



PUMP COURT

CHAMBERS

**Court of Protection and  
Mental Capacity Act 2005 Update 2020**

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- The problems encountered
- The regulations
- Assessments
- Contact
- A solution
- Residence

# Regulations

- Put simply, these change and have changed at each government review
- The guidance to care homes, and to individuals also changes
- Advice: when each case is presented – check for the up to date position but bear in mind the fundamental points about the vulnerability of the people with whom we are involved balanced against the risk to them and to others.

- Is there a capacity assessment?
- Is it satisfactory?
- Who can undertake the assessment and how?
- This is how Hayden J described the issues (as quoted in *BP – see below*)
- 37. Over the last few weeks I have had cause to issue a number of guidance documents to address a rapidly changing landscape. On 19th March **2020** I recognised the reality that capacity assessments would, of necessity, for the time being require to be undertaken remotely. There is simply no alternative to this, though its general undesirability is manifest. Assessments in these circumstances will require vigilant scrutiny. This said, with careful and sensitive expertise, it should be possible to provide sufficient information. In response to an identified question, answered with the benefit of consultation with the profession I was able, in the guidance document, to state the following:

*'Can capacity assessments be undertaken by video when it is established that P is happy to do so and can be "seen" alone?'*

- *Suggested solution: In principle, yes. The assessor will need to make clear exactly what the basis of the assessment is (i.e. video access, review of records, interviews with others, etc.) Whether such evidence is sufficient will then be determined on a case by case basis. It is noted that GPs are rapidly gaining expertise in conducting consultations by video and may readily adopt similar practices for assessments. Careful consideration will need to be given to P being adequately supported, for example by being accompanied by a "trusted person." These considerations could and should be addressed when the video arrangements are settled. It should always be borne in mind that the arrangements made should be those which, having regard to the circumstances, are most likely to assist P in achieving capacity.'*

# Assessments (continued)

- Are you prepared to proceed on the basis of the existing report, pending a more detailed assessment?
- If so, the scope of any agreement or declaration about any lack of capacity ought to be limited
- Other assessments: ingenuity needed! Can OT or more general assessments be undertaken by video e.g. a tour of P's home?
- There remains the issue of best interests assessments, including DOLS, if professionals cannot visit.

- I hardly need to say that this is one of the most devastating results of the COVID restrictions here and elsewhere.
- *BP v Surrey [2020] EWCOP 17* is worth reading because:
  - a) Hayden J reviews the early steps taken by the government to implement “lockdown” and the guidance given, at that time, to care homes.
  - b) Hayden J also reviews the convention duties of the State in respect of deprivation of liberty and the right to a family life (see paragraphs 13-23 and 27-31)

The facts of the case were that an application was made by BP’s daughter acting as his litigation friend seeking a declaration that it was in BP’s best interests to leave his care home and be cared for at home.

# Contact continued

BP had multiple difficulties both physical and cognitive. Hayden J described the history of assessments for BP and his recent care. He then goes on to describe the effect on BP of the changes on 20<sup>th</sup> March and 23<sup>rd</sup> March 2020 as “seismic”.

It is clear that during the hearing there were discussions about solutions as described:



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36. The plan advanced by FP was that her father should come and live with her. She has been self-isolating so as to prepare for his return. The arrangement is that Mrs RP would move out, in light of the safeguarding concerns I have referred to above and that FP would care for her father alone. Ideally, care support would reinforce FP's care but, all recognised that, in the present circumstances, this could not be secured. FP realistically acknowledged that her father is prone to what is termed "misadventure" and should be watched vigilantly. Though she could not quite bring herself to acknowledge it, she recognised that her offer of 24 hour per day single handed care for her father is not, in truth, a realistic option. FP said, *"everyone is a loser in this situation!"*. Both in and out of court, which in this case meant on or off Skype recording, efforts were made to explore the possibilities for contact. It is not necessary for me to work through them in this judgment. Their significance is that the care staff and the family, with the help of their advocates, began to absorb some of the stark realities of their present situation. A great deal of effort was made to see whether it might be possible to unlock a fire door and provide for a visit at a suitably safe distance. In the end and for a variety of reasons that was not possible. The plan that was ultimately put together provides for BP's education in to the world of Skype with creative use of a communication board and the exploration of concurrent instant messaging. Additionally, the family can, by arrangement, go to BP's bedroom window which is on the ground floor and wave to him and use the communication board. All this will require time, effort and some creativity. I am clear that there is mutual resolve by all concerned. When I asked FP what she thought her father would want if he was addressing this question objectively with his full faculties intact, she unhesitatingly told me that the last thing he would want would be to burden her or her family. Approaching this challenging situation from that perspective appeared to give

# A solution

- The Magic Bubble

France has been in lockdown in much the same way as the UK. Families in France have faced the same problems in relation to the care of and contact with their relatives

The relaxation of the need to isolate may mean that visits can start again, especially if the care home has adequate room to allow for distance to be maintained.

However, for many conversation at 2 metres distance may not mean much. An innovative solution has been adopted at a care home in Baubourg. A tent with two entrances has been erected in the garden. The residents go in one entrance and the family (including pets in the video) in the other. There is a plastic sheet in the middle which enables everyone to hold hands. Everything is sanitised before and after.

The manager of the care home pointed out that for her residents with Alzheimer's touch is "essential".

## Things to ask

- What assessments are there?
- How can any move be managed
- As with every case, there has to be a workable alternative

# Habitual residence

- Important concept for the provision of care and assessments
- Important given the number of “expats” who may now wish to return home to the UK
- The recent case is *QD (Habitual Residence) (No.2) [2020] EWCOP 14 (also as TD and anor v KD 2020 EWCOP 14)*
- This is a further hearing following the hearing at the end of 2019 reported as *QD (Habitual Residence) [2019] EWCOP 56*

# Fluctuating capacity

- Quite a lot of judicial disagreement
- The issue is that any given time P may lack capacity, but may regain it or vice versa.
- See *GSTT and SLAM v R [2020] EWCOP 4*
- P in this case had capacity at the time of the hearing but it was feared that anxiety might cause her to be unable to lose capacity. She was about to give birth. The medical and expert evidence showed that there was a risk that she would lose capacity during labour.
- Hayden J looked at his own decisions and those of other High Court Judges.
- He also looked at the statutory provisions and concluded:



# Fluctuating capacity

36. Any declaration relating to an act '**yet to be done**' must, it seems to me, contemplate a factual scenario occurring at some future point. It does not strain the wording of this provision, in any way, to extrapolate that it is apt to apply to circumstances which are foreseeable as well as to those which are current. There is no need at all to diverge from the plain language of the section. In making a declaration that is contingent upon a person losing capacity in the future, the Court is doing no more than emphasising that the anticipated relief will be lawful when and only when P becomes incapacitous. It is at that stage that the full protective regime of the MCA is activated, not before.

# Appointment of Welfare Deputies

- See *Mottram, Lawson and Hopton [2019] EWCOP 22*
- This case shows the change in practice in the COP and attitudes generally
- When the MCA was being considered by Parliament, the Select Committee was told that it was thought that there would be little need for welfare deputies.
- That reflected the “old COP” – mostly dealing with property and affairs. There has been a step change in the issues dealt with by judges of the COP. This case – which says that the appointment of welfare deputies should not be unusual, reflects all those changes