

## INTRODUCTION

Prior to the Mental Capacity Act 2005 few lawyers took an interest in the welfare of people whose mental capacity was impaired by mental health issues, learning disability or acquired brain injury. When I spoke at the initial Jordans seminars on this legislation attendances were small and largely restricted to those already working in the field. That has changed and in 2011 and 2012 these seminars have been oversubscribed. Practising barristers and solicitors, care and health professionals, and academics are all anxious to enhance their knowledge. This is undoubtedly a growth area but not without its problems.

The new Court of Protection continues to grow and mature and in the process is involving a wider range of lawyers throughout the country. The regional presence is providing a valuable service to those individuals and families who become involved in the uncertainties or disputes that result from adult incapacity. It was inevitable that time would be needed for the new court to bed down: procedures had to be developed, staff trained and a different culture acquired. Judges had to be appointed and gain the knowledge and skills required to address the new jurisdiction. The initial take-up rate was lower than might have been expected, but practitioners also had to absorb the new process and develop their marketing or await clients who did not know what they could expect. Despite these challenges the property and affairs work of the former Court of Protection had to be continued under the new regime, and less than ten per cent of new applications related to personal welfare decisions.

There is a tension between the desire of most families for a simple procedure to resolve disputes and the need to comply with human rights legislation which is reflected in the difference between the 'small claims' approach familiar to district judges and a 'Rolls Royce' trial in the High Court. High profile medical treatment and appeals on interpretation of the law clearly need the latter and there will always be those who pursue their viewpoint to the bitter end, but most want a speedy and inexpensive local resolution to the dispute or uncertainty by an independent and impartial suitably experienced judge. Resolving power struggles within dysfunctional families is part of the daily fare of district and circuit judges who deal with children cases and the nominated regional judges can be relied upon to dispose of the bulk of the cases that need an attended hearing.

The Deprivation of Liberty Safeguards (DoLS) have since been engrafted on the legislation and dominate those High Court Judges who sit in the Court of Protection. I view this as a distraction that the Court could well do without. The safeguards are an administrative nightmare that are needed to prevent the unjustified detention of some adults in breach of their human rights but have little to offer those who clearly need supervision for their own safety. The emphasis for them should be on quality care which enhances their human rights but the Court appears impotent to address inadequate provision. The search for 'best interests' may be restricted to that which is available and there is little that can be done if the only care package on offer does not seem satisfactory.

An unexpected growth area is the re-emergence of the inherent jurisdiction of the High Court in areas of lack of capacity not within the scope of this legislation. A new chapter deals with this and the cross-over with administrative law which will become more important as public authorities decline to put options on the table.

Contrary to the view of many lawyers the Mental Capacity Act 2005 is not just a Court of Protection issue but permeates all fields of law and practice. The core group of lawyers who pressed for this legislation 25 years ago has grown exponentially and it is reassuring to see the commitment of so many young lawyers. There are welcome developments such as the growth of organizations such as Solicitors for the Elderly which focus on client groups rather than traditional fields of law. The emphasis in training judges is now on judicial skills and diversity rather than

law and procedure. I would like to see more training of this nature at our law schools to help develop a new legal culture that takes into account the vulnerabilities and needs of individuals who as full members of our society encounter its legal system.

My own retirement approaches after 50 years with the law as taskmaster. As a solicitor I dealt with elderly and vulnerable people, and as a district judge I have worked at the coal face where justice is delivered to ordinary people in often extra-ordinary situations. Our son's handicapped life and premature death within the 'Bournemouth Gap' motivated me to address the legal needs of people whose vulnerabilities were too often overlooked. Not only those with apparent physical and mental disabilities for whom the need for some compassion or adjustment was obvious, but also those with communication difficulties, educational deficits and social deprivation. I constantly remind myself that it is the strongest case that should succeed and not the strongest litigant. There have been great advances since I wrote *Mental Handicap and the Law* some 20 years ago. We now have a policy of community care, discrimination legislation which includes disability, a Human Rights Act and, of course, the Mental Capacity Act 2005. It is all fertile ground for lawyers, but without adequate funding the dream does not become a reality. In the present financial climate the caring new world appears to be receding, yet with less support there is a greater need for protection.

In this second edition we have said goodbye to Laurence Oates, the former Official Solicitor, whose previous contribution was invaluable. He has been succeeded by Alex Ruck Keene from Thirty Nine Essex Street Chambers who practices extensively in this area. We have been joined by Marc Marin, a judicial colleague who is also nominated to sit in the Court of Protection. I wish to thank the contributors for their dedication and also James Beck from the Office of the Official Solicitor for his support, and Joan Goulbourn from the Office of the Public Guardian for her oversight of relevant material.

We have endeavoured to state the law as at 1 March 2012.

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Grange-over-Sands

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