

Public Law Newsletter

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Yesterday's *Times* reports an order from Sir Nicholas Wall that a mentally incapacitated adult must have a hysterectomy against her wishes. These are the sort of issues handled by Hardwicke's Court of Protection Team. In this edition, **Barbara Hewson**, one of the team members, discusses publicity in the Court of Protection and other closed proceedings. **David Lawson** sets out the progress of the new Upper Tribunal in education claims. If you have any questions or suggestions for future editions please contact Louise Poppelwell on louise.poppelwell@hardwicke.co.uk or 020 7242 2523.

This month we have been...

- **Barbara Hewson** appeared in the first Court of Protection hearing with journalists present
- **John Friel** appeared in the Court of Appeal responding to an appeal about provision for SEN
- **Andy Lane** has been advising social landlords on the duty of care for 16-18 year olds
- **Clive Rawlings** and **David Lawson** have advised where schools have made multiple offers in error and also where LAs are trying to increase admission numbers to popular schools in response to the increase in applications in some London boroughs this year
- We have maintained our busy seminar schedule. On the 18th of May, Hardwicke hosted the *LGG conference on SEN*. The speakers included **Clive Rawlings**, **Fiona Scolding**, **John McKendrick**, **David Lawson** and **Robin Jacobs**. On 19 May we hosted *Undertakings, Injunctions & Committals: getting it right* where **Brendan Mullee** and **Morayo Fagborun-Bennett** were speakers. **David Lawson** spoke to the Independent Schools Council conference.

Forthcoming Seminars

- **Kerry Bretherton** is speaking at the annual SHLA conference in Birmingham on 11 June. **Deborah Hay**, **Fiona Scolding** and **David Lawson** are speaking at a *CLT conference on SEN* on 23 June which will be chaired by **John Friel**. **Kerry Bretherton** and **John McKendrick** are speaking at the *CLT conference on care for vulnerable adults* on 29 September 2010.

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Privacy and the Court of Protection

Barbara Hewson comments on *A. v International News & Media*, *The Times*, 30 April 2010, in which she appeared as junior counsel for A.

On Friday 14 May, the newspapers reported on a Court of Protection case. They gave the name of the parties and wrote about the circumstances underlying the application and the outcome. How was this possible?

Anyone who has been to the Court of Protection in Archway knows that it is not accessible to the public! It is on the 11th floor and only parties and representatives can get up there - if escorted in a lift by court staff. The judges sit behind locked doors.

This position is backed up by the Rules. CoP Rule 90(1) sets out the general rule that the Court sits in private. Under CoP Rule 90(3), the Court may make an order authorising a person to attend the hearing; or excluding any person. CoP Rule 91(3) empowers the Court to make reporting restrictions. CoP Rule 92 empowers the Court to hold hearings in public whilst retaining the power to impose reporting restrictions. CoP Practice Direction 13A also deals with reporting restrictions.

In June 2009, the *Independent* applied to attend the hearing concerning A. Despite the CoP having been in existence for over a century, and the new CoP for some two years, the media had never made such an application before. The applications raised some familiar arguments about the interplay between Articles 8 and 10 of the European Convention, the right to a private and family life and the right to free speech.

A's legal team argued that the CoP only dealt with private, personal and financial affairs for disabled people who lacked the mental capacity to do so themselves. These were matters which, if someone had capacity, would be entirely private. The media argued that A's disabilities were already well-known and there was a public interest in reporting the proceedings about him.

Mr Justice Hedley decided that the media had shown "good reason." Firstly, there was a lot of information about A in the public domain already. Secondly, the media should be entitled to report "that which answers the legitimate questions of a reasonable person who knows what is presently within the public domain." That included publishing A's name, the nature of his disability, his reliance on others and the outcome of the CoP proceedings.

However, the Judge stressed that "the nature of his earnings, the details of his care, the nature of family discussions about these matters, the question of medical treatment and the criteria the family wish to employ ... in relation to decisions about public appearances should all enjoy privacy and not be reportable." A appealed but the Court of Appeal upheld the first instance

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decision as a valid exercise of discretion.

As parties to high-profile divorces have discovered, perhaps the only way to exclude the media altogether is to undertake private mediation. However, most incapacitated adults are not celebrities, so they would have a stronger case for saying that their affairs should be managed by the Court sitting in private. If there is some important point of legal principle involved, that can be put in the public domain by the publication of a suitably anonymised judgment.

What if a party to CoP proceedings seeks to involve the media? Careful consideration would need to be given as to whether “good reason” exists for letting the media in. In cases where the state is making allegations of abuse against private carers, for example, it might be argued that the role of the press as “public watchdog” might justify them being given access to the hearing, albeit subject to some form of reporting restrictions, to protect the privacy of the incapacitated person.

Barbara Hewson was also instructed by Irwin Mitchell for DP in the underlying CoP application.

The Progress of the Upper Tribunal

David Lawson discusses the progress of the Upper Tribunal in regard to education claims.

The most obvious difference about the Upper Tribunal (UT) for the advocate is the most simple – there is no need to stand. Indeed it is discouraged, although not quite disallowed. This makes the UT look and feel more informal which is probably the dominant theme in the tribunal.

In practice the UT is more willing than the High Court to consider the educational detail and the conduct of the SENDIST hearing (which we now need to call the FTT). It is ready, where the appeal does not depend on educational judgment, to re-take decisions. It takes a more investigatory role and the Judges will direct the parties about the sort of evidence they want to hear.

Permission is needed to appeal to the UT. It is vital to realise the effects that this system has. Different parts of an appeal often stand or fall together. In one case parents were given permission to appeal the evidence used for the transport issues but not the appropriateness of the schools (*MH v. Notts* [2009] UKUT 178). This effectively determined the appeal against them since transport issues alone could not be considered in an SEN appeal.

The UT has fleshed out the extent of its jurisdiction. The UT has statutory power to hear judicial reviews. It has decided that this includes the power to order interim relief but that it would

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exercise this power only rarely (*JW v. Learning Trust* [2009] UKUT 197).

The opposite of trying to get earlier and more provision is trying to delay or reduce provision. The UT has power in its rules to suspend the effect of an FTT decision but there is no case on this power yet. The other jurisdictional issue which has been considered is the power to consider appeals from interim decisions, like FTT directions decisions. The UT has decided that these can be appealed to the UT (*LM v. London Borough of Lewisham* [2009] UKUT 204).

George Pulman QC	1971 (1989)
John Friel	1974
Charles Calvert	1975
Barbara Hewson	1985
Karl King	1985
Deborah Hay	1991
Kerry Bretherton	1992
Arthur Moore	1992
Maggie Bloom	1994
Clive Rawlings	1994
Brendan Mullee	1996
Fiona Scolding	1996
Alison Meacher	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah Malik	1999
John McKendrick	1999
David Lawson	2000
Shazia Akhtar	2001
Dean Underwood	2002
Diane McBrinn	2002
Sarah Venn	2002
Morayo Fagborun Bennett	2004
Ajmal Azam	2006
Robin Jacobs	2006
Laura Tweedy	2007

The UT has continued the trend of later High Court decisions to condemn catch phrases like “waking day curriculum” as “unhelpful” (*Hampshire CC v. JP* [2009] UKUT 239). The appeal courts do not support reasoning that out of school provision is educational just because it helps to embed what is learnt in school. This is true of all provision.

It is hard to argue against the more fluid and flexible approach which the UT is taking. The UT has encouraged the FTT to give weight to the evidence of a wider range of witnesses (*MW v. Halton BC* [2010] UKUT 34). The approach can be seen in *HJ v. London Borough of Brent* [2010] UKUT 15. The unrepresented parents appealed when the FTT refused to look at a video of their son because it had been served late. The UT analysed the legal questions but then commented that it might have been simpler for the FTT just to look at the video not least to give the unrepresented parents the clear message that their son’s interests had been at the centre of proceedings. That is a good example of the new system at its best – and its most informal.

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