is sponsored by chambers in memory of Damian Norris a solicitor from Venters solicitors who is still very much missed by all those who knew him. 16 able students competed and the problem question was on surrogacy law. The moots were judged by members of chambers; Christopher Poole, Sam Wallace, Philippa Jenkins and Kathryn Blair, who were all impressed by the very good standard of mooting on display and the skills of all students involved. Congratulations to the winners!

Reported Cases

by Jemimah Hendrick

A (No2) (children: Findings of Fact) [2019] EWCA Civ 1947

Giles Bain leading Laura Harrington appeared in the Court of Appeal for the second appeal of a re-hearing of a fact finding following the death of a child.

The court considered a finding of FGM made by the Judge that was a case theory of his own. It found that there was no good reason for the court to have departed from the way the local authority framed its case and therefore that this finding must be set aside. This therefore led to the other findings also being set aside.

The Court of Appeal spent much time deliberating whether there should be a second re-hearing (third fact finding) in this matter and they have ultimately decided that there should be.

Re A (Children) [2019] EWHC 2334 (Fam)

Christopher Poole appeared on behalf of the Guardian before the President of the Family Division.

This matter was a rehearing of a fact finding that had initially been held in the High Court. The President heard this case following a successful appeal.

The proceedings involved a mother who accused a father of stranding her in Pakistan. The original findings were that the mother had not been stranded in Pakistan and the children had not been wrongfully removed. The Court of Appeal set that judgment aside and following this rehearing the court accepted the mother's evidence and made all the key findings in her favour. The court also held that the children had suffered very serious child abuse.

P (A Child) [2019] EWCA Civ 1346

Christopher Poole appeared for the respondent local authority in the Court of Appeal. This was an appeal of findings of fact made by HHJ Oliver. The appeal centered around the judge's decision to allow the mother to press for findings that had been regarded as unnecessary by the local authority.

This appeal was upheld with the Court of Appeal finding that the judge had fallen into error by failing to consider all the evidence when making his findings in relation to credibility.

In light of the decision on the appeal a revised threshold was agreed. The matter will go on to a welfare hearing without the need for a further fact finding hearing.

B(Children) [2019] EWCA Civ 575

Saiqa Chaudhry appeared for the mother in the Court of Appeal on appeal from HHJ Meston QC. This matter was an appeal of a finding that the father was within the pool of possible perpetrators responsible for infecting the children with gonorrhea.

Saiqa supported the father's appeal on behalf of the mother and her submissions were accepted by the Court of Appeal.

The court found that the allegations did not receive the thorough investigation that was required and that the judge's analysis fell short of that which was needed.

The appeal was allowed and the matter was remitted for rehearing.

In the matter of D (a child) [2019] UKSC 42 – a look at the most recent case law on Deprivation of Liberty

By Matthew Burman

In this recent decision from the Supreme Court, the Justices considered whether parents could consent to their 16 or 17 year old child being placed somewhere that would otherwise amount to a deprivation of liberty.

The case concerned a child "D" who has ADHD, Asperger's Syndrome, Tourette's Syndrome and a mild learning disability. His parents struggled to care for him and so, when he was 14, he was informally admitted to Hospital B. Child D lived in a unit in the hospital grounds and attended school there. The external door of the unit was locked and D was checked on by staff every half hour. If he left the site, he was accompanied by staff on a one-to-one basis. Hospital B applied under the Inherent Jurisdiction for a declaration that it was lawful for them to deprive Child D of his liberty. In March 2015, Keehan J held that (1) the living conditions did indeed constitute a deprivation of liberty, (2) that it was "within the zone of parental responsibility" for his parents to consent to these arrangements and (3) that, once he reached 16, he would come under the jurisdiction of the Court of Protection and would be subject to a different regime, namely the Mental Capacity Act 2005.

Child D was subsequently discharged from Hospital B and placed in residential placement B and Birmingham City Council took the lead in this respect. Keehan J had approved the transfer of D to Placement B. D was accommodated there under section 20 of the Children Act 1989. Placement B was a large house set in its own grounds. Child D was sharing the house with three other young people. The external doors were locked and he was not allowed to leave the premises except for a planned activity. There was one-to-one staff support during waking hours and constant staff attendance overnight.

When D turned 16, Birmingham City Council applied to the Court of Protection for a declaration that D was not deprived of his liberty in this new placement as his parents consented to it. Keehan J ruled that the parents could no longer consent to D's deprivation of liberty as he had turned 16, his view being that Parliament had on many occasions sought to make a distinction in statute between younger children on the one hand and young persons of 16 and 17 on the other.

Birmingham City Council appealed to the Court of Appeal- the appeal was heard in February 2017 but judgment was not handed down until October 2017. In the meantime D had turned 18 and so parental responsibility had ceased to have effect. Prior to turning 18, D had also moved to another placement (Placement C) where the arrangements were essentially the same, this move also being approved by further declarations made by Keehan J.

The Court of Appeal allowed the appeal; they disagreed with Keehan J and held that a parent could consent to what would otherwise be a deprivation of liberty of a 16 or 17 year old child who lacked capacity to decide for himself.

The Official Solicitor appealed to the Supreme Court on behalf of D. The OS's primary case was that no person can consent to the deprivation of liberty of a 16 or 17 year old child. If a child is confined, and that confinement is attributable to the state, then he is deprived of his liberty within the meaning of Article 5 and so there must be safeguards in place to ensure that those arrangements are lawful.

In her own judgment, Lady Black takes a firm view that, as a matter of common law, it is not within the scope of parental responsibility for parents to give authority for their 16 year old child to be confined in a way which would otherwise amount to a deprivation of liberty

The lead judgment is given by Lady Hale. Lady Hale summarises the key issues as follows [3]:-

- Is it within the scope of parental responsibility to consent to living arrangements for a 16 or 17 year old child which would otherwise amount to a deprivation of liberty within the meaning of Article 5?
- What difference, if any, does it make that the child lacks mental capacity?
- What difference, if any, does it make that the holder of parental responsibility is a public authority rather than an individual?

Lady Hale first considers the concept of parental responsibility and how we arrived at the modern definition as set out in section 3(1) of the Children Act 1989. She says that, historically, the concept of "custody" had both a wide and narrow interpretation. A distinction was drawn between custody in the narrow sense (the right to physical possession of a child) and the wider sense (the right to control every aspect of a child's life including his religion, education and property). Parental rights were never absolute and became increasingly subject to the overriding consideration of the child's own welfare [21]. Lady Hale quotes Lord Denning MR from the case of *Hewer v Bryant [1970] 1 QB 357*, where he stated that:

> "*the legal right of a parent to the custody of a child…is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."*

Lady Hale reminds us of the landmark House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112*, where it was held that a child under 16 could consent to or refuse their own medical treatment if they had sufficient understanding and intelligence to fully understand what was being proposed. However, Lady Hale did not believe that *Gillick* was relevant to the present case because (a) *Gillick* dealt with consent to medical treatment, not deprivation of liberty and (b) *Gillick* considered whether a child could acquire capacity before turning 16, whereas the present case was about a parent continuing to have authority beyond 16 in circumstances where the child lacked mental capacity [24]. In her own judgment, Lady Black agrees that it would be incorrect to apply *Gillick* to the circumstances of this case because *Gillick* was dealing with a '*materially different issue'*. Lady Black speaks of the '*distinct, and rather special'* features of the field of deprivation of liberty [88].

Lady Hale gives various examples of where Parliament has intended to treat 16 and 17 year olds differently from younger children. For example, Section 8 orders made under the Children Act 1989 cease to have effect when a child reaches 16 unless the circumstances are exceptional. Similarly, the powers under the Mental Capacity Act 2005 generally only apply to those over the age of 16, with some limited exceptions [26]. Lady Hale takes the view that the Mental Capacity Act does not override other common law and statutory provisions relating to 16 and 17 year olds, but it does indicate an appreciation of the different needs of this group [27].

In her own judgment, Lady Black takes a firm view that, as a matter of common law, it is not within the scope of parental responsibility for parents to give authority for their 16 year old child to be confined in a way which would otherwise amount to a deprivation of liberty [88-90]. For her own part, however, Lady Hale declines to give a concluded view on this issue. She says there may well be a general rule that PR extends to making decisions on behalf of a child of any age if they lack capacity. However, due to the view she takes in this case on the application of Article 5 (below), she finds it '*strictly unnecessary'* to reach a concluded view on the scope of PR [28].

Lady Hale therefore chooses to focus the thrust of her judgment on Article 5. She reasserts European jurisprudence on Article 5, most succinctly set out in *Storck v Germany (2005) 43 EHRR 6*, which was then adopted by the UK Supreme Court in *Cheshire West and Chester Council v P [2014] UKSC 19.* Both those authorities say that there are three components in a deprivation of liberty for the purposes of Article 5: (a) the objective element of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the State [1].

'The arrangements in Placements B and C did therefore amount to a deprivation of liberty and the procedural requirements of Article 5 therefore applied '

In terms of the objective element, Lady Hale considers the restrictions placed on Child D and asks whether they fall within normal parental control for a child of this age or not. If they go beyond normal parental control, Article 5 will apply. Lady Hale says that:

> "*Quite clearly, the degree of supervision and control to which D was subject while in Placement B and Placement C was not normal for a child of 16 or 17 years old. It would have amounted to a deprivation of liberty in the case of a child of that age who did not lack capacity"* [39]

Lady Hale then questions what, if any, difference it makes that D lacks mental capacity. She reaffirms the view taken in *Cheshire West*, that the living arrangements of a mentally disabled person had to be compared to those of people who were not disabled: "*they were entitled to the same human rights, including the right to liberty, as any other human being"*. She therefore finds that limb (a) of the *Storck* test has been satisfied [41-42].

In terms of limb (b) 'lack of valid consent', Lady Hale concludes that parental consent is not sufficient. Consent would only be 'valid consent' if the person concerned was willing to stay where they were and was capable of expressing that view [42].

The arrangements in Placements B and C did therefore amount to a deprivation of liberty and the procedural requirements of Article 5 therefore applied (Lady Hale acknowledges that those procedural requirements were in fact satisfied by Birmingham City Council applying more than once to the Court of Protection; in the present case, there was therefore no infringement of D's Article 5 rights)[44].

In terms of limb (c) 'attribution to the State', Lady Hale says that human rights are about the relationship between individuals (or other private persons) and the state. It was agreed between the parties that any deprivation of liberty in Placement B or C was attributable to the state [46]. If a private person sought to detain a child, the State had a positive obligation to protect that child and therefore Article 5 would be engaged. Lady Hale questions whether a parent could give consent for the State to violate their child's fundamental human rights- she concludes that this lies outside the scope of parental responsibility. By way of parallel, Lady Hale says it would be a '*startling proposition'* if, for example, a parent could use their PR to authorize the State to inflict what would otherwise be torture or inhuman or degrading treatment or punishment upon their child [48].
Lady Hale therefore concludes that it was not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty: "*Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child"* [49].

My colleague Robert Wilkinson discussed the dramatic increase of DOL applications in our June 2019 newsletter. This case provides a timely reminder of the serious implications of depriving young people's liberty and both the legal and procedural hurdles involved. It is, perhaps, also a helpful reminder of the *Cheshire West* criteria for considering whether, in fact, a placement constitutes a deprivation of liberty and therefore whether Article 5 is engaged in any given case.

It is clear from the judgment that the Justices were very aware of the forthcoming legislative changes to DOLS applications. The Mental Capacity (Amendment) Act 2019 will be coming into force in October 2020. This will replace the current Deprivation of Liberty Safeguards (DOLS) with a new scheme called the Liberty Protection Safeguards (LPS). Whereas the DOLS applied to persons of 18 or over, the LPS will apply to people aged 16 and over. This brings the LPS into line with the rest of the Mental Capacity Act 2005 which, save for some limited exceptions, applies to 16 and 17 year olds. It will also mean that a court application will no longer be required to authorize deprivation of liberty of a 16 or 17 year old who lacks relevant capacity.

With this in mind, in my view the implications of this case are limited given that a new legislative framework is on the horizon. Nevertheless, the decision may require some Local Authorities to review the placements of 16 and 17 year olds currently in their care, and the circumstances of those placements coming into being. It would also appear that Local Authorities will need to review any 'private placements' where they know of 16 or 17 year olds being confined in private settings such as at home or in a school- it is clear from the words of Lady Hale that if the Local Authority is aware of such a situation, it is still attributable to the State.

The key point of this case is that parental consent is NOT enough. If the placement constitutes a deprivation of liberty, the Local Authority must follow the relevant procedure to ensure that the placement is Article 5 compliant. It is that procedure which will be subject to change in the coming 12 months.

QUARTERLY COURT OF PROTECTION UPDATE

A ROUND-UP OF THE KEY JUDGMENTS AUGUST – OCTOBER 2019

By Katherine Couper

In the matter of D (A Child) [2019] UKSC 42

Determination as to whether arrangements for a 16-17 year old child, amounting to a deprivation of liberty, were within the scope of consent by the holders of parental responsibility.

D was diagnosed with ADHD, Asperger's syndrome, Tourette's syndrome, and a mild learning disability. Since the age of 14, D had been subject to a deprivation of his liberty, by virtue of living in secured premises and being subject to a high-level of supervision.

At first instance, Keehan J had concluded that D's parents could not consent to what would otherwise be a deprivation of liberty once D reached the age of 16. From that point, the provisions of the Mental Capacity Act 2005 would apply. The Court of Appeal then overturned this decision, holding that D's parents could consent, and that the Mental Capacity Act 2005 had no bearing on this. The matter was further appealed to the Supreme Court.

In a majority of 3 to 2, the Supreme Court allowed the appeal, concluding that parental consent cannot not substitute for the subjective requirements of Art. 5 ECHR for valid consent to the deprivation. The Court's authorisation is required in such circumstances.

The Judgment reiterates the principle of parental rights and controls dwindling as a child acquires sufficient understanding and intelligence to make his or her own decisions, with discussion as to the interplay of 'Gillick' competence. Alongside this, it notes that Art 5 protects children who lack the capacity to make decisions for themselves from being arbitrarily deprived of their liberty.

Lady Black also considered whether the provisions of s.25 ChA 1989 could apply to D's living arrangements. She concluded they did not, emphasising that s.25 should be narrowly constructed, with the s.25(1)(a)-(b) test having a "last resort" quality about it.

United Lincolnshire Hospitals NHS Trust v CD [2019] EWCOP 24

Application for anticipatory and contingent declarations in respect of a birth plan

Application for anticipatory and contingent declarations concerning CD, a pregnant, 27-year-old woman, detained pursuant to s.3 MHA 1983, who lacked capacity to conduct proceedings, but who did not presently lack capacity to make decisions in respect of the upcoming birth/treatment procedures in connection therewith.

Her clinicians agreed that there was a substantial risk that CD would become incapacitous in relation to such decisions at a critical moment in her labour. At that point, there would be insufficient time to make a renewed application to the court. Accordingly, the NHS Trust in question sought an 'anticipatory and contingent declaration' in respect of her birth plan.

The application was granted. Francis J. stated:*"I acknowledge that I am not currently empowered to make an order pursuant to section 16(2) because the principle enunciated in section 16(1), namely incapacity, is not yet made out. However, as I have already said, there is a substantial risk that if I fail to address the matter now I could put the welfare, and even the life, of CD at risk and would also put the life of her as yet undelivered baby at risk. As I have said, I am not prepared to take that risk. I am prepared to find that, in exceptional circumstances, the court has the power to make an anticipatory declaration of lawfulness, contingent on CD losing capacity, pursuant to section 15(1)(c)."*

Guidance that anticipatory or peremptory orders should be made in the declaration itself and not be buried within a long judgment.

JB (Capacity: Consent to Sexual Relations and Contact with Others) [2019] EWCOP 39

Consideration of the test for capacity to consent to sexual relations and whether the s.3(1) test in the MCA 2005 requires P to have a full understanding of any sexual partner's consent.

JB, a 36 year-old man, has autism and impaired cognition. JB wanted to have a girlfriend with whom he could enter into an intimate relationship; however, he was subject to restrictions aimed at preventing him from acting in a sexually inappropriate manner towards women. Professionals were concerned that JB's behaviours, if not subject to such restrictions, would place women at risk of sexual harm from JB, and would expose JB to a risk of criminal proceedings.

The court was only concerned at this hearing with whether JB had capacity to consent to sexual relations. The 'best interests' hearing was listed for a later date. The question which it is said remains unanswered is this: does the "information relevant to the decision" within section 3(1)(a) of the Mental Capacity Act 2005 include the fact that the other person engaged in sexual activity must be able to, and does in fact, from their words and conduct, consent to such activity? The local authority argued that s.3(1)(a) *does* include this. The local authority contended that this was a highly relevant factor in order to protect JB from committing a criminal offence. The Official Solicitor strongly opposed the local authority's argument, framing it as an 'impermissible attempt to raise the bar'.

In giving judgment, Roberts J agreed with the Official Solicitor, stating '*I do not accept that it is appropriate to increase the bar for the potentially incapacitous and thus potentially deprive them of a fundamental and basic human right to participate in sexual relations merely because the raising of that bar might provide protection for either P himself or for any victim of non-consensual sex when those consequences are viewed through the prism of the criminal law. … It is true that knowledge of the absence of consent might expose either to the risk of criminal prosecution but in both cases each is entitled to make the same mistakes which all human beings can, and do, make in the course of a lifetime.*'

However, Roberts J emphasised the importance of educating JB about these matters, so as to encourage and support him to recognise the essentially consensual nature of sexual activity. As such (and something which the more sensationalist media coverage of this case generally failed to report), the question of how to support JB and manage any issues arising when he is in the company of someone to whom he feels sexually attracted was deferred for consideration at a 'best interests' hearing.

LCC v AB [2019] EWCOP 43

Application to determine P's capacity and best interests with regard to his contact with sex workers.

AB was a 51-year-old man with a diagnosis of moderate learning disabilities, autistic spectrum

disorder, harmful use of alcohol and psychosis due to solvent abuse. Historically, he had been supported to access sex workers, including travelling to the Netherlands to do so.

Expert evidence within proceedings concluded that AB lacked capacity in all relevant domains, save the capacity to consent to sex. On the issue of his contact with sex workers, he was held to lack consent because he lacked insight into the potential risks that others may pose to him.

Giving judgment, Keehan J approved the local authority's approach in not seeking to facilitate AB's contact with sex workers, here or abroad. Keehan J notes that any care worker who were to facilitate this would be at risk of being prosecuted for a breach of the Sexual Offences Act 2003, by virtue of causing or inciting sexual activity by an individual for payment, with another person.

Re AB (Termination of Pregnancy), [2019] EWCA Civ 1215

Appeal decision about whether or there should be a declaration to terminate in respect of a pregnant woman with moderate learning disabilities.

AB was a 24-year-old woman, with significant developmental delay and learning difficulties, functioning at a level of between 6-9 years old. She became pregnant in unexplained circumstances.

The NHS Trust responsible for AB's antenatal care applied for a declaration that it would be in AB's best interests for the pregnancy to be terminated. AB's mother opposed the termination on religious and cultural grounds. At first instance, the High Court made a declaration that it would be lawful to carry out a termination. AB's mother, supported by the Official Solicitor, appealed.

The appeal succeeded on the basis that the court at first instance had not placed sufficient weight on AB's wishes and feelings, had not made reference to AB's mother's view (despite this being someone who knew AB better than anyone and had her best interests at heart), and had not given any weight to the views of AB's social worker, who was opposed to the termination.

In concluding remarks, King LJ notes that *'on any objective view, it would be regarded as being an unwise choice for AB to have her baby, a baby which she will never be able to look after herself and who will be taken away from her. However, inasmuch as she understands the situation, AB wants her baby. Those who know her best, namely CD and her social worker, believe it to be in AB's best interests to proceed with the pregnancy as does the Official Solicitor who represents her in these proceedings.* The case emphasises the need for courts to consider both wishes and feelings.

An NHS Foundation Trust v AB (Contraception) [2019] EWCOP 45

Further decision pertaining to AB, the 24-year-old woman with significant developmental delay who had become pregnant in unexplained circumstances. Determination of the question of whether it is in the interests of AB to have an 'IUD' contraceptive device fitted at the same time as she undergoes a caesarean section

The Local Authority and Official Solicitor contended that the device was not required, relying on evidence which, they submitted, showed that the risk of a further unplanned pregnancy for AB was at present, and in effect, *nil*, and, that with further educative work, AB could gain capacity in respect of decisions concerning contraception.

The court disagreed, and was satisfied that various factors 'point clearly to it being in AB's best interests' for the IUD device to be fitted at the time she undergoes a caesarean section in respect of her current pregnancy. These factors included that the witness suggesting AB could gain capacity in respect of decisions concerning contraception had been similarly optimistic that AB could gain capacity in respect of decisions concerning modes of delivery, and this optimism had proved unfounded. Other professionals had concluded that the prospects of AB gaining such

capacity is 'extremely unlikely'. The court also challenged the assertion that the risk of a further unplanned pregnancy for AB was *nil*, emphasising that the forensic circumstances of her present pregnancy undermine such a submission.

Wakefield Metropolitan District Council & Anor v DN & Anor [2019] EWHC 2306

Helpful review and clarification of the law about use of the inherent jurisdiction in cases involving vulnerable adults.

DN was a 25 year-old with a severe form of autistic spectrum disorder, a general anxiety disorder, and traits of emotionally unstable personality disorder. In April 2019, DN had received a Community Order with a two-year Mental Health Treatment Requirement (as a result of various Public Order offences). At the time of the sentence, DN had been bailed to a supported living accommodation ('Stamford House'). Objectively, features of the regime at Stamford House deprived DN of his liberty, contrary to his rights under *Article 5 ECHR*.

The local authority in which Stamford House was located took the view that DN was unable to give his consent to his care regime at Stamford House, arguing that his decision-making powers have been vitiated by his vulnerability and circumstance. They therefore issued an application seeking: (i) the court's approval under the inherent jurisdiction for ensuring that DN's need for care and support was delivered under a lawful framework; and (ii) authorisation for the deprivation of DN's liberty for as long as he remained at Stamford House.

Expert evidence concluded that DN, although vulnerable, had capacity to litigate, as well as the capacity to make decisions about the options which the criminal court was considering as part of its sentencing powers. His capacity to make decisions as to residence and care was not felt to be impaired. However, it was accepted that DN had occasional 'meltdowns', during which he lacked capacity to make decisions.

Cobb J considered 3 issued:

1. Whether DN is a person who falls in the category of 'vulnerable' adults for whom the inherent jurisdiction is available to offer protection and/or to facilitate decision-making;
2. Whether, if DN is a vulnerable adult over whom the court can exercise its inherent jurisdiction, it can or should do so to authorise his deprivation of liberty at Stamford House;
3. Whether the court could or should make anticipatory declarations as to DN's capacity and best interests under the section 15 and 16 of the Mental Capacity Act 2005, to cover those occasions when he has 'meltdowns' and is unable to make a capacitous decision as to his care.

Cobb J concluded that DN did not fall within the category of 'vulnerable adult', for whom the inherent jurisdiction is available. In so concluding, he noted that DN was able to offer his consent to his residence and care arrangements freely, and expressed his willingness, without coercion or constraint, to comply with the regime offered by the community order.

Cobb J also concluded that, on the facts, the inherent jurisdiction could not properly be deployed to authorise a deprivation of DN's liberty, because DN could not be held to lack capacity.

The parties were thus required to immediately review and implement changes to DN's care regime at Stamford House. Any aspects which deprived DN of his liberty to which he did not consent would need to be relaxed, and it must be made clear to DN that he is 'free to leave'. If DN were unable or unprepared to accept certain restrictions deemed essential by the professionals involved, then it would be open to the local authority to terminate the placement. In such circumstances, DN would potentially be referred to probation for breach of a community order, with the possibility of further Magistrates' Court sanctions being imposed as a result.

The court did make anticipatory declarations under ss. 15 & 16 MCA 2005 to cover occasions when DN has 'meltdowns' and is unable to make capacitous decisions.

An NHS Foundation Trust v AB (Contraception) [2019] EWCOP 45

Further decision pertaining to AB, the 24-year-old woman with significant developmental delay who had become pregnant in unexplained circumstances. Determination of the question of whether it is in the interests of AB to have an 'IUD' contraceptive device fitted at the same time as she undergoes a caesarean section

The Local Authority and Official Solicitor contended that the device was not required, relying on evidence which, they submitted, showed that the risk of a further unplanned pregnancy for AB was at present, and in effect, *nil*, and, that with further educative work, AB could gain capacity in respect of decisions concerning contraception.

The court disagreed, and was satisfied that various factors 'point clearly to it being in AB's best interests' for the IUD device to be fitted at the time she undergoes a caesarean section in respect of her current pregnancy. These factors included that the witness suggesting AB could gain capacity in respect of decisions concerning contraception had been similarly optimistic that AB could gain capacity in respect of decisions concerning modes of delivery, and this optimism had proved unfounded. Other professionals had concluded that the prospects of AB gaining such capacity is 'extremely unlikely'. The court also challenged the assertion that the risk of a further unplanned pregnancy for AB was *nil*, emphasising that the forensic circumstances of her present pregnancy undermine such a submission.

London Borough of Croydon v KR & Anor [2019] EWHC 2498

Application by a Local Authority for an injunction under the Court's inherent jurisdiction to prevent a husband from living with his wife

Application by a local authority to prevent KR, a seriously disabled 59-year-old man from living with his wife, ST, from whom he was said to be at risk of domestic violence and/or neglect. KR and ST had been married for 40 years.

KR was assessed to have capacity to make decisions about his residence and welfare, and to have capacity in relation to the proceedings.

Local authorities should take heed at the warnings within this judgment in respect of the need for full and frank disclosure in support of interim injunctions – it transpired at final determination that social work statements relied upon at earlier stages had severely overstated the risks in the case, and were not supported by the primary evidence.

By point of final hearing, the evidence did not support a conclusion that KR fell within the scope of the inherent jurisdiction as a vulnerable adult. The evidence did not support a conclusion that KR was under the undue influence of ST to a degree which would justify the use of the inherent jurisdiction. Lieven J went on to say that, even if KR had been held to fall within the scope of the inherent jurisdiction, the risks on the facts of the case would not justify the interference proposed under article 8(2), namely, to separate a married couple of 40 years.

The court emphasised that the local authority had not properly considered less intrusive means by which KR could be properly protected. Simple measures were suggested, such as providing him with his own mobile phone to call for help if needed, and securing more suitable accommodation for the couple (whereby each would have their own bedroom).

Redcar & Cleveland Borough Council v PR & Ors [2019] EWHC 2305

Judgment examining the circumstances in which interim orders under the inherent jurisdiction were made for a capacitous but apparently vulnerable adult, and whether injunctive-type orders could and/or should have been made against the adult for whom protection was sought.

The case concerned PR, a 32 year old woman who, suffered a significant deterioration of her mental health, and was admitted as a voluntary patient to hospital. While in hospital, she made a number of allegations about her personal and home life, in particular against her father, leading the local authority to seek protective orders pursuant to its duties under s.42 of the Care Act 2014. These orders initially included an injunction preventing PR from living with her parents, as well as injunctions against each parent regulating their contact with PR.

The court sought to determine whether it had been right for the court to have used its inherent jurisdiction to make orders in relation to PR and, if so:

1. Was it right for the court to make injunctive orders against PR herself to prevent her from having contact with her parents?
2. Could or should the inherent jurisdiction have been used to make orders which would have the effect of depriving PR of her liberty (if indeed she was so deprived)?
3. Was/is there a proper basis for withholding disclosure of evidence and/or information which has been filed by the applicant from the second and third respondents, SR and TR?

Cobb J concluded that the Judge hearing the application for an interim order was correct in concluding such an order was necessary and proportionate to protect PR, given that her co-operation with the relevant statutory processes was far from assured.

In considering whether PR's liberty had been deprived by the interim order, Cobb J noted that she had acquiesced in the move from hospital to local-authority arranged accommodation, rather than returning home to her parents. In the alternative, the decision was made in accordance with the ECHR's decision in *Winterwerp v The Netherlands*, where it was identified that emergency cases call for special measures, but that the maximum length of any interim order should not exceed six weeks.

However, Cobb J took a different position on the issue of whether an injunctive order should have been made against PR herself. He considered that any breach by PR could not have been classed as deliberate, due to her confused thinking. He could not conceive of a situation in which it would have sought to enforce the order against PR herself, by way of committal or otherwise.

Guidance given that, before a local authority makes an application under the court's inherent jurisdiction which is designed to regulate the conduct of the subject by way of injunction, particularly where mental illness or vulnerability is an issue, it should be able to demonstrate (and support with evidence) that it has appropriately considered

1. Whether X is likely to understand the purpose of the injunction;
2. Will receive knowledge of the injunction; and
3. Will appreciate the effect of breach of that injunction.

If the answer to any of these questions is in the negative, the injunction is likely to be ineffectual, and should not be applied for or granted, as no consequences can truly flow from the breach.

The court was not required to determine the issue relating to evidential disclosure, as the parties reached agreement effectively disposing of the proceedings.

Birmingham City Council v SR; Lancashire County Council [2019] EWCOP 28

Hearing of two applications under the Mental Capacity Act 2005 for authorisations relating to the Respondents' care plans involving, inter alia, deprivation of liberty. Issue arose in both relating to the interrelationship between the MHA (in particular the power to conditionally discharge a patient), and the powers under the MCA.

Both patients had been assessed not to have capacity in respect of decisions about their care packages, where they live, and their liberty or otherwise. There was also no dispute or any

potential for a dispute, that it was in both patients' best interests that they should be cared for and accommodated in the community settings proposed. In both cases, the patients' wishes and feelings were that they be allowed to live in the proposed placements.

Lieven J undertakes a review of relevant law, and in particular the implications of the Supreme Court's decision in *M v Justice Secretary...*(2018) 3 WLR 1784, which held that, upon discharge of a restricted patient, neither the Secretary of State, nor the First Tier Tribunal has the power (under the MHA or otherwise) to impose a condition that would amount to a deprivation of liberty within the meaning of Article 5. This is the case even if the patient consents.

The court then went on to consider what powers the Court of Protection has under the MCA to deprive an individual who had been (or was contemplated to be) conditionally discharged under the MHA.

Concludes that there is nothing in the Supreme Court decision in *M* (or in the MCA itself in the light of *M*),which would prevent the Court of Protection authorising a deprivation of liberty in the present case. Emphasises that *M* is concerned with the powers under the MHA to deprive a conditionally discharged patient of his/her liberty. The Supreme Court had made clear that they were not considering the powers under the MCA to authorise a deprivation of liberty

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London Borough of Tower Hamlets v NB (consent to sex) [2019] EWCOP 27

Case regarding the capacity of a wife to consent to sexual relations with her husband.

NB suffered from a global learning difficulty and an impairment in relation to her facility to communicate with others. NB had been married to her husband for nearly 30 years and they had a 20 year old daughter. The question before the court was whether or not she had capacity to consent to sexual relations

Hayden J undertook an important review of the case law, with focus on the question of whether the test for capacity to consent to sexual relationships is general and issue specific, rather than person or event specific. The court concluded that NB's assumed capacity to consent to a sexual relationship with her husband had not been rebutted.

"The Court of Protection deals with human beings who, for a whole variety of reasons, have lost or may have lost capacity. This may be temporary, permanent, fluctuating or limited to a constrained sphere of decision taking. A declaration of incapacity whether tightly circumscribed or expansive in its scope, should not impose sameness or uniformity. The personality and circumstances of the incapacitous are as rich, varied and complex as those of anybody else. All this requires to be taken into account when evaluating capacity in every sphere of decision taking. As practitioners and indeed as judges we must be vigilant to ensure that the applicable tests do not become a tyranny of sameness, in circumstances where they are capable of being applied in a manner that may properly be tailored to the individual's situation. To do otherwise would, for the reasons I have set out, lose sight of the key principles of the MCA 2005."

"I don't want him to know" - withholding information from another party

By Sam Prout

Often one party to proceedings will want to prevent information or evidence from being seen by or disclosed to another party. This might come up when one parent wishes to keep information from another (*Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017); when a child wishes to keep information from their parent (*PD -v- SD, JD and X County Council* [2015] EWHC 4103 (Fam)); or when a local authority or children's guardian want to keep information from a parent (*Local Authority X -v- HI and others* [2016] EWHC 1123 (Fam)). It's usually someone trying to keep something from a parent, occasionally with good reasons.

In family proceedings the Court's starting point is that all litigants should be able to see any information which the court will consider when reaching its decision and the court is usually reluctant to deviate from that position.

You can, if it's rainy outside, trace this starting point back through theories of natural justice to Aristotelian equality. A little less excitingly, equal service and disclosure is plainly consistent with a litigant's Article 6 right (see for example *Re D (Minors) (Adoption Reports: Confidentiality)* [1995] 4 All ER 385 and *Re X (Adoption: confidential procedure)* [2002] EWCA Civ 828).

The important thing, from a practical point of view, is that ordering a restriction of information is possible and is discretionary (that means we can argue it). The balancing act for the court is usually pitched as a battle of rights: it's one party's right to a fair trial (Article 6) vs. the other party's right to respect for private and family life (Article 8). You may have fond memories of the court balancing the big rights in popular cases like *Campbell -v- MGN Ltd* [2004] 2 AC 457 and *R. (on the application of L) -v- Metropolitan Police Commissioner* [2009] UKSC 3, [2010] 1 AC 410.

'The important thing, from a practical point of view, is that ordering a restriction of information is possible and is discretionary'

It's sometimes controversial with clients but worth remembering that Article 6 is an unequivocal and unqualified right whereas Article 8 is not. In a fair fight fair trial wins. You might want to describe Article 6 as "inviolable" for example, following Hale LJ (as she then was) in *Re X (Adoption: confidential procedure)*.

This approach applies in private family proceedings involving children (see *Re B (a minor) (disclosure of evidence)* [1993] Fam 142, [1993] 1 All ER 931, [1993] 1 FLR 191) and has been adopted in COP cases too - potentially even in cases involving adult subjects (*RC -v- CC (by her litigation friend the Official Solicitor) and X Local Authority* [2014] EWCOP 131 at para. 20). For COP applications just read "P" instead of "the child" in the two-stage test above.

RC -v- CC is helpful because it highlights the key parts of a decision that the then-President made some years earlier (Munby P's commentary on this is para. 15 in *RC -v- CC*). In the earlier case (*Re B (Disclosure to Other Parties)* as above) the judge - Munby J, as he was then - set out guidance for the court and practitioners when considering an application to restrict disclosure between parties. Key reading is paragraph 89:

> *[…] such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made[.] The test, at the end of the day, is one of strict necessity.*

It may be that a party's Article 6 right can be protected by the court making directions which allow disclosure in limited form, for example that the information is only disclosed to a party's legal representatives and not to the lay client. (It's a helpful suggestion but there can be practical difficulties to this - see *RC -v- CC*, paras.21 & 22. Some lawyers feel generally uncomfortable about this approach. It's a trust thing.) Redacted disclosure or partial disclosure of documents are two other popular options for limiting or managing both side's expectations (and can potentially be dealt with by agreement between parties).

Overall the authorities are clear that restricting disclosure between parties should be "the exception and not the rule" (*Re D (Minors) (Adoption Reports: Confidentiality)*, p.399) and where restrictions on disclosure are permitted "the restrictions must go no further than is strictly necessary[.]" (see *Re B (Disclosure to Other Parties)*, para.89.).

TL;DR?

Here's a route map to follow if you are a party who wishes to withhold information from another party in family (or COP) proceedings:

a. Withholding documents from another party to proceedings should be exceptional. It will only be authorised by the court when it is strictly necessary.

b. It is for the party seeking to withhold the information to show "convincingly and compellingly":

   i. Which documents need to be withheld; and

   ii. Why it is necessary to withhold them.

c. In reaching its decision the court will consider (i) whether disclosure of the information involves a real possibility of significant harm to the children involved and (ii) whether the possibility of harm from disclosure outweighs the benefit to the child of having the information properly tested in court.

Members of Chambers are happy to advise if your case needs anxious, rigorous, and vigilant scrutiny on a matter of disclosure.

Post-adoption contact: a change in attitude or law?

By Kezia Kernighan

The debate surrounding greater openness in adoption, particularly direct post-adoption contact between adopted children and their birth families, is pertinent with the rise of social media. There has been a significant growth in cases of adopted children, usually teenagers, finding and contacting their birth families (or vice versa) using social media, leading some to view it as an untested threat to stable adoptive placements.[1]

As put by Frances Coller from After Adoption, adopted children run "head first into an unsupported and often risky relationship."[2] Against this backdrop of increased but unregulated post-adoption contact, it is unsurprising that that there has been wider discourse about the need for increased openness in adoption. In ***The role of the social worker in adoption- ethics and human rights: An enquiry***, the British Association of Social Worker highlighted in 2018:

'…the need to think about how we might do adoption differently. It questioned whether there was a need for so many birth families to be removed so starkly from children's lives as they often are. It was asked whether another way could be found that gave children safety and security but kept meaningful connection with birth families… A vital point, we consider, is the question of resourcing an expansion of direct contact.'[3]

It is perhaps naïve to imagine that adopted children will not attempt to contact their birth families as they get older. Therefore, in circumstances where direct post-adoption contact is increasingly unavoidable, promoting regulated direct post-adoption contact may go some way to ensure that this happens as safely and constructively as possible.

The implementation of section 51A of the Adoption and Children Act 2002, as amended by the Children and Families Act 2014, provided the court with the specific power to make orders for post-adoption contact following a placement or adoption order. Prior to this, any orders for post-adoption contact were made under section 8 of the Children Act 1989.

The implementation of these amendments inevitably leads to the question of whether post-adoption orders will now be more readily made against prospective adopter's wishes.

Section 51A was considered for the first time in the Court of Appeal in 2018 in ***Re B (A Child) (Post-Adoption Contact) [2019] EWCA Civ 29.***

It is perhaps naïve to imagine that adopted children will not attempt to contact their birth families as they get older.

The trial judge made a final care and placement order in respect of B but invited "further discussion between the local authority, carers and, potentially, these parents… to see whether, in the particular circumstances of this case, there is some possibility of ongoing direct contact…

[1] https://www.theguardian.com/lifeandstyle/2015/may/23/how-social-networking-sites-threaten-the-security-of-adopted-children

[2] https://www.theguardian.com/lifeandstyle/2015/may/23/how-social-networking-sites-threaten-the-security-of-adopted-children

[3] https://www.basw.co.uk/system/files/resources/basw_55505-10_1.pdf

After the prospective adopters issued their application to adopt B, the parents applied for leave to apply for post-adoption contact under section 51A. They were granted leave but their application for post-adoption was then refused. The birth parents successfully applied for permission to appeal against the refusal, arguing that the implementation of section 51A and developing recent research on the issue of post-adoption contact justified consideration by the Court of Appeal. This amounted to a compelling reason.

The Court of Appeal, led by the current President Sir Andrew McFarlane, considered whether section 51A represented a change in the current test derived from case law, as stated in ***Re R (Adoption: Contact) [2005] EWCA Civ 1118:*** at para [49]***:***

"The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and
remains, extremely, unusual."

It was submitted on behalf of the parents that the purpose of section 51A was to "reflect the changing view about the benefits to greater openness in adoption [para 29]" The judge was referred to the 2018 enquiry by the British Association of Social Workers to bolster this point. It was thus argued that parliament's intention behind section 51A

was that more parents would be successful in applications for post-adoption contact.

The Court of Appeal dismissed the parents' arguments and concluded that section 51A was implemented to enhance the position of adopters as opposed to birth parents for two keys reasons:

1) The Explanatory Note that accompanies section 51A states that the new provision is intended "to reduce the disruption that inappropriate contact can cause to adoptive placements [para 45]"

2) The new provision means that parents are now required to apply for leave from the court before making an application for post-adoption contact.

In light of this, it is clear that greater openness in adoption is not to be found in the court's approach to post-adoption contact against the wishes of prospective adopters. Instead, it was submitted on behalf of the local authority that the promotion of greater openness should be found in social work practice and advice to birth parents and prospective adopters. This may then inform the issue of post-adoption contact on a case by case basis. The Court of Appeal confirmed that social workers, guardians and experts advising on the issue of contact should be fully aware of current and developing research. This is a matter of welfare, rather than law and the test in *Re R* stands.

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