Neutral Citation Number: [2015] EWCOP 59

Case Numbers and initials of P:
12482534 (NRA)
12685425 (HR)
12700041 (ML)
12699640 (MJW)
12683102 (VS)
12701735 (EJG)
11781450 (MT)
12701764 (DPW)
12699703 (NR)
1270184T (LM)

Date: 25/09/2015

IN THE COURT OF PROTECTION
(Sitting in Open Court)

Before

MR JUSTICE CHARLES

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

RE: NRA, HR, ML, MJW, VS, EJG, MT, DPW, NR and LM

Lee Parkhill (instructed by the Solicitor of the London Borough of Hillingdon in SV, the Solicitor for the London Borough of Redbridge in HR, Islington Legal Services for the London Borough of Islington in MT,) Suffolk Legal for Suffolk County Council in EJG and MT and Legal Services Lancashire County Council in LM and NR
Nicholas O'Brien (instructed by County Solicitor for Hampshire CC in NRA and County Solicitor for Hertfordshire CC in MJW and DPW)
John McKendrick (instructed by Guile Nicholas, Steele and Shamash, Odonells and Irwin Mitchell by the Official Solicitor for NRA, MJW, DPW, LM, NR, HR and SV
Jason Coppel QC and Joanne Clement (instructed by the Government Legal Department) for the Secretary of State for Justice
Sir Robert Francis QC and Benjamin Tankel (instructed by the Official Solicitor) for the Official Solicitor
Stephen Broach (instructed by the Law Society of England and Wales) for the Law Society (who did not appear but advanced written submissions)

Hearing dates: 30 and 31 July 2015

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE CHARLES

Charles J :

Index

Part 1

Introduction

1. I have ten cases before me seeking welfare orders under s. 16(2)(a) of the Mental Capacity Act 2005 (the MCA). The welfare orders are sought to authorise the deprivation of liberty that, it is common ground, is being, or will be, created by the implementation of the regime of care, supervision, control and support (the care package) upon which the welfare orders are based. If it had been thought that the care packages did not result in a deprivation of liberty it is highly likely that the relevant public authorities would have relied on s. 5 of the MCA and no application to the Court of Protection would have been made.

2. When the cases were transferred to me they were regarded as test cases on the directions that should be given for their determination and in particular on whether the subject of the proceedings (P) should be a party. As a result of steps taken by the Official Solicitor the position changed in eight of the cases. I shall return to this.

3. The issues before me were all raised in *Re X*. The decisions of the President in that case are reported at [2014] EWCOP 25 and 37 and the decision of the Court of Appeal is reported as *Re X (Court of Protection Practice)* [2015] EWCA Civ 599. The result of those decisions is that:

    i) I am faced with persuasive but contradictory obiter dicta on the issue whether P must be a party. On the one hand, the President concluded that in a non-controversial case a streamlined procedure was possible under which P was not joined as a party and this is contained in Practice Direction 10AA to the COP Rules. On the other hand, the Court of Appeal concluded that in <u>all</u> applications for welfare orders that will authorise a deprivation of liberty P must be made a party and so a litigation friend must be appointed for P.

    ii) The conflict between these obiter decisions only relates to applications that are presented as, and accepted by the court as being, non-controversial.

    iii) The Court of Appeal did not address issues that are relevant to the implementation of their conclusion that P must always be a party, namely (a) must the litigation friend be an independent person or can a family member or friend be appointed, (b) must a solicitor be instructed by a litigation friend who does not have a right to conduct litigation or a right of audience and (c) can the applications be disposed of without an oral hearing. These points have significant impact on issues relating to legal aid and whether a process that requires P to be joined as a party to all applications is likely to work in a manner that satisfies Article 5 and so is fit for purpose.

Background

4. The issues in the ten test cases and in many like them are an aspect of the fall-out from the majority decision of the Supreme Court in *P (By His Litigation Friend the Official Solicitor) v Cheshire West and Chester Council and Another; P and Q (By Their Litigation Friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19; [2014] 1 AC 896 ("*Cheshire West*"). At paragraph 10 of her judgment Baroness Hale points out that:

> The facts of the two cases before us are a good illustration of the sort of benevolent living arrangements which many find difficult to characterise as a deprivation of liberty.

The same can be said of the ten test cases before me.

5. *Cheshire West* is directed to the objective component of a deprivation of liberty. Although some arguments remain on the impact of the majority view (see for example paragraph 1.20 of the Law Commission Consultation Paper of Mental Capacity and Deprivation of Liberty – the "LC Consultation Paper") there is no doubt that this majority view has the result that the objective test covers a wide range of circumstances and that:

   i) that range is much wider than had previously been thought by many to be the case, and

   ii) that range includes regimes relating to the care, control, supervision and support of a number of persons (Ps) who lack capacity (and so cannot validly consent to the objective deprivation of liberty) that are obviously and which all (including loving members of their family who have supported and cared for P, often for all of their life) agree are the least restrictive available option to best promote P's best interests.

6. The range includes cases that are within the Deprivation of Liberty Safeguards (the DOLS) introduced by amendment to the MCA. Authorisations given under the DOLS can be challenged in the Court of Protection under s. 21A of the MCA. However, the range also covers a number of cases that are outside the DOLS. The ten test cases are examples of such cases and so of cases in which the route prescribed by law for authorising the deprivation of liberty and thereby

   i) the safeguarding of the Ps, and

   ii) the protection of public authorities from action for breach of Article 5,

   is a welfare order made by the Court of Protection.

7. The Supreme Court does not refer to Strasbourg cases that mirror living arrangements such as those in *Cheshire West* or the test cases before me and I do not know whether or not the lack of such cases is because other parties to the European Convention on Human Rights (the Convention) have not taken the same view as the Supreme Court:

   i) on what constitutes, on an objective assessment, a deprivation of liberty for the purposes of Article 5, and so

   ii) on what brings Articles 5.1(e) and 5.4 (respectively the need for the deprivation of liberty (detention) to be prescribed by law and the entitlement to take proceedings to challenge the deprivation of liberty speedily and effectively) into play.

   These two Articles together provide safeguards for P. But, in my view, it should always be remembered that the process that renders a deprivation of liberty lawful also protects those who provide, or arrange the provision of, the care package. This confirms that the issues of fairness of process and cost are a two way street.

8. Counsel for the Secretary of State and the Official Solicitor also did not know what the position was in other countries and so whether the "many" referred to by Baroness Hale includes such countries or some of them.

9. It remains the case that many still find it difficult to characterise living arrangements that are needed for P, and which are the least restrictive option for best promoting the welfare of P, as a deprivation of P's liberty and so a detention of P for the purposes of the application of Article 5. But any such difficulty and the position in other countries are irrelevant for family members, public authorities, providers of care and courts in this country because they are bound by the majority decision in *Cheshire West.*

10. When Baroness Hale addresses policy at paragraph 57 of her judgment she says:

> Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for are in their best interests. Such checks need not be as elaborate as those currently provided for by the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.

Experience gained from sitting in the Court of Protection and on appeals in Mental Health Act cases shows that whatever may be said to them many carers understandably do regard such checks as upsetting. For example, when the time comes at which a parent or parents can no longer bear the burden of caring for an adult child, who needs constant care and supervision, those parents can feel guilty. In many such cases, the suggested checks would not provide, or would not be seen to provide, the recognition of the care and quality of decision making of such carers. And so they would be unlikely to assist them in accepting that they have nothing to be guilty about and that what they are doing is firstly in the best interests of the P they love and have cared for, and secondly is a continuation of selfless care directed to promoting the best interests of someone they love.

11. The people that know P best and have often spent a long time negotiating with public authorities and getting the best care package available for P are members of P's family. And so it seems to me that to promote P's best interests their autonomy, dignity, status, and their past and continuing care and support of P needs to be recognised and promoted.

12. A way of doing that could be the funding and adoption of a process that provides the less elaborate checks referred to by Baroness Hale coupled with a recognition of the central role such carers have played and will and should continue to play in promoting P's best interests.

13. At paragraph 1.21 of the LC Consultation Paper reference is made to the significant resource implications arising from the widening of the range of circumstances that give rise to a deprivation of liberty.

14. I directed that, if it was practical, each of the applicant local authorities should include in the evidence they had been directed by the earlier orders of DJ Marin to serve an estimate of the number of applications seeking welfare orders to authorise a

deprivation of liberty they are likely to make in the next 12 months and the approximate cost to them of doing so. Some did so and their evidence indicates that the financial burden on health and social care budgets of seeking such welfare orders from the Court of Protection is likely to be of the order of tens of millions of pounds a year.

15. The estimates given in evidence are just and only that. Naturally, they are very dependent on the validity of the underlying assumptions about the number of cases and the frequency of the reviews that will be required. Thus far the number of applications made to the Court of Protection for such welfare orders is well below the thousands that were predicted after the decision in *Cheshire West* and which the evidence before me from the local authorities indicates are needed. There are a number of possible reasons for this. They include the points that local authorities are working their way through the widened range of cases covered by the DOLS, this is stretching their resources and so they have not yet got round to making such applications. Also, the uncertainties relating to the process and procedure for making such applications to the Court of Protection for welfare orders may have caused local authorities to delay making them.

16. However, results of the majority decision in *Cheshire West* are that:

    i) significant funding will have to be found to provide the checks referred to by Baroness Hale, and thus the necessary safeguarding of P (and protection to local authorities), and so, until changes are made to or in respect of them, the application of the DOLS and applications to the Court of Protection, and

    ii) it is highly likely that this funding will be at the expense of other provisions being made from health and social care budgets directed to the actual day to day care of a wider range of vulnerable people than those who are the subject of such processes.

    So the majority decision in *Cheshire West* has created a real risk if not an inevitability that the additional funds it requires to be spent on the safeguarding of the Ps to which it relates (and the protection of local authorities) will reduce the numbers and quality of available placements for Ps and other vulnerable people because funds will be diverted from those purposes.

17. The LC Consultation Paper is a recognition of these problems and it is suggesting solutions along the lines of those referred to by Baroness Hale in paragraph 57 of her judgment. However, it is not likely that any such solutions will be put in place for some time and so, for the time being, the best interests of Ps and other vulnerable people are likely to be assisted by proportionate and workable interim solutions to these problems that apply the existing COP Rules and satisfy Articles 5 and 14 and common law fairness.

18. In a recital to my directions order by which I joined the Crown, the Official Solicitor, by virtue of his office, and the Law Society as parties to the ten test cases I indicated that it was likely to be of assistance to the court in, for example, considering how best to further the overriding objective and apply Rule 3A of the Court of Protection Rules (the COP Rules), to have such information as is practically available concerning the provision of resources (whether publicly or privately funded) to enable P to have a

litigation friend or to take part in the proceedings with or without being made a party, and the timescale for the provision of such resources.

19. In this context, there was no evidence from the Secretary of State, who is responsible for the funding of the Official Solicitor and legal aid, that additional funding would be, or was likely to be made, available in the near future, or of any proposed or possible changes to the relevant regulations to the provision of non-means tested, or means tested, legal aid. So the evidence indicated that the present funding regime for local authorities and for Ps and their families would continue.

20. At paragraph 108 of the Court of Appeal's judgment in *Re X*, Black LJ commented:

> "..The concern about the increased workload that may be generated by the Cheshire West decision is understandable and I do not doubt that the joinder of P as a party would be more burdensome to the system in various ways than the President's scheme and may import greater delay. The extent of the increased burden would only become apparent over time…"

21. It is obviously correct that the extent of the increased burden will only become apparent over time. But the well-known difficulties in identifying and appointing the Official Solicitor as a litigation friend and the costs and delays of so doing mean that it did and does not take a crystal ball to see that the joinder of P as a party in <u>all</u> such cases will create burdens in terms of both delay and emotional and financial cost.

22. I am bound by *Cheshire West* but not by the conclusion of the Court of Appeal in *Re X*, although of course I acknowledge that it is persuasive and cogently argued. But the same can be said of the President's conclusion and the test cases were transferred to me to determine whether the streamlined process, based on the President's conclusion, should be abandoned or modified and in particular whether, in accordance with the conclusion of the Court of Appeal, P must <u>always</u> be a party, and if so:

    i) what criteria should be applied to the selection of P's litigation friend and so what degree of independence is necessary to ensure that, for example, the independent check referred to by Baroness Hale is carried out,

    ii) whether, absent an order of the court authorising him or her to do so, a litigation friend who does not have the right to conduct litigation or a right of audience can conduct the proceedings without appointing a solicitor, and

    iii) whether there must always be an oral hearing.

    And so issues left outstanding by the Court of Appeal if P is a party.

My approach

23. I have not included what I have and will say about the practicalities of implementing the view of the Court of Appeal in *Re X*, for the purposes of founding a conclusion based simply on pragmatism or resource.

24. If the likely practical reality of a proposed process is that it would not be fit for purpose, I acknowledge that that result could probably be avoided by the provision of further resources and that the determinative factors for me are:

i) what is required to satisfy the procedural and substantive requirements of fairness applying the common law and Article 5 (and so Articles 5(1) and (4)) and Article 14 (the Safeguards), and so

ii) what is required to satisfy the fundamental guarantees of procedure applied in matters of deprivation of liberty in a practical, effective and speedy way.

25. The identification of the Safeguards therefore involves a consideration of:

i) potential alternative ways of addressing the fundamental procedural guarantees and so in common law terms fairness (the Requirements), and

ii) whether, and the way in which, they are likely to work (or on the backwards-looking approach taken by the ECtHR the way in which they have worked in a given case) in providing those fundamental procedural guarantees (the Effects).

If there are alternatives this consideration will involve a balancing exercise. The identification of the Requirements will involve an identification of what is required to promote the essence of the rights given by Article 5. The assessment of the Effects will involve an assessment of an aspect of that essence, namely a speedy, practical and effective process as opposed to one that is theoretical or illusory. A flexible and proportionate approach is appropriate to the consideration of the potentially competing factors involved in that balancing exercise and so of the Safeguards. In other words, Safeguards that are likely to work in practice are to be preferred to those that are not. But, in any given case, it is unlikely that a failure to meet the Safeguards could be successfully defended simply on grounds of lack of resources.

Structure of this judgment

26. Although the most important issue raised in argument was whether or not P must be joined as a party to <u>all</u> applications to satisfy the common law requirements of fairness, Article 5 and Article 14, I do not deal with this first. This is because in my view the answer to that issue is informed by the practical consequences of that approach and thus the concrete situation on the ground relating to the rival processes to supply the Safeguards.

27. So in Part 2 of this judgment I address the background, the matters set out in paragraphs 3(iii) and 22 above, and problems relating to the appointment of a litigation friend and an independent Rule 3A representative and their consequences in respect of the representation, help and support of P and so the procedural safeguards that party status or such an appointment are likely to give in practice.

28. Unfortunately, such problems and their consequences, for example, the availability of alternatives to effectively replicate in practice (as a Rule 3A representative or otherwise) the advantages and safeguards that flow from the appointment of an IMCA and a RPR under the DOLS do not seem to have been provided in evidence to the Court of Appeal. Similar gaps exist in the evidence before me and as appears below:

i) the support of the Official Solicitor and the Law Society for the conclusion reached by the Court of Appeal, and

ii) the alternative advanced by the Secretary of State

were not supported by evidence or argument directed to showing that they were practical, effective and speedy processes.

29. Also, the evidence did not contain much about what local authorities and the Court of Protection could do to provide procedural safeguards with or without P being made a party. So the evidential base for a comparison between the practical consequences of alternative processes is disappointingly thin.

30. In Part 3, I shall deal with the conflict between the obiter approaches. Part 4 sets out in short form my overall conclusion.

Part 2

Some further preliminary observations

31. The obiter view of the Court of Appeal is directed to applications for welfare orders based on care packages that, when implemented, will result in P being deprived of his liberty and thus to the fundamental guarantees of procedure applied in matters of deprivation of liberty.

32. But logically the reasoning of the Court of Appeal and, in particular, reasoning based on the description of a party given by Moore-Bick LJ in paragraph 170 of his judgment could extend their conclusion to other (and possibly all) cases before the Court of Protection, notwithstanding the acknowledgment by Black LJ, at paragraph 104, that it may be possible to devise a scheme in relation to Article 5, and so deprivation of liberty, in which P was not formally a party.

33. I acknowledge that this possible widening of the impact of the Court of Appeal's conclusion is for another day. But it highlights both a problem and a special feature of proceedings in the Court of Protection relating to the balance to be struck between:

i) safeguarding P, and so ensuring that those proposing orders in respect of P's welfare or property and affairs are acting honestly and in P's best interests, and

ii) avoiding disproportionately intrusive, delayed and/or expensive intervention in the lives of P and his or her family and carers.

I shall refer to this as the Procedural Balance. In the present context it mirrors the balance between the Requirements and the Effects.

34. I freely acknowledge that the instinctive reaction of most English and Welsh lawyers would be that P must be a party to all proceedings in the Court of Protection because necessarily the orders directly affect his or her welfare or property and affairs and so he or she needs to be bound by them and have a say in what they should contain. Indeed, this was my starting point when the COP Rules were originally drafted.

35. But as soon as one considers the point that the great majority of the work of the Court of Protection is (and historically has been) non-contentious and necessary property and affairs applications, it becomes apparent that the reason for the existence of the court's jurisdiction, and its nature and effect, strongly indicate that fairness does not

require a replication of the procedure for a protected party in adversarial civil litigation, namely that P must be a party and have a litigation friend before any step can be taken.

36. As with the Family courts (see *Re R (Care; Disclosure; Nature of Proceedings)* [2002] 1 FLR 755 at 771/2) aspects of the jurisdiction of the Court of Protection are adversarial but significant aspects of its jurisdiction in applying the best interests test are investigatory. Accordingly, a procedure used for adversarial issues may not be appropriate to an application that is presented as non-controversial and which, after appropriate investigation, is non-controversial. This description applies to cases covered by the streamlined procedure based on the President's judgments in *Re X*.

37. The number of non-contentious property and affairs applications has increased year on year. Presently they are running at around 20,000 applications a year. The demographic of the population indicates that the number of those applications will continue to increase. The cost of such applications is likely to fall on P's assets (or his or her family). These applications are made of necessity because P cannot make the relevant decisions and give the necessary instructions about his or her property and affairs, and history shows that the vast majority of them are made by honest and caring family members or carers. If there was to be an independent check of every application by making P a party and appointing an appropriate litigation friend, or by some other method, in that vast majority of cases the cost and intrusion that would be so caused would be both unnecessary and very understandably resented. Further, its financial cost would mean that P's resources, or resources that might otherwise be used to support P, would be used on an unnecessary process. This lies at the heart of the Procedural Balance that the COP Rules strike by, for example, the Rules that P need not be a party, that P is bound whether or not he is a party and on the notification of P.

38. Similar issues exist on an application to appoint a property and affairs deputy. And, in those cases proportionate provisions exist in respect of the giving of security to guard against risk.

39. A problem relating to a high percentage of truly non-contentious applications that are obviously in P's best interests does not arise in respect of decisions relating to P's welfare that do not raise deprivation of liberty issues. The reason for this is that the relevant providers and supporters of the care can rely on s. 5 of the MCA (and the existence of this section may lead the Court of Protection to refuse permission to bring welfare proceedings).

40. The underlying purpose of s. 5 of the MCA shows that Parliament intended that when possible welfare issues and decisions should be left to those who, on a day to day basis, are caring for and supporting P.

41. Section 5 does not apply to a deprivation of liberty (see s. 6 of the MCA and the definition of restraint in s. 6(4)) but:

    i) as appears later, the determinative test on an application for a welfare order to authorise a deprivation of liberty is a best interests test, namely is the care package the least restrictive available option,

ii) this test applies to care packages whether or not there is a deprivation of liberty,

iii) the Article 5 deprivation of liberty or detention arising on the implementation of such a care package is a necessary consequence of the least restrictive available option that best promotes P's best interests,

iv) so the test or issue is not whether P should or should not be deprived of liberty or detained,

v) subject to the DOLS, in many cases exactly the same people are involved on the ground in applying the same test to a care package irrespective of whether it creates a deprivation of liberty, and

vi) under the DOLS, the relevant assessors mirror the qualifications and experience of those involved in the initial identification of available choices and the compilation of the care package.

42. Also, the implementation of some care packages can result in an objective deprivation of liberty of some vulnerable people who have capacity but no effective choice other than to accept the care package that is offered. This is because they have nowhere else to live and do not have the resources to bring proceedings in the Administrative Court.

43. So, the limits placed on s. 5 by s. 6 of the MCA introduce into the welfare jurisdiction of the Court of Protection the problem that, as the test cases before me indicate, a high percentage of applications made to the Court of Protection for welfare orders based on care packages whose implementation will give rise to a deprivation of liberty are likely to be obviously non-contentious and independent checking will in fact only serve to confirm what those responsible on the ground (including devoted and responsible family members) know to be needed and so the least restrictive available option to promote the best interests of the relevant P.

44. The points made above concern the Procedural Balance to be struck in meeting the Requirements and the Effects in non-contentious cases and do not ignore or fail to acknowledge:

i) the risk that an application that is presented as non-contentious and in P's best interests may be neither or may be outside the jurisdiction of the Court of Protection, or

ii) the potential advantages of an outside and independent check looked at through the eyes of the person who lacks capacity (P).

Rather the points accept and acknowledge those risks and advantages as competing factors in the balance to be struck. Another such factor, is the point that however rigorous and thorough the checks no guarantee can be given that they will pick up all cases that are contentious or not within the jurisdiction of the Court of Protection, or in which improvements to the care package could be made.

45. An issue to consider in identifying the right balance is the value that would be added to the safeguarding of P (and so to the Requirements) if on the face of the evidence a suitable family member or friend who has been involved in P's day to day care was appointed as P's litigation friend on P being made a party. Such a person might be a donee under a lasting power of attorney or could be (or could be made) a health and welfare deputy. So, I ask rhetorically: What value added would be achieved and what disadvantages would be caused by P being a party and having such a litigation friend? My answers are:

    i) there would be no, or only minimal, value added, and

    ii) there would be some disadvantages.

46. The extent of the disadvantages would depend on the answers to whether a solicitor would have to be instructed, whether there would have to be an oral hearing and the extent of the required paper work. But, on the assumption that no solicitor need be appointed, no hearing is necessary and the paper work is simple, there would still be the potential for some disadvantage caused by the emotional stress of the reaction to making P a party to court proceedings and perhaps expenditure on them that would add nothing of real value.

47. My experience of proceedings in the Court of Protection indicates that only rarely will a family member or friend who has not been involved in the day to day decision making be put forward as a litigation friend. The risk that such an appointment, to check what is being and should be done, will create problems within the family is obvious and high.

48. I shall return to the issue whether a family member can or should be appointed as P's litigation friend (or Rule 3A representative).

49. If no family member, friend, donee or deputy is available or should not be appointed to act as P's litigation friend, and it appears obvious from well-reasoned documents that P's care package is the least restrictive option, in most cases the only available option is the Official Solicitor.

50. In a non-contentious case his input through those he instructs (usually solicitors) may well add nothing of value, other than the confirmation of the accuracy of other information. This is not a criticism of the Official Solicitor and those he instructs because in those cases there is nothing of value that can be added apart from that confirmation.

51. It follows that the delays and costs that history indicates would follow from making P a party and appointing an independent litigation friend (usually of last resort and so the Official Solicitor) in <u>all</u> applications seeking a welfare order to authorise a deprivation of liberty would add value either:

    i) by providing that confirmation in what the ten test cases indicate is likely to be a high percentage of such cases, and but importantly

    ii) in a limited number of cases by bringing to light points or assertions that show or may show that the case is not an obvious and non-contentious one because,

for example, what is proposed is contested and is or may not be in P's best interests, or could be improved, or that P has or may have capacity.

52. As discussed above, these important benefits reflect the dilemma relating to the Procedural Balance that runs through all of the work of the Court of Protection.

The jurisdiction of the Court of Protection and the determinative test it applies

53. In my view, important starting points to a consideration of what is needed to satisfy the Requirements and the Effects are the jurisdiction of the court and the tests that apply on an application for a welfare order.

The most relevant provisions of the MCA

54. Sections 1, 2, 3, 4, 4A, 16, 21A provide:

> 1. The principles
>
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) ----------
>
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
>
> 3 Inability to make decisions
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
>
> (a) to understand the information relevant to the decision,
>
> (b) to retain that information,
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means).
>
> 4 Best interests
>
> (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
>
> (a) the person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
>
> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
>
> (3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be. ----------

(4) He must, so far as is reasonably practicable, permit and encourage the person to participate, or improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) ----

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

4A Restriction on deprivation of liberty

(1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.

(2) But that is subject to—

(a) the following provisions of this section, and

(b) section 4B.

(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.

(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

16 Powers to make decisions and appoint deputies: general

(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning—

(a) P's personal welfare, or

(b) P's property and affairs.

(2) The court may—

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

(7) An order of the court may be varied or discharged by a subsequent order.

21A Powers of court in relation to Schedule A1

(1) This section applies if either of the following has been given under Schedule A1—

(a) a standard authorisation;

(b) an urgent authorisation.

(2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—

(a) whether the relevant person meets one or more of the qualifying requirements;

(b) the period during which the standard authorisation is to be in force;

(c) the purpose for which the standard authorisation is given;

(d) the conditions subject to which the standard authorisation is given.

(3) If the court determines any question under subsection (2), the court may make an order—

(a) varying or terminating the standard authorisation, or

(b) directing the supervisory body to vary or terminate the standard authorisation.

(4) Where an urgent authorisation has been given, the court may determine any question relating to any of the following matters—

(a) whether the urgent authorisation should have been given;

(b) the period during which the urgent authorisation is to be in force;

(c) the purpose for which the urgent authorisation is given.

(5) Where the court determines any question under subsection (4), the court may make an order—

(a) varying or terminating the urgent authorisation, or

(b) directing the managing authority of the relevant hospital or care home to vary or terminate the urgent authorisation.

(6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person's liability for any act done in connection with the standard or urgent authorisation before its variation or termination.

(7) An order under subsection (6) may, in particular, exclude a person from liability.

The jurisdiction of the court

55. The court only has jurisdiction if the relevant P lacks the capacity to make the relevant decision (see s. 16(1) of the MCA). Capacity is issue specific (see s. 3 of the MCA) and so, for present purposes, P must lack capacity to make decisions about his care package and its consequences and so be unable to consent to any deprivation of liberty its implementation creates (or may create).

56. This means that on all relevant issues the time for supported decision making is past because, by definition, if there were practicable steps that could be taken to enable P to make the relevant decisions the court would not have jurisdiction (see ss. 1(3) and 16(1) of the MCA).

57. It also means that s. 4(4) of the MCA is not directed to enabling Ps to make the relevant decision for themselves.

The way in which the provisions of the MCA relating to a care package that deprives or may deprive P of his liberty work

58. Section 16A provides that if a person is "*ineligible to be deprived of liberty*" by the MCA the Court of Protection may not include within a welfare order a provision that authorises him to be deprived of his liberty.

59. The way in which ss. 4A(3), 16(2)(a) and 16A work together founds the making of an order to the effect that the relevant person is to live at a certain place pursuant to a defined care package on the basis that the (or any) deprivation of liberty that is thereby created is authorised. That authorisation is provided by s. 4A(3).

60. The underlying approach of s. 16 is, as it states, that by making the welfare order the Court of Protection is making the decision which P lacks the capacity to make on behalf of P. This is reflected in paragraph 18 of the judgment of Lady Hale in *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67, [2014] AC 591 where she says that the MCA:

> ----- is concerned with doing for the patient what he could do for himself if of full capacity but it goes no further.

61. In doing that, like a person with capacity, the Court of Protection can only choose between available options (see *ACCG and Another v MN and Another* [2013] EWHC 3895 (CoP) and in the Court of Appeal [2015] EWCA Civ 411). At paragraph 46, of his judgment Munby LJ said:

> It is easy to fall into the trap of thinking that, because, typically, both the court and some other public authority are concerned with the welfare or well-being of a child or incapacitated adult, they are viewing the matter from the same perspective and applying the same principles. Neither is so. The perspective of the court – the Court of Protection or the family court – is a narrow focus on the welfare of the individual child or adult. The perspective of the public authority is necessarily different and much wider. Often, the public authority, as with the authorities involved in the present case, will have to have regard to the interests of a very wide group of service users who are, in the nature of things, competing with each other for the allocation of often scarce resources. Sometimes, as in the case of the Secretary of State in an immigration case, the public authority has to balance an individual's private interest against a wider public interest, in the immigration context the public interest in a proper system of immigration control. Flowing from this, the principles that have to be applied by the court and the public authority will almost inevitably differ.

62. So, in the case of a regime of care, whether or not it involves a deprivation of liberty, the decision of the Court of Protection is effectively to give consent to that regime on behalf of P, and the same applies, for example, in respect of medical treatment that the Court of Protection concludes is in P's best interests. All substantive decisions of the Court of Protection are governed by the best interests test.

63. The deprivation of liberty safeguards (the DOLS) work differently. The Court of Protection only becomes involved under s. 21A of the MCA.

64. In my view, the DOLS apply when P is or may be being deprived of his liberty (see *AM v South London & Maudsley NHS Foundation Trust and the Secretary of State for Health* [2013] UKUT 0365 (AAC)). Schedules 1A and A1 to the MCA and the relevant Codes of Practice (which relate both to the DOLS and orders made by the Court of Protection relating to deprivation of liberty) are lengthy, in parts complicated and contain the provisions for determining whether a person is ineligible to be deprived of his liberty by the MCA.

65. In short, Schedule A1 provides that the managing authority of a hospital or a care home is authorised to deprive P of his liberty if he is detained there for the purpose of being given care or treatment if a standard (or urgent) authorisation is in place (see

paragraphs 1 and 2 of Schedule A1). A standard authorisation is given at the request of the managing authority by the supervisory body.

66. Paragraph 3 of Schedule A1 reverts to the concept of what P could have consented to if he or she had the relevant capacity by providing that any person (D) does not incur liability for any act which he does for the purpose of detaining (P) pursuant to paragraph 2 thereof if he would not have incurred liability for that act if P had the capacity to consent to it and had consented to it.

67. Before a standard authorisation can be given, positive assessments of the qualifying requirements must be made (see paragraph 12 of Schedule A1). This means that, amongst other things, the best interests test has to be satisfied and the relevant person has to be eligible to be deprived of his liberty by the MCA. It should also be noted that there is a mental health requirement and a mental capacity requirement.

68. The determinative issue of the best interests test that must be satisfied before an authorisation can be given is the same as the determinative question for the court when making a welfare order.

69. Many if not most applications under s. 21A will turn on the application of the best interests test.

70. It follows that:

    i) the underlying approach of the MCA is to authorise a deprivation of liberty if it is in the best interests of the relevant person (and so is the least restrictive available option to provide the relevant care, supervision, control and support in the best interests of that person), and

    ii) in most cases concerning the authorisation of a deprivation of liberty this approach identifies the determinative question.

The impact of the determinative question for the court on whether or not it should make the welfare order

71. In my view, this must be of central relevance to the determination of the directions to be given to satisfy the Requirements and the Effects and so the Safeguards.

72. The determinative question is not, and the court is not directly concerned with, whether P should or should not be deprived of his liberty. The fact that the welfare order will authorise any deprivation of liberty that the implementation of the care package will create is a consequence of the order and it does not alter the determinative issue for the court.

73. So the application of the substantive determinative test does not make it necessary or appropriate for the court to spend time on whether the relevant regime will or will not create a deprivation of liberty applying the objective test set by *Cheshire West*. On an application for a welfare order to authorise an objectively assessed deprivation of liberty the limited relevance of the deprivation of liberty issue relates to:

    i) whether there should be reviews and their frequency but as in *Cheshire West* this should usually be dealt with by directing regular reviews, and

ii) possibly the joinder of P as a party if this is necessary if there was a deprivation of liberty but not if there is not (although if the former is correct it would seem that P should be a party if there was any dispute about the existence of a deprivation of liberty).

74. The existence of a deprivation of liberty may of course be relevant to other issues, for example a claim for damages for breach of Article 5, or whether s. 5 of the MCA applies.

The procedural background and the practical difficulties of appointing the Official Solicitor to act as P's litigation friend.

75. The ten test cases were transferred to me at a time when the Official Solicitor had indicated that he was not in a position to accept appointment as the litigation friend of the person who is the subject of each application (P). In all of them orders had been made in standard form by DJ Batten making P a party as and when the Official Solicitor agreed to act as P's litigation friend.

76. The Official Solicitor had set out his position in letters dated 6 July 2015 to the Court of Protection and to local authorities. He makes points in them about legal aid which I discuss elsewhere.

77. The Official Solicitor's original position in a case in which P did not qualify for legal aid was that he would not accept appointment unless a specified minimum sum (generally £20,000) had been paid on account and that costs of legal representation might be in excess of £50,000. As confirmed by a later letter, which sets the amount that can be obtained on account of fees at £2,500, and a statement of the Official Solicitor provided during the hearing, these much higher figures must relate to a contested application which would need an oral hearing or hearings.

78. If what appears to be a non-contentious case turns out to be contested the streamlined process provides that it should proceed as a contested case.

79. By the date of the hearing on 30 and 31 July 2015, as indicated in his earlier letter to the Court stating that he was not then in a position to accept appointment, the Official Solicitor, in an attempt to identify and adopt a proportionate approach, had sought and obtained the agreement of solicitors who he retains to undertake without charge the work on the pre-acceptance funding enquiries usually undertaken by his health and welfare pre-acceptance team. That agreement lay behind the acceptance by the Official Solicitor of appointment in seven of the cases subject to the orders made by DJ Batten and in him being able to give an indication that he expected to be in a position to accept appointment in the eighth case.

80. Clearly, this change of position effectively de-railed those eight cases as test cases. This is because it would have been contrary to the interests of the Ps and their families not to proceed with them on the basis that the Official Solicitor had agreed to act and the solicitors he had instructed had gathered information. However, in two of the cases involving Suffolk (EG and MT) the Official Solicitor had not agreed to act and the effective "test issue" remained whether P should be a party.

81. In answering my questions leading counsel for the Official Solicitor indicated, and this was confirmed by a statement of the Official Solicitor provided during the hearing, that the solution he had found and adopted in those eight cases was not a long term fix and the Official Solicitor was not saying or advancing a solution that would enable him to speedily accept appointment and instruct solicitors to carry out proportionate enquiries in all applications for welfare orders in respect of care packages that are said to be non-contentious and which result in, or may result in, a deprivation of P's liberty.

82. In his skeleton argument counsel for the Official Solicitor had asserted that in general terms the Official Solicitor was not at saturation point in being able to cope with cases like the ten test cases but that he anticipated that, absent further funding for his litigation friend role, such a point would eventually be reached. I am not clear whether his reference to funding for his litigation friend role includes the funding of the solicitors he instructs through legal aid or private funding. As appears below the funding of solicitors through legal aid and privately introduces significant problems.

83. It seemed to me that this was an approach that simply postponed the problem. In response to this view, it was confirmed during the hearing that the Official Solicitor accepted that although it is not possible to put an exact time on it what he refers to as a "saturation point" will be reached in the near future even if the Court of Protection receives only a smallish wave of such applications, rather than the expected tsunami (the timing of which remains uncertain).

84. The timing of the escalation of the problems faced by the Official Solicitor will depend on whether the relevant solicitors are prepared to continue to carry out the preliminary work for nothing, the numbers of the applications and the availability of legal aid on his new proportionate approach. But the reality, accepted by the Official Solicitor during the hearing (and not contested by the Secretary of State), is that absent the provision of extra publicly funded resources to enable the Official Solicitor, or someone else, to act as an independent litigation friend for P if, in accordance with the obiter conclusion of the Court of Appeal, P has to be a party to all cases of this type the process will soon become one that is not fit for purpose, because its Effects (namely the delays and costs involved) will mean that is not speedy, practical and effective.

85. This consequence will be alleviated but I suspect not avoided if family, friends or carers can act as litigation friends. However, the thrust of the Official Solicitor's argument and that of the Law Society (who put in written submissions) was to the effect that it would only be in limited circumstances that family, friends or carers could so act because they would not be in a position to carry out the required <u>independent</u> check, in line with the majority decision in *Cheshire West* and the conclusion of the Court of Appeal in *Re X*, because they will have been involved in the best interests decision making that has identified the relevant care package.

86. The Official Solicitor also advanced an argument that problems might be reduced, and "a least bad result" achieved, if the Court of Protection joined P and then made an interim order in what appeared to be a non-contentious case before a litigation friend was appointed. He advanced arguments that any such order could and would be validated (see by analogy *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933). But, on the assumption that such orders would be valid or would be validated, this is not an

effective solution because the reviews of such interim orders would have to take place earlier than those of a final order and so this proposed course would create an additional category of case in an ever increasing backlog and possibly the need for further applications to validate earlier orders.

Legal aid

87. The route to the relevant independent check urged by the Official Solicitor and the Law Society in reliance on the obiter conclusion of the Court of Appeal involves or effectively involves the retainer, and so payment, of a solicitor to act for P in all of the applications.

88. In *Re X* the Lord Chancellor had provided a note on legal aid. The Official Solicitor referred to that and to comments of solicitors he regularly instructs in the statement he provided during the hearing. Also, the Secretary of State, at my request, provided an updating note on legal aid after the hearing. The substantive position has not changed from that set out in the Lord Chancellor's note, but some of the cross references have changed.

89. The first six points to note are:

i) the relevant regulations rival the DOLS in their complexity,

ii) there is no non-means tested legal aid,

iii) there may be some divergence in practice on the application of the regulations on a case by case basis,

iv) legal aid is potentially available under three heads: "legal help", "full representation" and "investigative representation",

v) it was not made clear which head would be used to finance legal representation in the seven test cases in which the Official Solicitor, applying his new proportionate approach, had accepted appointment and solicitors had done some work, and

vi) it was also not made clear which head would be used in the future in cases that were presented as and were non-contentious.

An important issue in respect of points (v) and (vi) is whether there needs to be or will be hearing.

90. The Secretary of State ended his note under the heading: "*Role played by investigative representation when an oral hearing is not listed*" by stating that where legal services are required for eligible individuals in relation to deprivation of liberty cases under the MCA the source of funding will be legal help. The reason for this is that, as the relevant Regulations show, investigative representation is only likely to be available when (a) the prospects of success of proceedings are unclear and substantial investigative work is required, and (b) the director has reasonable grounds to believe that once the investigative work is completed the case will satisfy the criteria for full representation.

91. In the context of that note that conclusion is open because it is not focusing on the position of a solicitor instructed by a litigation friend and so the course urged by the Official Solicitor and the Law Society. Legal help as "controlled work" can be applied for by someone who is proposing to become a litigation friend. It is subject to the merits and means criteria and covers advice and assistance that is likely to give sufficient benefit to justify its provision. But it does not cover (i) issuing or conducting court proceedings, (ii) instructing an advocate in proceedings, (iii) preparing to provide advocacy in proceedings, or (iv) advocacy in proceedings. On the information and argument before me, I am of the view that these exclusions mean that, save in respect of very limited introductory matters, whose only benefit is likely to be an identification of the relevant principles and thus of the information that needs to be gathered and assessed for the purposes of the proceedings, the advice and assistance that P and his litigation friend or proposed litigation friend would want and benefit from would not be covered by legal help. This is because it would relate to one or more of the areas directed to the "conduct of proceedings" that are excluded from legal help. For example, a visit to P and the placement, the preparation and presentation of a report of that, advice on the care package and possible changes to it and advice on the application of the determinative test are all directed to conducting the proceedings and advocacy in the proceedings, even if they lead to an order that is agreed and presented to the court for approval. To my mind, this means that legal help would not provide an effective basis for the funding of P as a party acting through a litigation friend (or to a P whether or not a party) for the purposes envisaged by the Court of Appeal, the Official Solicitor or the Law Society, namely the safeguards in "the conduct of the proceedings" provided by a litigation friend. In any event, if that is wrong, the financial limits for legal help and problems relating to the cap on new matter starts would mean that legal help would not effectively fund those safeguards.

92. That effectively leaves the possibility of a legal aid funding route based effectively on full representation, given the grounds for investigative representation. Although it was not spelt out I understand that this is the route envisaged by the Official Solicitor and the solicitors he has instructed in respect of the listed hearings and for other cases if P is joined as a party and the Official Solicitor is appointed as the litigation friend.

93. Full representation is only available if the Merits Regulations are satisfied which include the costs/benefit analysis and the prospects of success test.

94. History relating to the position concerning legal aid in respect of an application under s. 21A of the MCA (see for example *Re UF* [2013] EWCOP 4289), the view expressed in the Secretary of State's note and my general experience of the approach to the grant of legal aid found a prognosis that full representation will not be regularly and promptly provided if P is made a party to all applications even if it is not precluded on the basis that it is not likely that there will be a hearing.

95. In his note the Secretary of State made the point that the existing regulations were made before the decision of the Supreme Court in *Cheshire West* and that the Lord Chancellor is (and I assume for some time has been) carefully considering the implications of that judgment for the availability of civil legal aid and whether any changes to the regime should be made. A similar response was made by the Secretary of State to paragraph 249 of the House of Lords Select Committee Report on the MCA by which, in March 2015, the committee recommended an urgent remedy to the inconsistent provision of non-means tested legal aid in cases concerning deprivation

of liberty. No changes to implement such a remedy were identified in evidence and the stance of the Secretary of State in these proceedings is an indication that none are imminent or likely to effect it. This lack of action is unfortunate but represents the concrete situation on the ground.

96. Further, and importantly, it is clear that under the present regulations if a hearing is not listed or likely to be listed legal aid for full and investigatory representation will not be granted (see the next heading as to whether there will be a hearing).

97. Many Ps will satisfy the means test but the limits are not high and no doubt many will not (e.g. those who have received a substantial award in damages or who have owned a home). The process is not a "one off" and so the expense for those Ps who do not satisfy the means test is a repeating one that diverts funds from the provision of their care and support.

98. As I understand it, the means and the merits tests (including whether there is or is likely to be a hearing) have to be repeated for each review.

Must there be and so will there be or is there likely to be a hearing

99. This was one of the issues that the Court of Appeal did not deal with although it is central to the availability of legal aid to fund investigation and legal representation and thus the practical implementation of the safeguards envisaged if P is made a party to all applications.

100. No-one has pointed to any requirement of European law or the common law that there must be an oral hearing of a non-controversial case because it involves a deprivation of liberty or a person who lacks capacity to litigate or otherwise. Indeed, such a rigid requirement would run counter to the flexibility of the approach taken to such issues by reference to the facts and circumstances of the case.

101. The highest argument for there having to be an oral hearing was advanced by the Law Society on the basis that P should have a right to an oral hearing as a matter of common law fairness and to satisfy Articles 5 and 14 because his or her liberty is being determined.

102. In advancing that argument the Law Society relied on a citation from the speech of Lord Reed in *R(Osborn) v Parole Board* [2014] AC 115 at paragraph 2(i). Taken in isolation the passage cited supports the mandatory argument advanced but that support evaporates when regard is had to follows in the further sub-paragraphs of paragraph 2 which clearly show that:

    i) it is not always necessary for the parole board to have a hearing, and

    ii) in deciding whether or not one is necessary the board should consider, for example, whether there is a factual dispute and whether its independent assessment of risk, and the means by which it should be managed and addressed, may benefit from the closer examination an oral hearing can provide and the legitimate interest of a prisoner to participate in the making of a decision with important implications for him (see paragraphs 2(ii), (iii) and (iv)).

These passages readily apply by analogy to the determinative question for the Court of Protection and are in line with paragraph 34 of Lord Hope's judgment in *Dudson* (cited below and by the Law Society). They show that to achieve fairness and necessary safeguards a fact, issue and consequence approach is taken and that an oral hearing is not a mandatory procedural requirement.

103. Further, both the Law Society and the Official Solicitor assert and accept that if P is a party and his or her legal representative consents to it both the application for an initial order and a review can be dealt with without a hearing. This is an inevitable and proper recognition of the issues involved and in particular of the determinative test and the point that fairness is a two way street.

104. The lack of a need for a hearing in non-controversial cases is shown, for example, by the orders made in the cases relating to *LM, VS, HR* and *NR* where the Official Solicitor accepted appointment. Those orders provide that if, after further information has been provided, the parties agree the terms of the welfare order (and so the care package) the case can or will be dealt with on the papers. In many similar applications for welfare orders:

i) there will be nothing that a representative of P can add at an oral hearing, and

ii) the three factors mentioned by Lord Hope in *R(Dudson) v SSHD* [2006] 1 AC 245 at paragraph 30 (citing *Goc v Turkey* Application no. 36590/67) that can justify dispensing with a public hearing would be satisfied

and, as correctly recognised in the *LM, VS, HR* and *NR* cases it would be wrong and unfair for the litigation friend and any representative of P to incur costs for P personally (or the legal aid fund if he has legal aid) and the other parties (particularly in light of the costs already incurred by the public authority involved) by insisting on a hearing. I comment that if I was re-making those orders I would add that a paper determination of the adjourned hearing could take place if the court so directed, and I would make the same provision in respect of the review hearings ordered in the MJW, DPW, and NRA cases (where by consent and with my approval welfare orders were made).

105. In any such case, the only reason for having a hearing would be to try and satisfy the legal aid criteria. If the court was to list hearings on that basis issues would, or would be likely to, arise as to whether that satisfied the legal aid criteria or whether the course taken was a contrivance.

Legal aid conclusion

106. The position is therefore that there are significant problems relating to the funding of legal representation in applications that are presented as being non-controversial and which are readily identifiable on the information provided or by limited further investigation as being non-controversial.

107. Firstly, this is because they are or are likely to be cases that will not require a hearing and so they do not satisfy the criteria for full or investigative legal aid and legal help will not be available or will not fill that gap. Secondly, it is because after any funded investigation they are likely not to satisfy the criteria for full representation because

there will be no need for a hearing. Thirdly, absent changes in approach or regime, my prognosis on obtaining legal aid is that set out in paragraph 94 above.

108. These legal aid problems were not squarely addressed by those advocating the implementation of the obiter conclusion of the Court of Appeal and on my analysis (without assistance of detailed argument on how the representation of P would be funded) legal aid will not be an available source of funding unless the case turns out to be contentious and so requires a hearing.

The practical difficulties of appointing an independent person as a Rule 3A representative

109. The Secretary of State argued that the deficiencies in the streamlined process and the reasons for making P a party identified by the Court of Appeal would be met by the appointment of a Rule 3A representative for P without making P a party.

110. This rule was not in force when *Re X* was before the Court of Appeal. But it was shown it in draft and did not comment on it. The Secretary of State advanced this argument on the basis that the amendment of the COP Rules to add Rule 3A introduced something new that undermined the reasoning of the Court of Appeal.

111. Although I accept that an independent Rule 3A representative or others, who continue to have an active role after the welfare order is made, could effectively replicate the roles of the IMCA and the RPR under the DOLS and so meet or substantially meet deficiencies in the streamlined process identified by the Court of Appeal, I do not agree.

112. Under the un-amended COP Rules the Court of Protection could have effectively invited someone to provide information on behalf of P and so effectively as a Rule 3A representative although the role has now been made more formal and clearer.

113. But most importantly I do not agree because the force of the reasoning of the Court of Appeal is directed to its conclusion that P is to be a party and so on the need for P to have that status and the procedural rights, assistance and so benefits that go with it. An assertion that the court can or even that it will (or generally will) appoint a rule 3A representative in all cases is not a complete answer to this, even though it addresses some of the reasoning.

114. Further and in any event, this submission is completely theoretical because the Secretary of State has not provided any evidence to show, and did not through counsel identify, how IMCAs (his suggestion) or anyone else could in practice be appointed (and so would agree to act) in the cases before me, or generally in all such cases, as an independent Rule 3A representative. It is well known that there are a number of problems relating to the possible appointment of IMCAs to take a role in proceedings including issues relating to the relevant contractual and funding arrangements and their availability having regard to the other roles they perform.

115. The argument as presented was therefore one that would have led to a result on the evidence that I made an order that such an unidentified independent person should be appointed as a Rule 3A representative (and it was suggested that that person be identified by the local authority) on the basis that I could confidently expect a further

application on the basis that no-one could be found who could and would agree to take up the appointment.

116. So again judged by reference to the existing evidence (and experience of the Court of Protection) this proposed solution is not fit for purpose absent the provision of additional publicly funded resources which were not identified by the Secretary of State.

Accredited legal representatives

117. At present none exist and so any solution based on their appointment is also theoretical. However I comment that I do not accept the submission of the Law Society that it would not be appropriate to appoint one in a case concerning a deprivation of liberty particularly if it appeared to be non-contentious. Such a representative could easily do what has been done by the solicitors appointed by the Official Solicitor in the seven cases before me without any involvement by the Official Solicitor.

The practical availability and impact of the procedure advanced by the Official Solicitor, the Law Society and the Secretary of State

118. They all advance arguments that create a result judged by reference to common law fairness or Article 5 or Article 14 that is or soon will be one that is not fit for purpose, unless additional public funding is made available to provide one or more of (a) independent litigation friends, (b) legal or other representation or (c) Rule 3A representatives who can effectively provide the necessary safeguards.

119. No likely source of such funding has been identified by those who would be responsible for the decisions to provide it.

120. In his letter to the court (and so before he put in place the procedure that has enabled him to accept appointment in the majority of the ten test cases before me) the Official Solicitor points out that the Convention guarantees rights of access to the court that are practical and effective not theoretical and illusory. I agree. He then asserts that unless it is read down Rule 3A(4), which provides that P does not become a party until a litigation friend is appointed, makes the rights of P, if he must be a party, theoretical and illusory. I do not follow this. Firstly, it is not an assertion based on a lack of P's right to be a party under the relevant procedural rules. Rather, it is based on a delay after an order joining P has been made and so it is the practical non-availability of the litigation friend and the problems relating to the effectiveness of interim orders that have this result.

121. The starting point that P is not automatically a party and the impact of Rule 3A(4) apply far more widely than in applications for welfare orders made to authorise a deprivation of liberty, and Rule 3A(4) enables the court to act quickly in a range of contentious or potentially contentious cases where this is necessary and, if as the Court of Appeal concluded, P must always be a party in cases seeking a welfare order to authorise a deprivation of liberty this can be achieved by exercising Rule 3A. So, although I agree that if P must be made a party in all such applications the reality is that the right of access to a court that this would give to P will in many cases soon not be fit for purpose. The reasons for this relate to the practical application of that

joinder as of right (or effectively as of right) and not the starting point that P is not automatically a party and Rule 3A(4).

The resources of the Court of Protection

122. I shall not dwell on this. A number of tribunal judges have been recruited and trained to enable the streamlined process to operate. If it is not available, or not available in a suitably modified form, issues relating to the use and further training of this judicial resource or the identification of a replacement for it will arise.

123. If it or a substitute cannot be used further issues would arise as to how the Court of Protection could deal with applications for welfare orders to authorise a deprivation of liberty and their review, which on the evidence before me is likely to comfortably exceed its present annual caseload (around 25,000 applications of which around 20,000 are non-contentious property and affairs applications).

124. In short, the resource implications are not limited to the availability and funding of litigation friends but extend to the Court of Protection. The number of hearings required will have a significant impact on the judicial and supporting resources needed by the court.

Amelioration of the problems created by a process that makes P a party to all cases and so requires P to have a litigation friend

125. This would flow from the appointment of litigation friends who do not have to retain solicitors to represent P. The absence of a funded and available independent source for such litigation friends means that the available source is family or friends.

126. Questions arise as to whether they can perform their role as a litigation friend without instructing a solicitor and whether they are sufficiently independent.

Whether a litigation friend who does not have rights of audience can, absent an order of the court authorising him or her to do so, exercise rights of audience and conduct the litigation without appointing a solicitor.

127. The Official Solicitor and the Law Society have raised this issue. It is based on provisions of Part 3 of the Legal Services Act 2007 ("the 2007 Act").

128. It is an arid one because as the heading indicates, in line with the conclusions reached in *Gregory v Turner* [2003] 1 WLR 1149, at paragraphs 50 to 58, it is common ground that if and when the court appoints such a litigation friend:

i) it can also give him or her a right of audience and the right to conduct litigation in relation to those proceedings (see Paragraphs 1(2)(b) and 2(1)(b) of Schedule 3 to the 2007 Act),

ii) it can remove those rights, and further and alternatively

iii) it can end the appointment of the litigation friend (see COP Rules 144 and 140).

129. Applying the approach set out later to the appointment of a person without a right to conduct litigation and a right of audience as a litigation friend it is difficult to envisage circumstances in which the court would be prepared to make that appointment but was not prepared, subject to further order, to give that litigation friend the right to conduct the litigation without appointing a solicitor and a right of audience.

130. It is the regular practice of the Official Solicitor to instruct solicitors and counsel. The reasons for this were not gone into before me.

131. The issue relates to the entitlement to carry on a "reserved legal activity". Section 13(1) of the 2007 Act provides that that entitlement is to be determined solely by the 2007 Act. The definition of a "reserved legal activity" in s. 12 of the 2007 Act includes (a) the exercise of a right of audience, and (b) the conduct of litigation. Section 13(2) of the 2007 Act provides that a person is entitled to carry on an activity which is a reserved legal activity where (a) the person is an authorised person in relation to the relevant activity, or (b) the person is an exempt person in relation to that activity. Section 14 of the 2007 Act provides that it is an offence to carry on an activity that is a reserved legal activity unless the person is entitled to carry on that activity.

132. An authorised person is a person who has been authorised to carry on the relevant activity (see s. 18 of the 2007 Act), for example, a solicitor or barrister and Schedule 3 defines who is an exempt person. Paragraphs 1(3)(b) and 2(3)(b) of Schedule 3 provide that a person is an exempt person if respectively he or she has a right of audience or a right to conduct litigation "granted by or under any enactment".

133. At paragraph 26 of his preliminary judgment in *Re X*, the President concluded that a litigation friend does not have to act by a solicitor and can conduct the litigation on behalf of P. The President gave further reasons for that conclusion at paragraphs 28 to 34 of his second judgment. As can be seen therefrom he adopted the approach taken by Brooke LJ in *Gregory v Turner* [2003] 1149 at paragraphs 63 and 64, where he said:

> 63…. The removal of the specific requirement for the litigation friend to act by a solicitor appears to imply that there is nothing to prevent the litigation friend carrying out procedural steps on behalf of the patient. Although there is no definition of the expression "conducting legal proceedings" in Part 21 (or in the Civil Procedure Act 1997, under which the new rules were made) it is difficult to see how it can differ significantly in scope from the expression "conducting litigation" as defined in the 1990 Act. On this basis, this may be seen as a case within category (b) under the 1990 Act, where the right to conduct litigation in relation to the proceedings is "granted by or under any enactment".
>
> 64. Such an interpretation, however, would leave open the question the litigation friend has a right of audience under section 27. In the absence of any specific provision in Part 21 expressly giving him such a right, it is difficult to bring this within category (b). It is unnecessary to resolve that issue in this case. However, it is to be noted that the court would in any event have a discretion to allow the litigation friend to be heard, under category (c).

134. The Official Solicitor sought to challenge that conclusion before the Court of Appeal. As he had done before the President, he contended that:

i) Part 21 of the CPR (and Rule 140 of the COP Rules) by which a litigation friend is appointed to fairly and competently "conduct proceedings" on behalf of P, do not grant a litigation friend the right to "conduct litigation" or a "right of audience" in relation to the particular proceedings in question; and

ii) there is a common law rule that a litigation friend must act by a solicitor, which survived the repeal of RSC Ord 80 r. 2(3), and any provision in the CPR or the COP Rules which purports to override this common law rule is ultra vires.

135. I agree with the Secretary of State that neither proposition is correct and the President was correct to conclude that there is no requirement for a litigation friend to act by a solicitor.

136. The first proposition is based on an argument that:

i) "conducting proceedings" describes the taking of material decisions about the proceedings (e.g. on whether to bring or defend them), and so what I shall call "the strategic or determinative role", but excludes "conducting litigation" because that describes only

ii) the implementation of those decisions and so the juristic acts of pursuing or defending the proceedings procedurally and in argument on paper and by making submissions to a court, and so what I shall call "the implementation role", and does not include

iii) the advancement of argument on paper and orally before a court, which I shall call "the advocacy role".

137. In my view, although there is clearly a distinction between those three roles they all fall within the task of a litigation friend conferred by the relevant Rules namely to "conduct proceedings".

138. There is no definition of the phrase "conduct proceedings" in the CPR, its enabling Act, or in the COP Rules. However, the term "conduct of litigation" is defined in paragraph 4 of Schedule 2 to the 2007 Act. It is defined as: (a) the issuing of proceedings before any court in England and Wales; (b) the commencement, prosecution and defence of such proceedings; and (c) the performance of any ancillary functions in relation to such proceedings. So that definition:

i) relates to the particular proceedings in which the relevant person will make decisions, give advice and take steps, and

ii) it is primarily directed to the implementation and advocacy roles because it is primarily directed to cases when the relevant party has capacity to perform the strategic or determinative role and so to dictate what should be done in respect of the proceedings.

139. So the issue becomes whether the relevant Rules empower the litigation friend:

i) to do what P could do if he had capacity and so to perform all of the strategic and determinative, implementation and advocacy roles, or

ii) as argued by the Official Solicitor, to perform only the strategic and determinative role unless the litigation friend is otherwise qualified to perform the other two roles. (The argument did not cover whether in those circumstances the litigation friend could give instructions to himself to perform the implementation and advocacy roles.)

140. Firstly, like the President, I agree with paragraph 63 of the judgment in *Gregory v Turner* and add that in my view the definition of "conduct of litigation" in the 2007 Act by reference to the particular proceedings reinforces this view. Accordingly, as a matter of language, the duty and task to "conduct proceedings" can include the conduct of litigation as defined.

141. Secondly, I agree that as the 2007 Act deals with the right of audience and the right to conduct proceedings separately this approach leaves open the question whether the Rules confer a right of audience. But, as a matter of language, it is in my view clear that giving someone the task or duty to "conduct proceedings" can include the conferment of the advocacy role as it is a core part of conducting any proceedings.

142. In my view, the determinative question is not simply a linguistic one but is whether the purpose of the relevant Rules:

i) is to confer on a litigation friend the ability and task of doing what the party could do if he or she had the relevant capacity, or

ii) is limited to the strategic or determinative role.

This is a purposive question.

143. In my view, the answer to the purposive question is not determined or affected by whether the litigation friend is or is not a party or is or is not to be treated as a litigant himself. I proceed on the basis that he is not and is not to be treated as either party (see, for example, paragraph 29 of the President's second judgment and *Re E (mental health patient)* [1984] 1 WLR 320 at 324 F/H).

144. Indeed, the requirement that a litigation friend must be able to act fairly and competently, and the fact that he can be removed by the court, indicate that a litigation friend is not in the same position as a party. This is confirmed by *RP v United Kingdom* (App. No 38245/08), [2012] ECHR 1796, [2013] 1 FLR 744, at in particular paragraph 76 because it shows that the litigation friend is not obliged to advance any argument that P wants him to and that it would not be in P's best interests to advance an unarguable case.

145. A litigation friend can only be appointed if P lacks capacity to litigate as opposed to capacity to make the relevant decisions about the care package; although generally P will lack capacity in both respects. The role of a litigation friend (which has a significant overlap with that of a legal representative appointed by a First-tier Tribunal (HESC) in a case under the Mental Health Act 1983 when the patient lacks capacity to litigate which I discussed and described in *YA v Central and NW London NHS Trust and Others* [2015] UKUT 0037 (AAC) in particular at paragraphs 92 to 103) shows that a litigation friend can be faced with difficult decisions in respect of both the advocacy role (directly or by giving instructions) and the implementation role

and thus that both roles are integral to his task. Indeed, by applying the best interests test the litigation friend may have to control all aspects of the proceedings and, in doing so, may have to take a position that is contrary to, or does not fully accord with, the expressed wishes and feelings of a P.

146. Subject to the Official Solicitor's second point, in the absence of an express provision limiting how a litigation friend can perform these roles, and thus an express provision that he must act through a solicitor, the tasks of a litigation friend provide a powerful and in my view determinative pointer that, on a purposive approach, the relevant Rules should be interpreted as conferring on a litigation friend (subject to the control of the court by his removal) all three of the roles I have identified.

147. This conclusion is supported by, but is not dependent upon, the minutes of the discussion recorded by the Civil Procedure Rules Committee ("the CPRC"). No equivalent discussion exists in respect of the COP Rules.

148. *The second argument.* The Official Solicitor argued that there was a common law rule that a litigation friend has to act through a solicitor and that this revived when its replication in the old rules was removed.

149. First, while there was an historical practice at common law that a litigation friend had to act by a solicitor, I agree with the President (see paragraph 30 of his second judgment) that this was not a fundamental or immutable rule. Further, and on the assumption that it was such a rule, I also agree with the President that it did not involve a fundamental right or something approaching it so as to bring into play cases such as *Great Mediterranean Holdings SA v Patel* [2000] 1 WLR 272.

150. Further and however it is classified, the approach at common law must have related to practice and procedure and so to what the relevant statutory Rule making powers are directed to.

151. The Rules of the Supreme Court ("RSC") provided that a next friend had to act by a solicitor (see RSC Order 80 r 2(3)). However, the County Court Rules ("CCR") contained no such requirement (see CCR Ord 10 r 12). The commentary in the County Court Practice said:

> Next friend's authority – This rule corresponds to RSC Ord 80 r2(2). There is nothing in the county court rules like RSC Ord 80 r 2(3), requiring a next friend or guardian ad litem to act by a solicitor.

152. This commentary is a pointer to the conclusion that absent a provision in the Rules that relate to and govern practice and procedure the intention of the Rule makers was that a litigation friend did not have to act by a solicitor.

153. Those Rules are now repealed and amalgamated in the CPR and, as before, the relevant practice and procedure is dictated by the exercise and product of the relevant statutory powers that govern it.

154. The vires to make the COP Rules, is different and is conferred by section 51 of the MCA. It provides that rules of court "with respect to the practice and procedure of the court" may be made. Section 51(2)(e) of the MCA then provides that the COP Rules may, in particular, make provision "for enabling the court to appoint a suitable

person (who may, with his consent, be the Official Solicitor) to act in the name of, or on behalf of, or to represent the person to whom the proceedings relate". This is in wide terms that clearly cover the three roles I have described.

155. Silence in rules made pursuant to the widely drafted rule making statutory powers under which the RSC, the CCR, the CPR and the COP Rules are made is not a persuasive indicator that an old common law rule or practice is to be continued or, in the case of the RSC and the CCR, no longer to be suspended. The approach to the replacement of an inherent, prerogative or common law jurisdiction by a statutory one, and thus the suspension or removal of the former, is one of statutory interpretation (see for example *DL v A Local Authority and Others* [2012] COPLR 504, and the citations at pages 719/721 in *Laker Airways v Dep of Trade* [1977] QB 643). In my view, the language and purposes of the rule making powers powerfully indicate that the relevant rules are intended to provide a complete statutory code in place of pre-existing common law rules of practice and procedure and so that the lack of reference to such a rule means that the intention of the rule maker, and thus of the secondary legislation, was that it should no longer apply.

156. In the case of the CPR, this conclusion is supported by the approach of the CPRC. It expressly considered whether the new civil procedure rules should adopt the position under the RSC or the CCR. In the absence of any express requirement that a litigation friend act by a solicitor, I agree with the Secretary of State that the only sensible conclusion is that the CPRC was of the view that in the County Court a litigation friend did not have to act by a solicitor and decided to take that position. As I have said, no equivalent support exists in respect to of the COP Rules.

157. Finally:

i) I agree with the Secretary of State that there is no question of the relevant Rules overriding criminal provisions in the 2007 Act. The only issue is whether the relevant Rules confer the right to conduct litigation and a right of audience.

ii) I reject the policy and public interest points advanced by the Official Solicitor which are based on the role of the litigation friend and the need to ensure that inappropriate persons should not be given a right of audience or a right to conduct litigation and so to avoid the potential for mischief being caused by such lay litigation friends. In support of his contention the Official Solicitor referred to the practice guidance relating to McKenzie friends, *D v S (Rights of Audience)* [1996] EWCA Civ 1341 and *Re Bageley* [2015] EWHC 1496 (Fam) and asserted that the risk of mischief would be greater if a lay litigation friend had a right to conduct litigation and a right of audience and so did not have to rely on it being granted on a case by case basis. I do not agree because any such grant, as with the appointment of the litigation friend, would be based on (a) a prediction of behaviour that would demonstrate the suitability for the role, and (b) the safeguard of the ability of the court to control and prevent the mischief referred to by the Official Solicitor. Further, that mischief is effectively the same however the rights are acquired. (Also I repeat what I have said in paragraph 129 above).

The appointment of family or friends or independent persons who do not have a right to conduct litigation or a right of audience as litigation friends

158. Part 17 of the COP Rules governs the appointment of litigation friends. By Rule 140(1), a person may act as a litigation friend on behalf of P if that person (a) can fairly and competently conduct proceedings on behalf of P; and (b) has no interests adverse to those of P. Any litigation friend must also be required to confirm that he will act in P's best interests: see *AB v LCC (A Local Authority)* [2011] EWCOP 3151, at paragraph 173 (endorsed by me in *Re UF* [2013] EWHC 4289 (COP) at paragraphs 19 to 25).

159. The practical difficulties of finding and appointing such an independent person, other than a family member or friend, as a litigation friend mirror those of appointing a Rule 3A representative – the solution suggested by the Secretary of State. In addition the contracts of, or relating to the provision of, many potential candidates (e.g. IMCAs) may well not cover them acting as a litigation friend and, in any event, many would not feel comfortable in doing so.

160. I have already mentioned the role that is often played by devoted and responsible family members in the life of P and that the appointment of a member of the family or a friend who has not been involved in the care and support of P would often be an obvious catalyst for family discord.

161. In supporting P, devoted and family members or friends will inevitably have considered the options available for the care of P and what is in his or her best interests. Indeed, one of them may have been or could have appointed as P's welfare deputy. (This is not the time or place to consider whether such a deputy could consent to a deprivation of liberty).

162. It is also inevitable that such family members or friends will have "an interest" in the outcome of the proceedings because it affects them as well as P. Their role may have continued over the life of P, or may have started when P became less capable of looking after his or her affairs and continued after P lost relevant capacity. In my view, the fact such persons have performed that role, and in doing so have formed firm views, as to where P's best interests lie, and have voiced those views, does not mean that they cannot meet the criteria in Rule 140(1) or that they are disqualified from acting as P's litigation friend. This view is supported by, for example, *AVS v NHS Foundation Trust and P PCT* [2011] EWCA Civ 7 and *WCC v AB and SB* [2013] COPLR 157 which are cases in which respectively a brother and an aunt were appointed as the litigation friend.

163. The general reason for this is that the interest of such family members or friends does not give rise to an adverse interest to P and so to a conflict of interest, or otherwise mean that they cannot properly and effectively promote P's best interests. Indeed, in performing their supporting and caring role over the years many such family and friends will have been doing just that by, for example, investigating, negotiating, obtaining and reviewing care and support from public authorities to promote P's best interests at home and in the community.

164. The performance of that role will often mean that they have "fought P's corner" over a long time to promote his or her best interests and that they are and will be the best or

an appropriate litigation friend because they know P best, and will be best placed to ensure the promotion of P's best interests, P's participation in the decisions relating to the care package and the proceedings and a fully informed consideration by the court of the determinative test by:

i) eliciting P's wishes and feelings and making them and the matters mentioned in s. 4(6) of the MCA known to the Court without causing P any or any unnecessary distress,

ii) critically examining from the perspective of P's best interests, and with a detailed knowledge of P, the pros and cons of a care package, and whether it is the least restrictive available option, and

iii) keeping the implementation of the care package under review and raising points relating to it and changes in P's behaviour or health.

165. As appears later, all of these factors go to the essence of P's Article 5 right.

166. In the present context, the problems relating to their appointment as a litigation friend arises in two main ways:

i) firstly, does the fact that an issue relating to deprivation of liberty arises mean that the independence required precludes the appointment of a family member or friend, and

ii) secondly, if it does not, when would it be inappropriate to so appoint a family member or friend.

I shall return to the "independence point" when dealing with the issue whether P must be a party to all applications.

167. If a family member or friend can be appointed as a litigation friend in such applications, there was effective and, in my view, correct common ground before me that examples of the correct approach to be adopted to their appointment are found in my decision in *Re UF* at paragraphs 19 to 25 and, by analogy, in *AJ v A Local Authority* [2015] EWCOP 5 in particular at paragraphs 82 to 91, where Baker J was dealing with the appointment of a RPR under the DOLS.

168. In *Re UF* the relevant family member was in dispute with her siblings as to what would promote P's best interests. In *AJ* the RPR had taken a view in line with that of the relevant public authorities that it was in P's best interests to go into residential care and P was objecting to this before it took place, was extremely unhappy in residential care and wished to challenge the DOLS authorisation. In broad terms, in both cases the involvement of the family member in a disputed situation meant that they could not perform the role of respectively a litigation friend and a RPR because they were firmly wedded to a particular result in circumstances that founded the conclusion that they were not, or were unlikely to be, able to take a balanced approach to factors that would determine what was in P's best interests.

169. Such a situation is likely to be readily identifiable when there is a family dispute or when P is objecting to what is proposed or to what has happened or because the

relevant family member or friend may be motivated by their own interests or pressures. Also, it is likely that in many cases the relevant local authority or others who the family member or friend has dealt with in connection with the care of P will be able to say and demonstrate:

i) whether for those or other reasons the relevant person should not be appointed as a litigation friend, or

ii) whether they would be suitable because they have acted and are likely to act in the way set out in paragraph 164 above.

170. The role of a litigation friend and a RPR involve them forming a view on what is in P's best interests and advancing it although it may not accord with what P is asserting (see paragraph 144 above). It follows that:

i) anyone performing those roles may well have to advance a solution that does not accord with objections being expressed by P,

ii) an independent litigation friend may well have to advance argument that does not accord with P's expressed wishes. Indeed, this is not uncommon, and so

iii) the point that P is expressing objections that a family member or friend as P's litigation friend concludes or has concluded do not accord with P's best interests does not of itself preclude a family member or friend being appointed.

171. A part of the role of a RPR is to bring proceedings under s. 21A when appropriate and so, for example, as Baker J points out when P is objecting (see paragraph 88 of his judgment). But it cannot be that in every case a RPR should test the validity of a DOLS authorisation because then they would only be the precursor to proceedings in the Court of Protection. Rather, the role of the RPR, like that of a litigation friend, involves deciding whether to issue a challenge and then advancing P's best interests in any such challenge without advancing unarguable points (see by analogy the approach to be taken by a legal representative in a tribunal dealing with a Mental Health case which I discuss in *YA* (cited earlier) see in particular paragraphs (13) to (20) of the Overview and paragraphs 65 to 103 of the Decision). Objections expressed by P are a relevant but not a determinative factor for a RPR in deciding whether to issue such proceedings.

172. That role of a RPR and the point that a RPR does not have to issue proceedings under s. 21A mean that paragraph 137 of the judgment in *AJ* has to be read in the context of that case. There Baker J said:

> "it is likely to be difficult for a close relative or friend who believes that it is in P's best interests to move into residential care, and has been actively involved in arranging such a move, into a placement that involves a deprivation of liberty, to fulfil the functions of RPR, which involve making a challenge to any authorisation of that deprivation. BIAs and local authorities should therefore scrutinise very carefully the selection and appointment of RPRs in circumstances which are likely to give rise to this potential conflict of interest."

When that is done the passage shows that in a number of cases the conflict of interest may not arise as it would not be appropriate to make such a challenge or it can be done by the RPR in a balanced way to promote P's best interests although he or she is

of the view that the placement is the least restrictive available option for the promotion of P's best interests.

173. So the issue whether a family member or friend should be appointed as a litigation friend is fact and case sensitive and will turn on whether in all the circumstances the family member satisfies the relevant Rules and more generally whether he or she can properly perform the functions of a litigation friend and so in a balanced way consider and properly promote P's best interests.

174. To my mind, this will often be the case because a devoted and responsible family member or friend will be able to perform the tasks to achieve the aims set out in paragraph 164 above.

175. However, I acknowledge that there will be other cases when the history shows that a family member or friend is not an appropriate litigation friend because, for example, (a) he or she has not been taking or is not likely to take that approach or is in dispute with other family members, or (b) the way in which the issue has arisen will mean that the pressures on, or interests of, family members of friends make this inappropriate.

Part 3

Do the Requirements and Effects mean that P must be a party to ALL applications for welfare orders seeking an authorisation of a deprivation of liberty

176. I emphasise "ALL" because it is common ground, and the existing streamlined procedure recognises, that in some cases P should be a party (in the sense of "must" on a correct exercise of the court's discretion). The essential issue is therefore whether P must be a party to such applications based on a care package that is presented as being non-contentious and so in all such cases, until accredited legal representatives are available, a litigation friend must be appointed.

177. In my view, the answer is "No" and so I disagree with the reasoning and obiter conclusion of the Court of Appeal on this point and prefer that of the President.

178. I shall consider the issue by reference to the following factors:

i) The ECtHR and domestic cases.

ii) Flaws and gaps in the reasoning of the Court of Appeal.

iii) Whether P must be a party and further or alternatively have legal representation and further or alternatively independent representation.

iv) Improvements to the information provided under the streamlined procedure.

v) The position when there is a family member or friend who could act as a litigation friend or a Rule 3A representative.

vi) The position when there is no such person.

vii) Article 14.

The ECtHR and domestic cases.

179. Baker J gives a useful summary at paragraphs 35 to 38 of his judgment in *AJ* which I gratefully adopt. I also adopt my own analysis in *YA* at paragraphs 36 to 45. These predate the decision of the Court of Appeal in *Re X* and the case referred to by Black LJ, namely *M.S. v Croatia (No. 2)* (2015) ECHR 196. But that case does not create new law or guidance as it applies and continues the earlier authorities and, in particular, the approach laid down in *Winterwerp v Netherlands* (1978-80) 2 EHRR 387, at paragraph 60, namely that:

> ..it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" …

180. By reference to that *Winterwerp* formulation, the heart of the issue before me is whether the fundamental guarantees of procedure applied in matters of deprivation of liberty require P to be a party to all applications for welfare orders that will authorise a deprivation of liberty.

181. That *Winterwerp* formulation was set out when the ECtHR was dealing with Article 5(4) and was applied in *MS (No 2)* to Article 5(1)(e).

182. The "*process prescribed by law"* demanded by Article 5(1) need not involve a court or court proceedings (for example the DOLS) but the proceedings demanded by Article 5(4) must be in a court (or tribunal). As, unlike the DOLS or sectioning under the MHA, the relevant process prescribed by law for the making of a welfare order involves an application to the Court of Protection there is no mileage in making distinctions between what Articles 5(1) and 5(4) demand.

183. The distinction does however, as Black LJ said at paragraph 93, show that it is the substance that matters. That substance relates to P's direct and indirect participation in the decision making process applying the MCA (including s. 4(4) thereof) and not on party status. In other words, the debate relates to what procedural safeguards party status or other provisions bring to the decision making process and not on the right to be a party as such.

184. The national law in *Winterwerp* authorised rather that enjoined the compulsory confinement and so such a distinction is not valid. In this context, it was common ground and I agree that it is the substance of what is said in Article 5 and the relevant decisions that matters. In my view, this applies to all aspects of Article 5 and thus to whether there is a deprivation of liberty and to the procedural guarantees including an assessment of arbitrariness.

185. It is well established that the approach to the existence of a deprivation of liberty is governed by the *Guzzardi* principle. This is that the starting point in assessing whether there has been a deprivation of liberty is "the concrete situation" of the person and the consideration of "a whole range of criteria such as the type, duration, effects and manner of implementation of the [restrictive] measure in question" (see *Guzzardi v Italy* (1980) 3 EHRR at paragraph 92 and 93). So, in that context, it is the effects of the practical situation on the ground created by a care and treatment regime, and so its practical impact on the freedom of the relevant person to act as he or she

wishes, that matter when assessing whether objectively there is a deprivation of liberty.

186. I have not found this "in all the circumstances, fact and issue sensitive approach" as clearly enunciated in respect of the procedural guarantees required by Article 5. But, in my view, it is the approach to be taken when applying the Convention and the common law to procedural issues relating to fairness.

187. Such an approach is in line with the well recognised approach in the English courts that what fairness requires is dependent on the context of the decision and so the principles to be applied in the determination of what is fair is issue and fact sensitive and should not be applied by rote identically in every situation (see for example *R(Doody) v Home Secretary* [1994] 1 AC 531 at 560 D/G, and *Osborne* referred to above and by Black LJ in paragraph 66 of her judgment). This approach is also reflected in:

i) the approach taken by the ECtHR in *Winterwerp* and *MS (No 2)* to the determination of whether the procedural guarantees were met because in them the court examined the consequences of what happened in the given case and thus, for example, the failings of the legal representative in *MS (No 2).* This is an example of the backward looking approach of the ECtHR to matters of fairness. Other examples are its approach to the admissibility and use of evidence obtained under compulsion and the provision of the assistance of a lawyer,

ii) paragraph 142 of the judgment in *MS (No 2),* where the ECtHR (a) points out that the court has not formulated a global definition of "arbitrariness" for the purposes of Article 5(1) but that key principles have been developed on a case by case basis which demonstrate that "*the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved*", and (b) cites two cases that make that general point in an asylum case and a case relating to detention for treatment,

iii) paragraph 57 of the judgment in *Winterwerp*, which refers in the context of Article 5(4) to the need for the condition that "*the procedure followed has a judicial character and gives the individual concerned guarantees appropriate to the kind of detention in question*",

iv) the range of situations covered by the sub-paragraphs of Article 5(1) and thus of the circumstances giving rise to a deprivation of liberty to which the procedure prescribed by law and Article 5(4) applies,

v) paragraph 65 of the judgment in *RP* where, with my emphasis, the ECtHR said:

> In cases involving those with disabilities the Court has permitted the domestic courts a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the health of the person concerned (see, for example, *Shtukaturov v. Russia*, no. 44009/05, § 68, 27 March 2008). This is in keeping with the United Nations Convention on the Rights of Persons with Disabilities, which requires States to provide appropriate accommodation to facilitate the role of disabled persons in legal proceedings. However, the Court has held that such measures should not affect the very

> essence of an applicant's right to a fair trial as guaranteed by Article 6 § 1 of the Convention. In assessing whether or not a particular measure was necessary, the Court will take into account all relevant factors, including the nature and complexity of the issue before the domestic courts and what was at stake for the applicant (see, for example, *Shtukaturov v. Russia*, cited above, § 68).

That margin of appreciation is referred to in paragraph 46 of the judgment in *Winterwerp.*

188. That approach accords with the principles I identified at paragraph 45 of my decision in *YA* (cited earlier) in respect of the analogous position of the application of Rule 11(7) by a tribunal in a Mental Health Act case, which enables the tribunal to appoint a legal representative for the patient. After a discussion of recent cases including *Megyeri v Germany* (1992) 15 EHRR 584 *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* (Application no 47848/08 reported on 17 July), which cites *Stanev v Bulgaria* (2012) 55 EHRR 22, and *Ivinovic v Croatia* (Application no 13006/13 reported on 18 September 2014) I concluded that:

> To my mind the most important principles to take forward from this discussion when a tribunal is applying Rule 11(7) are:
>
> i) the underlying purpose and importance of the review and so the need to fairly and thoroughly assess the reasons for the detention,
>
> ii) the vulnerability of the person who is its subject and what is at stake for that person (i.e. a continuation of a detention for an identified purpose),
>
> iii) the need for flexibility and appropriate speed,
>
> iv) whether, without representation (but with all other available assistance and the prospect of further reviews), the patient will practically and effectively be able to conduct their case, and if not whether nonetheless
>
> v) the tribunal is likely to be properly and sufficiently informed of the competing factors relating to the case before it and so be able to carry out an effective review. (As to this the tribunal should when deciding the case review this prediction).

189. As appears from my citations and reasoning in *YA*, I add that I accept, as pointed out by Black LJ at paragraph 94 of her judgment, that the required procedural safeguards because a person is not capable of acting for himself are there to secure the Article 5 right and must not impair the very essence of it.

190. That returns one to a consideration of what that essence is in the particular circumstances of the case and so having regard to both:

i) the issues in and circumstances of the case, and

ii) the determinative test applied by the court

what "*opportunity*" (the word used in the cases in contrast to right) should P have to be heard in person or through some form of representation.

191. The combination of the requirements of Article 5(1) and 5(4) to the initial decision making and the challenge of the decision made (see paragraph 182 above) shows that, when in reliance of Article 5(1)(e) there is or is going to be an objective deprivation

of liberty, the essence of Article 5 is to provide safeguards that put a person who lacks the relevant capacity in a sufficiently equivalent position to a person who has that capacity and so who could himself:

i) consider, test and decide between competing provisions for his care or treatment,

ii) consent to one of them, and

iii) keep under review and challenge the arrangements put in place.

This gives rise to the need for a process that is directed to ensuring that the steps referred to in paragraph 164 (i) to (iii) above are adequately carried out or that their subject matter is adequately investigated by the court. Namely:

- the elicitation and communication to the court of P's wishes and feelings and the matters referred to in s. 4(6) of the MCA without causing P any or any unnecessary distress,

- the critical examination from the perspective of P's best interests, and with a detailed knowledge of P, the pros and cons of a care package, and whether it is the least restrictive available option, and

- the review of the implementation of the care package and changes in P's behaviour or health.

192. Next, in my view, the principles enunciated and the guidance given in the earlier cases show that the national procedure must provide a minimum but do not demand a particular approach in different circumstances to those that existed in the decided cases. So the application of the principles and the guidance as to the determination of the minimum that is needed to meet the procedural safeguards required, and so to avoid arbitrariness in respect of deprivations of liberty however they arise, is fact and issue sensitive.

193. That means that the minima can vary in respect of both:

i) different classes of a deprivation of liberty required (e.g. conviction for a criminal offence - Article 5(1)(a) and the detention a person of unsound mind – Article 5(1)(e)),

ii) different routes to a deprivation of liberty within a class and so as between (a) detention in hospital for treatment that is necessary for a person's mental health or the protection of the public, and (b) a long term care package that promotes P's best interests in the least restrictive available way, and

iii) different types of issue for example (a) a purely adversarial one (e.g. the resolution of a dispute of fact or opinion) and (b) an investigatory one to determine whether there is any such dispute of fact or opinion.

194. In my view, in deciding what the minimum is in the circumstances of a given case the determinative issue is whether <u>in practice</u> the procedure adopted enables P's position in respect of the essence of P's Article 5 right to be properly protected and promoted

by his case and his wishes and feelings on the determinative test (having regard to the consequence that the implementation of the care package will deprive him of his liberty) being fairly and appropriately put before the court when it is considering the making of the first welfare order and on its review. This again returns one to a consideration of the performance of the steps referred to in paragraph 164 (i) to (iii) above.

195. In paragraph 57 of her judgment in *Cheshire West* Baroness Hale recognises that in deprivation of liberty cases of this type, which she has already recognised many find difficult to characterise as a deprivation of liberty because of the differences between them and other detentions within Article 5, a more simplified and less elaborate process of checking could satisfy the minimum procedural safeguards. This supports the conclusion that the Court of Protection can apply the COP Rules in a flexible way to put the necessary procedural safeguards in place.

196. So, in my view, the approach of the ECtHR and the domestic cases:

i) do not set a red line for a requirement or guaranteed minima that have to be satisfied particularly if, for reasons that the court can do nothing about, they do not or are unlikely to provide a practical, effective and speedy process, and they support the view that

ii) in exercising its powers under the COP Rules to further their overriding objective the Court of Protection should have regard to what I have described earlier as the Requirements and the Effects and so the practical and proportionate balance to be struck between competing procedures having regard to the essence of Article 5.

Flaws and gaps in the reasoning of the Court of Appeal.

197. Black LJ's judgment at paragraph 87 to 108 provides the most detailed and the effective reasoning of the Court of Appeal. In theory she accepted that P need not always be a party to the proceedings if P's participation in them can reliably be secured by other means. But from the foundation of the *Winterwerp* test as applied in *MS (No 2)* she concluded that given the tools presently available in our domestic procedural law, there was no alternative to joining P as a party to all "deprivation of liberty proceedings" which she also described as proceedings where P's liberty is at stake (my emphases).

198. In her view unless this was done the process was not sufficient to ensure that P would have the "opportunity to be heard", the risk that cases would slip through the net was too great and the streamlined procedure (and necessarily the COP Rules) placed an inappropriate additional hurdle in the way of P participating in the proceedings – instead of being a party automatically, in that they include an additional process to be gone through before P is joined, namely the collection or provision of material to persuade the court that he wishes or needs to be joined.

199. In her view the problems with the President's approach were, at least, twofold. First, it was heavily dependent upon P conveying a wish to be joined in the proceedings or opposition to the arrangements proposed for him, or someone else who has his interests at heart taking these points on his behalf.

200. Secondly, it was dependent entirely on the reliability and completeness of the information transmitted to the court by those charged with the task. In many cases, this would be the very person or organisation seeking authorisation for P to be deprived of his liberty and the possibility of a conflict of interest was clear.

201. Black LJ then compared the President's streamlined procedure with the position as it would be if the DOLS applied. In that event, assessments would be carried out, an Independent Mental Capacity Advocate ("IMCA") would be appointed where needed (my emphasis) and once a Schedule A1 DOLS authorisation had been given, there would be a RPR who would represent and support P in all matters relating to the deprivation of liberty, including making an application to the Court for a variation or termination of the authorisation.

202. She pointed out that the RPR is independent of those who commission and provide the service P is receiving, and is charged with making such application to the Court as is appropriate. In her view, this degree of independence and duty is lacking in the streamlined procedure.

203. As I have said this reasoning is confined to cases involving a deprivation of liberty. Moore-Bick LJ and Gloster LJJ agreed with the observations of Black LJ, for the reasons that she gave (see paragraphs 127 and 171).

204. Unsurprisingly, this is powerful and persuasive reasoning but, respectfully, in my view parts of its foundations are flawed or contain gaps.

205. Generally:

i) it does not address the practical consequences of the conclusion and so how it will or will be likely to provide or address the minimum safeguards, and

ii) it treats all deprivations of liberty as being or effectively being the same for the purposes of the application of the procedural safeguards.

As a result, it does not address alternatives and, although the possibility of devising a less elaborate process in line with the suggestion of Baroness Hale is recognised by Black LJ at paragraph 104 of her judgment, she did not address whether and if so how the COP Rules could be applied to achieve that result.

206. Importantly, I do not agree that because the determination of whether there is or is not a deprivation of liberty is based on a comparison with a person who has capacity (and so could consent to it) founds the weight given by the Court of Appeal in its consideration of the procedural safeguards to the comparison between the procedural position in respect of persons with capacity when they are being deprived of their liberty. In my view, its comparative approach in respect of the procedural safeguard gave insufficient weight to:

i) the differences in the determinative tests that are applied in the different situations, and

ii) the point that by definition s. 4(4) of the MCA applies to circumstances where a substituted rather than a supported decision is being made because it applies when P lacks the capacity to make the decision.

Both points take one back to the points that the determinative test is a welfare test and anyone assisting and seeking to safeguard P has to act in his or her best interests which may involve not putting forward hopeless arguments based on objections or points asserted by P.

207. In my view, this flaw is demonstrated by the description of the proceedings in paragraph 86 of Black LJ's judgment as ones where P's liberty is at stake and the observation that proceedings under s. 25 of the Children Act 1989 are perhaps the best and certainly a closer parallel to proceedings in the Court of Protection concerning deprivation of liberty than wardship and private law proceedings (referred to and adopted as analogous by the President).

208. Such proceedings under s. 25 are not governed by the paramountcy principle, and so the child's welfare is relevant but not the paramount consideration (see *Re M (Secure Accommodation Order)* [1995] Fam 108) and the criteria set by s. 25 relating to absconding and significant harm, or to injury must be satisfied. The approach in such a case therefore does not mirror the determinative test applied by the Court of Protection. Rather, that determinative test is one under which the best interests of P is determinative (or paramount), and is not one which poses the issue whether P's liberty should be removed or P should be detained for a particular purposes (e.g. treatment). Rather, it asks whether the care package is the least restrictive available option to promote P's best interests and the deprivation of liberty is a consequence and not an aim of what is applied for or what is at stake. The position in wardship and private law proceedings is similar.

209. I do not say that either possible analogies are complete parallels. Rather, in my view:

i) the determinative test shows that the route or trigger to a deprivation of liberty through the making of a welfare order provides a distinction between on the one hand (a) a deprivation of liberty authorised by a welfare order, and (b) on the other hand ones arising under s. 25 of the Children Act, or the Mental Health Act 1983, which equate more closely with the situations in the cases decided by the ECtHR, and

ii) that distinction is relevant to the minimum procedural safeguards.

210. In addition, in my view when comparing the position of P on an application for a welfare order and the position of others faced with being deprived of their liberty the Court of Appeal does not sufficiently recognise that the relevant comparison:

i) is not with say a person resisting committal or a criminal charge or allegations about absconding made under s. 25 of the Children Act, but is, or to a significant extent, is with

ii) a person with capacity who has concluded that he or she consents to the deprivation of liberty.

This is because by making a welfare order that authorises a deprivation of liberty the Court of Protection makes the relevant decision on behalf of P (see s. 16(2)(a)).

211. In many contexts the giving of such consent by a person with capacity is an unreal prospect. But, for example, it arises in the context of voluntary patients under s. 131 of the MHA (see for example *AM* (cited earlier)). In such cases, there is no court involvement or other authorisation process, whilst the consent continues and the focus of procedural fairness is directed to whether the consent is based on a properly informed and fair decision making process. That focus reflects the procedure required by law (see Article 5(1)) and so what has to be taken into account by the decision maker in reaching it. The mirror of the safeguard in Article 5(4) is based on the ability of the patient to change his or her mind and to pursue proceedings.

212. In addressing the safeguards that would flow from having the equivalent of an IMCA appointed in certain circumstances and a RPR as occurs under DOLS (see s. 39A and 39C of the MCA and paragraphs 139 to 141 and 159 to 161 of Schedule A1; which are quite complicated but in general terms provide in defined circumstances for the appointment of an IMCA to act pending the appointment of an RPR and if the RPR appointment ceases, although an IMCA can after consulting the RPR make an application under s.21A to challenge a DOLS authorisation) the Court of Appeal:

    i) does not spell out that the appointment of the IMCA is only necessary when there is no person other than one engaged in providing care or treatment for P in a professional capacity or for remuneration who it would be appropriate to consult in determining what would be in P's best interests. And so does not recognise the support this trigger gives to the conclusion that family members and friends can be so consulted to provide the safeguard, and

    ii) does not recognise that in practice it is highly unlikely that an independent litigation friend himself or through a solicitor will keep the implementation of a care package under review but will only become involved when applications are live and even if legal aid was granted for the initial application would need to seek it again for the review. And so does not recognise that these limitations on the role that a litigation friend mean that the advantages flowing from the appointment of a RPR would only exist in practice if the litigation friend was a family member or friend who kept in contact with P and promoted P's best interests because of the family relationship or friendship.

213. As a consequence, in commenting on the streamlined procedure and in comparing it with the DOLS, the Court of Appeal does not consider whether the procedural safeguards that the appointment of either an IMCA or a RPR provided for in the DOLS before and after the giving of a standard authorisation:

    i) can be effectively replicated without making P a party, or

    ii) the extent to which they would be replicated if P is made a party to the application for a welfare order, in respect of the monitoring of the implementation of the care package and on a review of the welfare order.

Whether P must be a party and further or alternatively have legal representation and further or alternatively independent representation.

214. In accordance and agreement with both paragraph 93 of the judgment of Black LJ and the approach taken by the ECtHR of looking at the practical consequences of what occurred Article 5 does not require that the opportunity referred to in, for example, *Winterwerp* must be provided by a right to be a party. The issue is whether the fact that P was not a party and its consequences (which include the effects of the alternative process adopted) mean that the minimum procedural safeguards were not in place.

215. In *YA* (cited earlier), I concluded at paragraphs 39 to 41 of my decision that legal representation is not a minimum requirement in all cases. I remain of that view for the reasons given. That view accords with my analysis and conclusion set out above on the approach to be taken to the identification of the minimum procedural safeguards.

216. As I have mentioned, the Official Solicitor and the Law Society advanced arguments that an independent assessment was required and so, in the context of the argument, that the litigation friend must be independent or instruct an independent person. The independent person identified was a solicitor unless the court ordered that the litigation friend could conduct the litigation and have a right of audience. In my view, that qualification is clearly correct and carries with it an acceptance that (a) legal representation is not always necessary in proceedings involving a deprivation of liberty, and (b) it is not always necessary for a lay litigation friend to instruct an independent person with qualifications or experience equivalent to those of an IMCA and a RPR.

217. I acknowledge that Baroness Hale and Black LJ refer to independence and the advantages of independence, but in my view:

    i) those references and the guidance of the ECtHR do not rule out such independence being provided by a family member or friend, and

    ii) for the reasons given in the last paragraph this was effectively and correctly accepted by the Official Solicitor and the Law Society.

218. The issue is whether the family member or friend will provide that independence.

219. As I have already mentioned in many cases the history of the family will show that family members or friends have done so by taking a balanced approach over a lengthy period of time to "fighting P's corner" to promote P's best interests and so that they will continue to act in this way. In my view, in such cases this makes one of them not only an appropriate choice but the best choice to act as P's litigation friend because that person:

    i) is best placed to provide information and reasoning relevant to the original and review decisions, and

    ii) can and will keep the implementation of the care package under review.

220. Examples of such cases are MJW and DPW and the two Suffolk cases before me. MJW and DPW are brothers in their early forties who were born with defective chromosones which resulted in brain damage and a range of problems that have meant

that they have required constant care and supervision all their lives. Their parents who are now 70 and 69 have been actively, devotedly and constructively involved with this care throughout the lives of their two sons and until recently they have lived at home with their parents. The care packages build on respite care that has been provided and will result in them living for the majority of the time in residential care with home visits rather than at home with respite care away from home. The parents for convincing and very understandable reasons have concluded that because of their age and some health problems the time has come for their sons to make this move. The very responsible and effective role of the parents in directly and indirectly promoting the best interests of their sons is well recognised and the move is clearly the least restrictive available option that is highly likely to work having regard to the needs of their sons and their behaviour in respite care.

221. The Suffolk cases are comparable. EJG is 19 and has his own flat in a four flat living scheme. His autism, learning disability and bipolar affective disorder makes him very vulnerable and in need of care and supervision. His vulnerability is increased by the fact that he looks much younger than his age. His care package recognises the need to support him to become as independent as possible. His mother, who is a social worker and an approved mental health professional, has been actively and constructively involved in his care throughout his life. She supports the care package for convincing reasons and has made a witness statement asking that she be considered as AJG's litigation friend. His parents are divorced but his father supports the care package as does his twin brother who is at university studying law and lives with his mother. The documents filed provide convincing and persuasive reasons why the care package is the least restrictive available option to best promote EJG's best interests.

222. MT is 34 and has severe physical and learning difficulties and epilepsy (which is medically controlled) and he cannot communicate verbally. He is strapped to his wheelchair when in the community to prevent him falling out and to his commode for toileting. He is hoisted when personal care tasks are performed. His care package is that he shares a bungalow with two others and is under a high level of monitoring to prevent him harming himself and to ensure he takes his medication. He does not have the physical ability to unlock the door and leave the bungalow. His father has been appointed as his property and affairs deputy and is willing to be his litigation friend. His parents have been actively and constructively involved in promoting his best interests throughout his life and the reasoning in support of the conclusion agreed by them that the care package is the least restrictive available option for MT is convincing.

Improvements to the information provided under the streamlined procedure

223. At this stage, I address this leaving on one side issues relating to the involvement of different or more people in the provision of the information. I am grateful to the Official Solicitor and the solicitors he instructs for gathering and providing information I sought about this through a further submission by counsel. Part of the problem relates to the presentation of care plans in a form that is appropriate for the court as opposed to the often lengthy forms and language used on the ground that are designed, amongst other things, to make them user friendly to P and carers.

224. Firstly, I agree that the present forms and process direct the minds of their authors to the key issues and that they can provide all of the required information to demonstrate that the care package satisfies the determinative test and no more information is needed. This is demonstrated by the MJW and DPW and the Suffolk cases. In the former, and in the NRA case the Official Solicitor, as the litigation friend, agreed a final order.

225. However, I agree that it would be an improvement if the key provisions of the care package were summarised and the questions presently raised in the forms were answered by reference to that summary (or provisions in the care package not mentioned therein). The summary should in particular include the level of supervision (1:1, 2:1 etc); the periods of the day when supervision is provided; the use or possible use of sedation or restraint: the use of assistive technology; and what would happen if P tried to leave. This would be an approach under which the key questions are posed and sought to be answered through the prism of the care package upon which the welfare order is sought. It would be an improvement because it would help to focus the authors of the documents on the core issues and so would assist the court and others to assess the information and reasoning provided.

226. I also agree that questions, or a mechanism for addressing the following issues, would be likely to further assist in clearly demonstrating whether the care package is the least restrictive available option and one that can be approved without a hearing:

i) if the proposed placement is planned and has not yet taken place, there should be an explanation of whether or not a transition plan has been produced, a provision to append the transition plan and an explanation as to how the placement will be reviewed, particularly in the context of responding to P's reaction to his or her new placement. This would inform the timing of a review by the court,

ii) if P is already living at the placement in respect of which a welfare order is sought the following information should be provided, namely the date P moved there, where he or she lived before, why the move took place, and how the move was working

iii) any recent change or planned change in the care package and the reasons for it should be provided,

iv) there should be a specific requirement to explain why the identified sedation or restraint are or may be used, and why they are the least restrictive measures to deal with the relevant issues,

v) there should be a question about the tenancy agreement (if there is one) and who has the authority or needs to apply for the authority to sign it on P's behalf,

vi) there should be a specific question as to why it is thought the case is not controversial and can be dealt with on the papers,

vii) there should be a question directed to participation of family and friends over the years and the nature of the care and support they have provided and their

approach to issues relating to its provision in the past and so whether and the reasons why it is thought that family or friends have provided and will provide balanced support for P in his or her best interests,

viii) there should be a question that requires the reasons why family and friends support the care package to be set out,

ix) there should be a question directed to the willingness of a family member or friend to be a litigation friend or a Rule 3A representative and their ability to keep the care package under review,

x) there should be questions directed to the suitability of family members or friends for such appointment that direct the author of the answers to particularise the answers by reference to the history of P's care, and

xi) there should be a question on what options have been considered and why the care package advanced has been chosen as the appropriate one.

227. In my view, the last question is particularly important because it should highlight the core of the decision making process and so the reasons why the determinative test is satisfied. It will also clarify the recent chronology of events. It will identify and answer the issues in the case and so conform to the approach that I have been trying to introduce to Court of Protection proceedings for years and which, if followed, can trigger consensus.

228. I accept that the following are matters that can and have given rise to concerns in the consideration of care packages and are helpful to its consideration and assessment by the court:

i) conflicting interests within the same placement (in any one supported living placement there can be a number of service users and the demands of the care package for one service user can impact on the others). So, for example, in the case of NR, her co-service user is understood to be likely to be subject to a similar DOLS authorisation application and there could be competing interests as to how a care package for one impacts on the other,

ii) an analysis of, and so the reasons for, restrictive practices, such as the use of restraints, sleeping arrangements, administration of medication, restrictions on contact with others, as well as changes to care packages. As to which the actual care notes can be very informative and their production would obviate the need for a summary or a lengthy summary, and

iii) information from the actual carers can be of assistance and so a statement from one or more of them would be informative on P's wishes and feelings and any deficiencies or possible changes to the care package.

So it would be an improvement to point out that such information should be covered in answers given or to add specific questions designed to obtain such information.

229. In my view, it would be appropriate to make changes to the existing forms and process to cover all of these points irrespective of whether there is or is not a streamlined process because they will assist in providing the core information.

The position when there is a family member or friend who could act as a litigation friend or a Rule 3A representative.

230. I have already made it clear that in my view such an appointment could be made and often it would be the best way of providing the safeguards to promote the essence of P's Article 5 right.

231. If my views that (a) as a litigation friend they do not need to instruct a solicitor or an independent person, and (b) there is no need for a hearing are correct there is no substantive difference between them giving their reasoned support to the welfare order being made without a hearing, a further hearing or further participation by P as a family member or friend, as a Rule 3A representative or as a litigation friend.

232. In those circumstances a process or exercise that made P a party and appointed such a person as P's litigation friend would be a matter of form rather than substance and so, in my view, would make no difference to the consideration of whether the minimum procedural safeguards had been put in place and had been effective in the given case.

233. I acknowledge that the same can be said about making them a Rule 3A representative but it seems to me that such an appointment would have the advantages that it:

    i) would identify a particular person within the category of "any person who is properly interested in P's welfare" referred to in the present standard term orders and so who can apply for a reconsideration under the order, and

    ii) would give them a status and court directed role to monitor the implementation of the care package for the purposes of providing updating information on the review and the making of any earlier application for its discharge or variation.

    This relates to the third task referred to in paragraph 164(iii) namely keeping the implementation of the care package under review and raising points relating to it and changes in P's behaviour or health, and thus a role equivalent to that of a RPR under the DOLS, which a family member or friend can supply and other litigation friends could, or probably could, not.

234. Whereas, the first two tasks referred to in paragraph 164 namely:

    i) eliciting P's wishes and feelings and making them and the matters mentioned in s. 4(6) of the MCA known to the Court, without causing P any or any unnecessary distress, and

    ii) critically examining from the perspective of P's best interests, and with a detailed knowledge of P, the pros and cons of a care package, and whether it is the least restrictive available option

    identify the information that such a family member needs to provide or confirm to the court to promote the essence of Article 5. This can be done in various ways, for example, by confirming other reports concerning the analysis of the choices and the

reasons why the determinative test is satisfied and the accounts of P's behaviour wishes and feelings, or by giving separate and additional accounts of such matters.

235. In my view, the evidence in the two Suffolk cases shows that these tasks have been performed by family members and that their participation in and approval of the care package, together with their continued active involvement in P's life to promote P's best interests, have provided and will continue to provide the procedural safeguards required by Article 5 and common law fairness.

236. I made interim orders appointing a parent as a Rule 3A representative in both cases. I have considered taking the safety first course of confirming DJ Batten's orders joining P in those cases and making that family member a litigation friend (rather than the Official Solicitor). But I have concluded that I should not do so and that I should make appealable orders in both cases that reflect my conclusions in them that:

i) P does not have to be party, and indeed that

ii) the necessary procedural safeguards are, and the promotion of P's best interests (the substantive issue), are best promoted by not joining P and making a parent P's Rule 3A representative.

Those orders will therefore need to discharge the earlier orders made by DJ Batten joining P and make the appointments of the Rule 3A representatives together with directions on their role.

237. However, if invited to do so, I will consider whether I should discharge the appointment of the Official Solicitor as the litigation friend in one or more of the MJW, the DPW and the NRA cases and appoint a family member in his place with a declaration to the effect that as the litigation friend they can conduct the litigation and have a right of audience and need not instruct a solicitor to provide an appealable order reflecting my views on their appointment as a litigation friend and its effect.

238. Such orders would be relevant on the review of those cases.

239. *Conclusion.* When there is a family member or friend who can act in a balanced way to promote P's best interests they can and should, without making P a party, effectively provide:

i) the independent check referred to by Baroness Hale and the Court of Appeal,

ii) the safeguards that an IMCA would provide under the DOLS if there was no such person in the identification and terms of the care package and the obtaining of the information required by s. 4(6) of the MCA, and

iii) the safeguards that a RPR provides in keeping an authorisation under review without P being a party,

and so making P a party would only be a matter of form and so is unnecessary. However, and in most cases it would be appropriate to make such a family member or friend a Rule 3A representative with a direction to keep the care package under review.

240. This conclusion accords with both of the obiter conclusions in *Re X*, because Black LJ accepts that P need not always be a party if his participation can be reliably secured by other means and, in my view, this is what this approach would achieve in both of the Suffolk cases.

The position when there is no family member or friend who could act as a litigation friend or a Rule 3A representative.

241. This is a more difficult situation but I disagree with the Court of Appeal that the only available solution is to make P a party with the consequence and purpose of having a litigation friend appointed.

242. Rather, in my view if the Court of Protection was to conclude that the information gathered under the present streamlined process (with or without the suggested improvements set out earlier) does not meet the minimum procedural safeguards there are options that are likely to be more effective in providing those safeguards than joining P as a party and appointing a litigation friend, who if he consented to act would be likely to be the Official Solicitor.

243. For the reasons I have given that route to the implementation of procedural safeguards is not fit for purpose and it is unlikely that changes relating to the resources of the Official Solicitor and the funding of legal representatives instructed by him can be achieved to render it fit for purpose in the short term.

244. As appears below, without joining P as a party:

i) a better solution, would be the making of orders for s. 49 reports and the issuing of witness summonses, and

ii) a much better solution, would be that suggested by the Secretary of State (namely the appointment of Rule 3A representatives identified by the local authority) if and when the Secretary of State takes steps to make it one that is available in practice.

245. A problem presented by the change in position of the Official Solicitor is that I have no such test case before me and so I cannot make an order in such a case that can be appealed. In my view, the solution is for another test case or cases that raise the directions to be given in such a case to be listed before me (or another judge) rather than me making an order discharging the joinder of P in all or some of these cases before me where the Official Solicitor has agreed to act. The former course avoids the problems about there being an appealable decision and the latter course cannot ignore what the Official Solicitor and the solicitors he has instructed have done.

246. However I shall make some observations on such a case.

247. Before the Court of Appeal the Secretary of State conceded that a trigger for removal from the streamlined process would be if there was no one appropriate to consult P about his views. This was withdrawn before me on the basis of the submission that an independent Rule 3A representative could be appointed. But, as I have said, on the evidence this is not at present a practically available solution.

248. As the provisions in the DOLS concerning the possible appointment of an IMCA, and the appointment of a RPR, recognise there are obvious advantages that flow from a person or persons not involved in providing the care or treatment in a professional capacity or for remuneration being involved (a) in the decisions made on the terms of the care package, and (b) in keeping it under review.

249. This reflects the important points that:

i) compliance and lack of objection by a person who lacks relevant capacity cannot be equated to a consent for the purposes of Article 5, and

ii) by reason of their lack of capacity the relevant Ps cannot advance or fully advance their interests themselves.

250. To a limited extent the first of these advantages is also recognised by the notes to Annex C in the general information about completing COPDL 10. But, unhelpfully this does not say when it would be appropriate for the consultation with P to be by an IMCA rather than the allocated social worker.

251. An allocated social worker regularly gives independent views, and many social workers who given evidence in an application could be IMCAs for other Ps. But, the lack of input from persons not directly concerned in a professional capacity or for remuneration with the formulation, implementation and commissioning of the care package is a weakness in the streamlined procedure, notwithstanding the dedication and independent thinking of many who are so involved.

252. It is easier to remedy this weakness than it is to provide a safeguard focused on the monitoring and review of the implementation of the care package on the ground. Absent the identification and funding of a resource (other than family and friends) the only way that it has occurred to me that this monitoring safeguard can be addressed by the court is in the frequency of its reviews or by including interim reviews in which it assesses reports.

253. It is common knowledge that things can go wrong and a care package can be inappropriate and as a result the best interests of Ps are not being promoted and they are suffering harm. It is also common knowledge that the views of an outsider looking at matters from the perspective of what is in P's best interests can be helpful and can identify issues and promote changes that are beneficial.

254. Also, as shown by the cases where the Official Solicitor accepted appointment and orders were not made, I accept that the views of someone who has visited P and the placement and spoken to those involved there in giving the care is useful and informative. However, I should add that if the cases before me had been dealt with under the streamlined procedure I would have expected the judge to have picked up the need for the further information so identified in them.

255. But the chances that the court will not pick up the need for such information or other matters will be increased if there is no involvement by someone on the ground who (a) is not professionally or for remuneration involved in giving or commissioning the care package, and who (b) has assessed the care package and seen P and visited the placement.

256. I also agree that the reliance in the streamlined process on P not asking to be a party is problematic because it is not likely that P will have the capacity to weigh up the pros and cons of that decision (see, for example, the *YA* case).

257. Black LJ refers at paragraph 107 to examples where things went wrong. These were referred to in the evidence before me. I asked for further information about them to enable me to assess what procedural safeguards would have avoided them. No such information was given and so I am not in a position to consider whether, and if so when, joining P as a party would have avoided them in those cases. The first relates to the quality of the evidence on capacity and the second to points referred to above in the improvements suggested. On the face of it, there is nothing to suggest that the experience and skills of the Official Solicitor or the solicitor instructed by him (both of which I acknowledge) were important factors. It is also trite to observe, as I have done above, that no process can provide safeguards that guarantee that issues are not missed.

258. In cases where there is no family member or friend who the court can rely on for assistance the investigative issue for the Court of Protection is whether it should make the welfare order sought notwithstanding that the tasks referred to in paragraph 164 (i) and (ii) have not been carried out (or the information relating to them has not been confirmed on the ground) by someone who has seen P and the placement and has sufficient independence from those providing the care package professionally or for remuneration.

259. The best interests assessor might have that independence and their contact with P and the placement and their reasoning may be sufficient to demonstrate that there is no issue relating to the medical evidence on capacity and that the care package satisfies the determinative test. But my understanding is that at present the best interests assessor does not usually have that independence.

260. If that is so, the cases will be fact sensitive but in my view (and although I acknowledge the skill and independence of social workers and providers of care packages) it is unlikely that the court would be able to conclude that the procedural safeguards were satisfied without obtaining further information from someone who is not involved professionally or for remuneration in the provision or commissioning of the care package.

261. However, in contrast to the Court of Appeal and subject to further argument in a test case or cases, I consider that the way in which the Court of Protection can best do this is for it to exercise its investigatory jurisdiction to obtain information through obtaining s. 49 reports or through the issue of a witness summonses. This keeps the matter under the control of the court rather than invoking the necessity of appointing a litigation friend with the problems and delays that history tells us this entails and will entail.

262. I do not for a moment suggest that absent further resources being provided there will not be problems and delays in taking this course. Also, and importantly, I recognise that it would be focused on Article 5(1) and would not provide for monitoring on the ground until it is repeated from time to time for that purpose. But, as I have said, the appointment of a litigation friend will also not provide that monitoring.

263. This returns me to the argument advanced by the Secretary of State that a Rule 3A representative identified by the local authority be appointed.

264. The way in which he advanced this argument shows that he must recognise that if this was a practically available option it would replicate the input that I have decided can be provided by an appropriate family member or friend and so satisfy the procedural safeguards required by Article 5 and common law fairness in non-controversial cases, without joining P as a party.

265. To my mind, that replication is an obvious solution that will provide the necessary safeguards more efficiently and at less expense than either:

    i) the making of orders for s. 49 reports and the issuing of witness summonses perhaps coupled with more frequent reviews, or

    ii) joining P as a party.

266. So I urge the Secretary of State and local authorities to consider urgently, and in any event before a test case or cases of this type are before the court, how this solution can be provided on the ground.

267. If it is not, the likelihood that in such cases the Court of Protection will not provide a procedure that satisfies Article 5 and is fit for purpose, and so will not promote the best interests of the relevant Ps, cannot be ignored and, in my view, alternatives to address this risk (e.g. changes to legal aid or the resources provided to the Official Solicitor or the provision and funding of accredited legal representatives) should be addressed immediately.

Article 14

268. On the assumption that either or both (a) all Ps who are the subject of applications for welfare orders that will authorise a deprivation of liberty, or (b) all Ps who are the subject to such applications that are presented as and shown to be non-controversial, constitute a class with the requisite status for each of the Ps within them for the purposes of Article 14, I have concluded that my assessment of the Requirements and Effects and thus the Procedural Balance, which have led me to conclude that the procedural safeguards required do not found the conclusion reached by the Court of Appeal in *Re X* that those Ps must be made parties to all such applications also founds the result that the COP Rules and a practice of not joining all such Ps as parties to such applications, has an objective and reasonable justification and is not discriminatory.

Part 4

Overall conclusion

269. A brief summary of my conclusions is that:

    (1) P does not have to be a party to all applications for welfare orders sought to authorise, and which when they are made will authorise, a deprivation of P's liberty caused by the implementation of the care package on which the welfare order is based.

(2) In two of the test cases before me I have made orders that reflect that conclusion and my conclusion that the procedural safeguards required by Article 5 are (and are best) provided in those cases by appointing a parent of P as P's Rule 3A representative. As such, that parent as a continuation of the dedicated and devoted support given by P's family to P and directed to promoting P's best interests, in a balanced way, can best provide (a) the court with the information it requires about the care package and P, and (b) P's participation in the proceedings. Also, that parent can and in my view will monitor the implementation of the care plan and so initiate any challenge to it or review of it that the parent considers should be made in P's best interests.

(3) I do not have a test case before me in which (a) P has not been joined as a party and the Official Solicitor has not agreed to act as P's litigation friend, and (b) the appointment of a family member or friend as P's Rule 3A representative without joining P as a party is not an available option. Such a test case or cases should be listed for hearing.

(4) In contrast to the Court of Appeal in *Re X* and subject to further argument in such a test case or cases, I consider that the way in which the Court of Protection can at present best obtain further information and P's participation in such cases is for it to exercise its investigatory jurisdiction to obtain information through obtaining s. 49 reports or through the issue of a witness summonses. This keeps the matter under the control of the court rather than invoking the necessity of appointing a litigation friend with the problems and delays that history tells us this entails and will entail and I have concluded is, or shortly will be, not fit for purpose.

(5) I do not for a moment suggest that absent further resources being provided there will not be problems and delays in taking the course referred to in paragraph (4). Also, and importantly, I recognise that it would be focused on Article 5(1) and would not provide for monitoring on the ground until it is repeated from time to time for that purpose. But, the appointment of a litigation friend will also not provide that monitoring.

(6) In such cases the argument advanced by the Secretary of State before me that a Rule 3A representative identified by the local authority be appointed shows that if this was a practically available option it would replicate the input that I have decided can be provided by an appropriate family member or friend and so satisfy the procedural safeguards required by Article 5 and common law fairness in non-controversial cases without joining P as a party.

(7) That replication is an obvious solution that will provide the necessary safeguards more efficiently and at less expense than either

i. the making of orders for s. 49 reports and the issuing of witness summonses perhaps coupled with more frequent reviews, or

ii. joining P as a party.

(8) So I urge the Secretary of State and local authorities to consider urgently, and in any event before a test case or cases of this type are before the court, how this solution can be provided on the ground.