Family Law Reports/2013/Volume2/DL v A Local Authority - [2013] 2 FLR 511

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DL v A Local Authority

[2012] EWCA Civ 253

Court of Appeal

Maurice Kay, McFarlane and Davis LJJ

28 March 2012

Vulnerable adult - Elderly couple retained capacity for the purposes of the MCA 2005 - Local authority claimed they lacked capacity by reason of duress of undue influence by their son - Whether the inherent jurisdiction of the High Court in relation to vulnerable adults survived the MCA 2005

The local authority sought to invoke the inherent jurisdiction of the High Court in respect of an elderly couple whom they claimed lacked capacity by reason of duress or undue influence exerted by their son. The 90-year-old mother was physically disabled and, during proceedings, the 85-year-old father was assessed to lack capacity within the terms of the Mental Capacity Act 2005 (MCA 2005) and, therefore, his case was now proceeding under the jurisdiction of the Court of Protection. The local authority case was that the son, with whom the couple lived, was aggressive and physically violent towards his parents and had been attempting to coerce them into signing ownership of the property over to him. The local authority, therefore, sought to take measures to protect the couple from their son despite the fact that, at the outset of the proceedings, they both retained capacity for the purposes of the MCA 2005 to make their own decisions. In the High Court the judge determined that the inherent jurisdiction to protect adults survived the passing of the MCA 2005 and that the court, therefore, had jurisdiction to make orders in respect of the couple notwithstanding that one or both of them continued to retain capacity under the terms of the MCA 2005. The son appealed. The appeal focused on a single point of law: the extent to which the inherent jurisdiction of the High Court may be deployed following the implementation of the MCA 2005 for the protection of adults perceived to be vulnerable.

Held - dismissing the appeal -

(1) Nothing in the MCA 2005 made express provision with respect to individuals who may lack capacity for a reason other than an impairment of, or disturbance in the functioning of the mind or brain. In contrast to the Children Act 1989 and the Family Law Act 1996 neither was there any express reference to the inherent jurisdiction of the High Court. It would have been open to Parliament to include a provision either permitting or restricting the use of the inherent jurisdiction in cases relating to the capacity to make decisions which were not within the MCA 2005. In the absence of any express provision, the clear implication was that if there were matters outside the statutory scheme to which the inherent jurisdiction applied, then that jurisdiction continued to be available (see paras [58]-[61]).

(2) There was a sound and strong public policy justification for the jurisdiction to remain. The concept of 'elder abuse' was all too easy to contemplate and the jurisdiction was in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy had been compromised by a reason other than mental incapacity (see paras [54], [63]).

(3) The inherent jurisdiction should not be defined so as to limit or constrict the groups of 'vulnerable adults' for whose benefit it may be deployed (see para [63]).

(4) The use of the inherent jurisdiction in this context was compatible with Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) in just the same manner as the MCA 2005 was compatible. Any interference with the right to respect for an individual's private or family life was justified to protect his health and/or to protect his right to enjoy his Art 8 rights as he may choose without the undue influence (or other adverse intervention)

of a third party. Any orders made by the court in a particular case must be only those which were necessary and proportionate to the facts of that case, again in like manner to the approach under the MCA 2005 (see para [66]).

(5) The facilitative, rather than dictatorial, approach of the court described in *LBL v RYJ and VJ* [2010] EWHC 2665 (COP) was entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhanced, rather than breached, their European Convention Art 8 rights (see para [67]).

(6) The exercise of the inherent jurisdiction was not limited to providing interim relief designed to permit the vulnerable individual the 'space' to make decisions for themselves, removed from any alleged source of undue influence. Whilst such interim provision may be of benefit in any given case, it did not represent the totality of the High Court's inherent powers (see para [68]).

Statutory provisions considered

Children Act 1989, s 100

Family Law Act 1996, s 63R(1), Part 4A

Housing Act 1996, s 153A

Human Rights Act 1998

Mental Capacity Act 2005, ss 2(1), 4, 43, 44, 48

Forced Marriage (Civil Protection) Act 2007

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 3, 8

Cases referred to in judgment

A and C (Equality and Human Rights Commission Intervening), Re [2010] EWHC 978 (Fam), [2010] 2 FLR 1363, FD

A Local Authority v Mrs A (Test for Capacity as to Contraception) [2010] EWHC 1549 (COP), [2011] Fam

61, [2010] COPLR Con Vol 138, [2011] 1 FLR 26, CP

B (Consent to Treatment: Capacity), Re [2002] EWHC 429 (Fam), [2002] 1 FLR 1090, [2002] 2 All ER 449, FD

Black v Forsey 1988 SC (HL) 28, 1988 SLT 572, HL

City of Westminster v IC (By His Friend the Official Solicitor) and KC and NN [2008] EWCA Civ 198, [2009] Fam 11, [2009] 2 WLR 185, [2008] 2 FLR 267, CA

F (Mental Patient: Sterilisation), Re [1990] 2 AC 1, [1989] 2 WLR 1025, [1989] 2 FLR 376, [1989] 2 All ER 545, HL

G (An Adult) (Mental Capacity: Court's Jurisdiction), Re [2004] EWHC 2222 (Fam), [2004] All ER (D) 33 (Oct), FD

LBL v RYJ and VJ [2010] EWHC 2665 (COP), [2010] COPLR Con Vol 795, [2011] 1 FLR 1279, COP

Local Authority (Inquiry: Restraint on Publication), Re [2003] EWHC 2746 (Fam), [2004] Fam 96, [2004] 2 WLR 926, [2004] 1 FLR 541, [2004] 1 All ER 480, FD

MM, Re, Local Authority X v MM and Another [2007] EWHC 2003 (Fam). [2009] 1 FLR 443, FD

S v McC: *W v W* [1972] AC 25, HL

SA (Vulnerable Adult with Capacity: Marriage), Re [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, FD

Shiloh Spinners Ltd v Harding [1973] AC 691, [1973] 2 WLR 28, [1973] 1 All ER 90, HL

Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Others [1985] AC 871, [1985] 2 WLR 480, [1985] 1 All ER 643, HL

SK (An Adult) (Forced Marriage: Appropriate Relief), Re [2004] EWHC 3202 (Fam), [2006] 1 WLR 81, [2005] 3 All ER 421 sub nom *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2005] 2 FLR 230, FD

SK, Re; A London Borough Council v KS and LU [2008] EWHC 636 (Fam), [2008] 2 FLR 720, FD

T (Adult: Refusal of Treatment), Re [1993] Fam 95, [1992] 3 WLR 782, [1992] 2 FLR 458, [1992] 4 All ER 649, CA

Nathalie Lieven QC and Alex Durance for the appellant

Paul Bowen and Alison Pickup for the respondent

Cur adv vult

28 March 2012

MCFARLANE LJ:

[1] The focus of this appeal is a single point of law. The point relates to the extent to which the inherent jurisdiction of the High Court may be deployed following the implementation of the Mental Capacity Act 2005 (MCA 2005) for the protection of adults who are perceived to be vulnerable. The issue does not concern those cases that fall within the MCA 2005 and which proceed in the Court of Protection. The question for consideration is whether, despite the extensive territory now occupied by the MCA 2005, a jurisdictional hinterland exists outside its borders to deal with cases of 'vulnerable adults' who fall outside that Act and which are determined under the inherent jurisdiction.

[2] It is common ground that the High Court exercised the inherent jurisdiction in relation to adults prior to the commencement of the MCA 2005 in 2007. The appellant argues that the MCA 2005 and its supporting Code of Practice represent comprehensive statutory provision for the protection of adults and that Parliament intended that it would be impermissible for the High Court to exercise any jurisdiction in relation to the care and protection of adults who fall outside the provisions of the 2005 Act.

[3] The point is of real importance in the present case where, at the start of the proceedings, the two elderly adults concerned plainly had mental capacity to make decisions for themselves. The MCA 2005 s 2(1) limits the compass of that legislation to a person who lacks capacity in relation to a matter because, at the material time, 'he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'. In the present case the local authority, who seek to invoke the inherent jurisdiction for the protection of these two elderly people, claim that the couple lack capacity as a result of undue influence and duress brought to bear upon them by their son, DL.

[4] This point of law fell to be determined as a preliminary issue in the proceedings and, on 19 April 2011, Theis J gave judgment to the effect that the High Court's inherent jurisdiction to protect adults had survived the passing of the 2005 Act and that the court, therefore, had jurisdiction to make orders with respect to DL's parents in this case notwithstanding that one or both of them continued to retain capacity under the terms of the MCA 2005.

[5] By the time the matter fell to be determined, sadly GRL's mental wellbeing had deteriorated to the extent that it was agreed that he lacked capacity within the meaning of the MCA 2005 and his case, therefore, proceeds within the statutory scheme in the Court of Protection before Theis J sitting as a judge of that court.

[6] The substantive order made by Theis J included a wide-ranging interim injunction order made under the inherent jurisdiction (with respect to ML) and under the MCA 2005, s 48 (with respect to GRL) restraining DL's behaviour towards his parents, care staff and other professionals.

[2013] 2 FLR 511 at 514

[7] On 29 June 2011 Hughes LJ granted DL permission to appeal to this court. The appeal, which we have now heard, was litigated between DL and the local authority, with no contribution on behalf of DL's parents.

[8] At the conclusion of the oral hearing, we announced our decision which was that the argument on behalf of DL had failed, the conclusion reached by Theis J was correct, the inherent jurisdiction for the protection of adults survived the passing of the MCA 2005 and the court, therefore, had jurisdiction to move forward and consider whether the facts in this case justified its deployment for the protection of DL's parents, ML and/or GRL. As a result, and in order to allow the proceedings to progress, we announced our intention to dismiss the appeal. The purpose of this judgment is, therefore, to spell out the reasoning behind our decision.

The assumed facts

[9] For the purposes of the determination of the legal point the parties have helpfully agreed a set of 'assumed facts' which formed the basis of the case before Theis J and before this court. I set them out below in full but in doing so make it clear that these assumed facts are not agreed by DL as being true and are, in fact, in the main denied by him.

> 'Mr and Mrs L are an elderly married couple. He is 85: she is 90. They live with their son, DL, (who is in his fifties) in a house which is owned by Mr L. Mrs L is physically disabled. She receives support by way of direct payments and twice daily visits from health and social care professionals commissioned and paid for by the claimant local authority under its statutory community care duties. At the time that these proceedings were commenced, the local authority accepts, for the purpose of this hearing, that neither Mr nor Mrs L (nor, for that matter, DL) was incapable, by reason of any impairment of or disturbance in the functioning of the mind or brain, of managing their own affairs, and, in particular, both Mr and Mrs L appeared capable of deciding what their relationship with their son should be and, in particular, whether he should continue to live under the same roof as themselves. Mr L has, however, been recently assessed as lacking capacity to make his own decisions and a decision is soon to be reached whether he has requisite capacity to litigate. Mr L is no longer residing at the family home and it is not known if or when he will return to the family home. Nevertheless the need to resolve the preliminary issue remains and for that purpose it is assumed that both ML and GRL have capacity as to residence and contact with DL for the purposes of s 2 of the Mental Capacity Act 2005.
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> The local authority is concerned about DL's alleged conduct towards his parents, which is said to be aggressive, and which, on occasions, has resulted, it is said, in physical violence by DL towards his parents. The local authority has documented incidents going back to 2005 which, it says, chronicle DL's behaviour and which include physical assaults, verbal threats, controlling where and when his parents may move in the house, preventing them from leaving the house, and controlling who may visit them, and the terms upon which they may visit them, including health and social care professionals providing care and

> support for Mrs L. There have also been consistent reports that DL is seeking to coerce Mr L into transferring the ownership of the house into DL's name and that he has also placed considerable pressure on both his parents to have Mrs L moved into a care home against her wishes.
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> The local authority has brought these proceedings to protect Mr and Mrs L from DL. It has considered (and rejected) using the criminal law. It has considered (and rejected) an application to the Court of Protection under the Mental Capacity Act 2005 (MCA 2005). It has considered (and rejected) an application for an ASBO (an anti-social behaviour order) under the Crime and Disorder Act 1998. It has considered (and rejected) an application under section 153A of the

Housing Act 1996.

The local authority acknowledges that, on the information currently available to it, neither Mr nor Mrs L lacks the capacity to take proceedings on behalf of themselves or each other by reason of any impairment of or disturbance in the functioning of the mind or brain. The local authority recognises that Mrs L, in particular, wishes to preserve her relationship with DL and does not want any proceedings taken against him. Furthermore, the local authority acknowledges that whilst Mr L is more critical of DL's behaviour, it remains unclear as to whether he, Mr L, would wish to take steps in opposition to his wife's wishes.

Interim injunctions were made by the President, Wall LJ, on 12 October 2010, ex parte and without notice, restraining the First Defendant from:

(i) assaulting or threatening to assault GRL or ML;

(ii) preventing GRL or ML from having contact with friends and family members;

(iii) seeking to persuade or coerce GRL into transferring ownership of the current family home;

(iv) seeking to persuade or coerce ML into moving into a care home or nursing home;

(v) engaging in behaviour towards GRL or ML that is otherwise degrading or coercive, including (but not limited to): stipulating which rooms in the house GRL or ML can use; preventing GRL or ML from using household appliances, including the washing-machine; "punishing" GRL or ML, for example, by making GRL write "lines"; shouting or otherwise behaving in an aggressive or intimidating manner towards them;

(vi) giving orders to care staff;

(vii) interfering in the provision of care and support to ML;

(viii) refusing access to health and social care professionals;

(ix) behaving in an aggressive and/or confrontational manner to care staff and care managers.

The President also made a *Harbin v Masterman* order inviting the Official Solicitor to investigate ML and GRL's true wishes and to ascertain whether they are operating under the influence of DL in relation to the contact that they have with him.

The Official Solicitor appointed an Independent Social Work Expert, Jeff Fowler, to visit and interview GRL and ML which took place on 10 November 2010 and he produced a written report dated 13 November 2010. Mr Fowler invited DL to be interviewed during the visit which

> DL acceded to, however the appointment could not be re-arranged to suit DL's availability and the assessment proceeded without DL (para 2.1)). Mr Fowler concluded (without the benefit of any assessment of DL's account or evidence), so far as is material, that both GRL and ML are unduly influenced by DL to an extent that their capacity (in the SA sense) to make balanced and considered decisions is compromised or prevented (paras 3.19-3.26). However it was recorded that DL's influence is not so strong that ML is unable to give instructions which reflect her own wishes although they are subject to DL's influence (3.29) and that GRL had resisted pressure from DL (3.30). It was further recorded that neither DL nor GRL meet the criteria set down in s 4 of the MCA 2005 and that they both understand advice which is given to them (3.28). In order for both GLR and ML to regain capacity (in the SA sense) DL must stop behaving in an abusive manner towards GRL, in particular. His report concludes (para 3.34):
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> "In any event DL must change the way he has behaved towards his parents as this has compromised the extent to which they have the capacity to make all decisions in respect of their lifestyle, living arrangements, personal and inter personal relationships."
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> Thus, while the claimant accepts (for the purposes of this preliminary issue) that ML and GRL are not suffering from any impairment or disturbance of functioning of the mind or brain and therefore have capacity to decide as to residence and contact with DL for the purposes of the 2005 Act, Mr. Fowler's preliminary evidence suggests that they have or may have been deprived of capacity to decide those issues due to the undue influence of DL. However it is acknowledged that further evidence will be necessary before this issue can be determined conclusively'.

The legal issue

[10] Both sides agree that Theis J correctly framed the legal issue at para [7] of her judgment in these terms:

> 'The central issue in this case is whether, and to what extent, the court's inherent jurisdiction is available to make declarations and, if necessary, put protective measures in place in relation to vulnerable adults who do not fall within the MCA but who are, or are reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent by reason of such things as constraint, coercion, undue influence or other vitiating factor.'

The case of Re SA (Vulnerable Adult with Capacity: Marriage)

[11] It is accepted that the decision of Munby J (as he then was) in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam),

[2006] 1 FLR 867 is the high point in a series of first-instance decisions which describe the extent of the inherent jurisdiction in relation to vulnerable adults, and, in particular, illuminate the margins of that jurisdiction insofar as it relates to adults who do not lack capacity as a result of impairment of, or disturbance in the functioning of, the mind or brain. It is, therefore, helpful at this stage to look in detail at that decision.

[12] *Re SA (Vulnerable Adult with Capacity: Marriage)* focused upon an 18-year-old woman, who was profoundly deaf, lacking in any means of oral communication, had a profound bilateral sensory neural loss and who had a significant visual loss in one eye. Her only means of communication was via British Sign Language, which is based on English. Her parents, whose language was Punjabi, could not use sign language and their ability to communicate with their daughter was very limited. The issue before the court related to the prospect that SA may, in due time, be involved in a marriage. It was common ground that she had sufficient understanding of the general concept of marriage and did not lack the capacity to marry. The question raised in the case was whether the court had jurisdiction to continue protection provided previously during her minority to protect her from the risk of an unsuitable arranged marriage.

[13] The judgment given by Munby J is characteristically comprehensive. It merits reading in full and I intend to do no more than quote the key elements of the judgment within this judgment.

[14] At para [37], Munby J stated his headline conclusion before descending into a detailed analysis of the earlier case-law:

> 'It is now clear, in my judgment, that the court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established parens patriae or wardship jurisdictions in relation to children. The court exercises a "protective jurisdiction" in relation to vulnerable adults just as it does in relation to wards of court.'

[15] In passing, Miss Nathalie Lieven QC for the appellant submits that the use of 'incompetent adults' in an apparently interchangeable and equal manner with that of 'vulnerable adults' in this paragraph is a piece of judicial 'sleight of hand' and illustrates a blurring of the very distinction which was at the heart of the case. Whilst I understand the point being made, I do not consider that there is any substance in it as throughout the remainder of the judgment, when the need arises, Munby J is absolutely plain that he is looking at adults who are 'vulnerable' for reasons other than 'incompetence' or lack of capacity (for example, Munby J's description of 'vulnerable adult' at paras [82] and [83] and reproduced at para [23] below).

[16] In paras [38]-[103], Munby J traced the development of the jurisdiction following its 'rediscovery' by the House of Lords in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 WLR 1025, [1989] 2 FLR 376, [1989] 2 All ER 545, HL. He described 'the nature of the jurisdiction', 'the circumstances in which the jurisdiction is exercised', 'the ambit of the jurisdiction', 'the powers of the court' and 'the exercise of the court's powers'.

[17] Amongst the matters developed within his analysis, Munby J drew attention to the description of the use of the common law as 'the great safety

net' which was necessary to fill gaps where it is necessary to do so. The phrase originated from Lord Donaldson of Lymington MR in the *Re F (Mental Patient: Sterilisation)* decision and was endorsed by, among others, Dame Elizabeth Butler-Sloss P in *Re Local Authority (Inquiry: Restraint on Publication)* [2003] EWHC 2746 (Fam), [2004] Fam 96, [2004] 2 WLR 926, [2004] 1 FLR 541.

[18] The baseline is established in paras [46] and [47] where Munby J recorded the fact that it had always been recognised that the jurisdiction is exercisable in relation to any adult who is, for the time being, and whether permanently or merely temporarily, either disabled by mental incapacity from making his own decisions or, although not mentally incapacitated, is unable to communicate his decision. In addition the jurisdiction extended to the taking of interim measures while proper inquiries are made.

[19] From para [48] onwards Munby J identified the key question of whether the jurisdiction extends beyond those established boundaries and, after proffering the answer that it does, he set out the reasons that support that conclusion.

[20] Part of the case mounted by Miss Lieven is to the effect that *Re SA (Vulnerable Adult with Capacity: Marriage)* stands alone and is neither supported by earlier authority nor a permissible development of earlier authority. In that context it is to be noted that Munby J is at pains to refer to and recite much of the relevant case-law, which he marshals into the argument in support of his conclusion. In order to illustrate the point, regard can be had to paras [55]-[64] in *Re SA (Vulnerable Adult with Capacity: Marriage)*:

> '[55] A few months before *Re C (Mental Patient*: *Contact)* [1993] 1 FLR 940, the Court of Appeal had made it clear in In *Re T (Adult*: *Refusal of Treatment)* [1993] Fam 95, that the court has jurisdiction to determine whether an apparent consent or refusal of consent is vitiated, for example, by the effects of shock, fatigue, pain or drugs, or because the will has been overborne by the undue influence of another, or by deception or misinformation of a significant kind. As Butler-Sloss LJ said at page 117:
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> "Although the issues of capacity and genuine consent or rejection are separate, in reality they may well overlap, so that a patient in a weakened condition may be unduly influenced in circumstances in which if he had been fit, he would have resisted the influence sought to be exercised over him."
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> Staughton LJ made a similar point at page 122 when he said:
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> "at the time of apparent consent or refusal the patient may not, for the time being, be a competent adult. Her understanding and reasoning powers may be seriously reduced by drugs or other circumstances, although she is not actually unconscious."
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> [56] Lord Donaldson of Lymington MR made some general comments at page 113 which are important in the present context:
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> "When considering the effect of outside influences, two aspects can be of crucial importance. First, the strength of the will of the patient. One who is very tired, in pain or depressed will be much less able to
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> *[2013] 2 FLR 511 at 519*
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> resist having his will overborne than one who is rested, free from pain and cheerful. Second, the relationship of the 'persuader' to the patient may be of crucial importance. The influence of parents on their children or of one spouse on the other can be, but is by no means necessarily, much stronger than would be the case in other relationships. Persuasion based upon religious belief can also be much more compelling and the fact that arguments based upon religious beliefs are being deployed by someone in a very close relationship with the patient will give them added force and should alert the doctors to the possibility - no more - that the patient's capacity or will to decide has been overborne. In other words the patient may not mean what he says."
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> [57] Butler-Sloss LJ made much the same point at page 120:
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> "it has long been recognised that an influence may be subtle, insidious, pervasive and where

religious beliefs are involved especially powerful. It may also be powerful between close relatives where one may be in a dominant position vis-à-vis the other. In this case Miss T had been during her childhood subjected to the religious beliefs of her mother and in her weakened medical condition, in pain, and under the influence of the drugs administered to assist her, the pressure from her mother was likely to have a considerably enhanced effect. I find it difficult to reconcile the facts found by the judge with his conclusion that the influence of the mother did not sap her will or destroy her volition. The degree of pressure to turn persuasion or appeals to affection into undue influence may, as Sir James Hannen P said in *Wingrove v Wingrove* (1885) 11 PD 81, 82-83, be very little."

[58] These observations reflect Lindley LJ's well-known comment in *Allcard v Skinner* (1887) 36 ChD 145 at page 183 that "the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful".

[59] In *Re G (an adult) (mental capacity*: *court's jurisdiction)* [2004] EWHC 2222 (Fam), [2004] All ER (D) 33 (Oct), the facts so far as material for present purposes were simple. G was a woman of 29 with a history of mental illness. Proceedings under the inherent jurisdiction were commenced on 10 March 2004 at a time when, as it was subsequently established, G lacked capacity. What Bennett J described as a "protective framework" for G, regulating her parents' contact with her, was put and maintained in place by interlocutory orders made on 11 March 2004, renewed on 17 March 2004 and extended on 19 May 2004. By the time of the final hearing on 26 July 2004 G no longer lacked capacity. The reason for this was explained in the medical evidence, which (see paras [70]-[76]) was to the effect that G's capacity had been severely compromised by her will being overborne by her father's powerful character; that prior to the protective framework being put in place the father's ability to overbear G's decision-making processes was very significant; that by contrast the protective regime, which limited the father's access to G, had reduced the impact of his power over her decision-making processes; but that if the protective

framework was removed, so that G had unrestricted contact with her parents, this would probably lead to disturbance and a significant deterioration in G's mental state, adversely affecting her capacity.

[60] Bennett J's conclusion at para [86] was that:

"If the restrictions were lifted ... it is probable that the situation would revert to what it was prior to March 2004. G's mental health would deteriorate to such an extent that she would again become incapacitated to take decisions about the matters referred to. Such a reversion would be disastrous for G."

[61] In these circumstances it was argued that, because G currently had capacity, the court had no jurisdiction to grant any relief. Bennett J rejected the argument and made orders the effect of which was to retain the protective framework in place.

[62] Bennett J began his analysis of the law with these powerful observations at paras [90]-[91]:

"[90] [Counsel's] submissions seem to me to have serious practical flaws and very undesirable consequences. Both experts acknowledged that but for the court's protective framework G

probably would revert to her mental state prior to 10 March, with the consequences I have already referred to. If then I have to dismiss the local authority's application for lack of jurisdiction, that is to say because the local authority has failed to establish G's mental incapacity as of today, the court's protective framework must therefore fall away. Thus, contact between G and her parents would be unrestricted; there would be no control over the father and his conduct vis-à-vis G's mental health, her health care needs and team. It is probable that G's mental health would deteriorate and she would become incapacitated. The local authority in such circumstances might feel obliged to institute proceedings all over again, the court would put into effect another protective framework, G might well recover her capacity leading to the same result in those fresh proceedings. Thus the purpose of the court's inherent jurisdiction in cases such as these would be completely defeated. Further, the logic of [counsel's] submission is, as he acknowledged, that had the court's protected framework not had the impact that, in fact, it did have, and G had remained lacking in mental capacity, the court would have had jurisdiction.

[91] Thus, in my judgment, the court's jurisdiction would be entirely dependent on the shifting sands of whether or not G did, or did not, have the requisite mental capacity at the time of the final hearing. I do not find that to be an attractive submission.'

[63] Having referred to various authorities, and in particular to the judgment of Thorpe LJ in *In Re F (Adult*: *Court's Jurisdiction)* [2001] Fam 38, Bennett J concluded at paras [103]-[105] as follows:

"[103] ... To adopt the sentiment expressed by Thorpe LJ ..., it would be a sad failure were the law to determine that I had no jurisdiction to investigate and if necessary make declarations as to G's best interests to ensure that the continuing protection of the court

put in place with effect from 11 March 2004 is not summarily withdrawn simply because she has now regained her mental capacity in respect of the matters referred to, given the likely consequences to G if the court withdrew its protection.

[104] If the declarations sought are in G's best interests, the court, by intervening, far from depriving G of her right to make decisions as submitted by [counsel], will be ensuring that G's now stable and improving mental health is sustained, that G has the best possible chance of continuing to be mentally capable, and of ensuring a quality of life that prior to 11 March 2004 she was unable to enjoy.'"

[21] These extensive references to the judgments of the Court of Appeal in *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, [1992] 3 WLR 782, [1992] 2 FLR 458 and of Bennett J in *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* [2004] EWHC 2222 (Fam) focus directly upon a situation where a person's ability to make decisions may be overborne by the undue influence of another, rather than lost as a result of mental incapacity. In *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* the very issue related to a vulnerable adult who lacked capacity when under the influence of her father's powerful character, but who regained capacity when protected from that influence. Having considered those two earlier decisions, set in the context of earlier authority, it is, in my view, very difficult for Miss Lieven to persuade this court that Munby J's analysis in *Re SA (Vulnerable Adult with Capacity: Marriage)* is an isolated decision, which is not supported by earlier case-law.

[22] Following his review of the authorities (which was far more extensive than the purely illustrative text that I have extracted), Munby J drew his conclusions together at paras [76]-[79]:

> '[76] In the light of these authorities it can be seen that the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.
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> [77] It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.
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> [78] I should elaborate this a little:
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> (i) Constraint: It does not matter for this purpose whether the constraint amounts to actual incarceration. The
>
> *[2013] 2 FLR 511 at 522*
>
> jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint, even if the restraint is only of the kind referred to by Eastham J in *Re C (Mental Patient*: *Contact)* [1993] 1 FLR 940. It is enough that there is some significant curtailment of the freedom to do those things which in this country free men and women are entitled to do.
>
> (ii) Coercion or undue influence: What I have in mind here are the kind of vitiating circumstances referred to by the Court of Appeal in *In Re T (Adult*: *Refusal of Treatment)* [1993] Fam 95, where a vulnerable adult's capacity or will to decide has been sapped and overborne by the improper influence of another. In this connection I would only add, with reference to the observations of Sir James Hannen P in *Wingrove v Wingrove* (1885) 11 PD 81, of the Court of Appeal in *In Re T (Adult*: *Refusal of Treatment)* [1993] Fam 95, and of Hedley J in *In Re Z (Local Authority*: *Duty)* [2004] EWHC 2817 (Fam), [2005] 1 WLR 959, that where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.
>
> (iii) Other disabling circumstances: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.
>
> [79] I am not suggesting that these are separate categories of case. They are not. Nor am I

> suggesting that the jurisdiction can only be invoked if the facts can be forced into one or other of these headings. Quite the contrary. Often, indeed, the facts of a particular case will exhibit a number of these features. There is, however, in my judgment, a common thread to all this. The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction
>
> *[2013] 2 FLR 511 at 523*
>
> if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.'

[23] Finally, in this regard, at paras [81]-[83] Munby J offered a definition of 'vulnerable adult' for the purposes of the jurisdiction that he was describing. The definition was deliberately couched in wide and loose terms:

> '[82] In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive.
>
> [83] The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable. That is all.'

The decision of Theis J

[24] Following a necessarily extensive review of the decision of Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)*, Theis J considered a number of subsequent first instance authorities on this point. Each of these cases illustrates the deployment of the inherent jurisdiction in different factual circumstances and it is not necessary in this judgment to do more than list the cases:

- *Re MM, Local Authority X v MM and Another* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443;
- *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363, FD;

- *A Local Authority v Mrs A (Test for Capacity as to Contraception)* [2010] EWHC 1549 (COP), [2011] Fam 61, [2010] COPLR Con Vol 138, [2011] 1 FLR 26;

- *LBL v RYJ and VJ* [2010] EWHC 2665 (COP), [2010] COPLR Con Vol 795, [2011] 1 FLR 1279;

- *Re SK; A London Borough Council v KS and LU* [2008] EWHC 636 (Fam), [2008] 2 FLR 720.

[25] Between paras [35] and [40] of her judgment, Theis J summarised the contentions made by each side in relation to the Human Rights Act 1998. In

short the local authority argued that the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) and the HRA 1998 required the court to retain the inherent jurisdiction to comply with its obligations, in particular under Arts 3 and 8. The submission was that the common law has to develop for the positive obligations imposed by the HRA to be given effect. It was submitted that, if DL's argument succeeded, there would be a new 'Bournewood gap'. For DL, Miss Lieven QC submitted that all the cases relied upon by the local authority involved children or incapacitated adults; she further argued that the positive obligation under Art 8 could not be extended in the way that the local authority, through their counsel, Mr Bowen, sought to do.

[26] After describing the genesis of the legislation that eventually became the Mental Capacity Act 2005 (MCA 2005) and after summarising the submissions made to her, at para [48] onwards of her judgment Theis J discussed the issues and moved to her decision which was set out in the following terms at para [53]:

> 'Having considered the detailed written and oral submissions, I have come to the conclusion that the inherent jurisdiction can still be invoked in cases such as this and that what has been termed the *SA* jurisdiction does survive the MCA and the Code. I have reached this conclusion for the following reasons:
>
> (1) It is accepted prior to the implementation of the MCA that the inherent jurisdiction extended to cases that went beyond issues relating to mental capacity. In appropriate cases, having balanced the competing considerations, the jurisdiction was invoked and exercised with the court making declarations and protective orders (*SA above*).
>
> (2) It is accepted that the essence of this jurisdiction is to be flexible and to be able to respond to social needs.
>
> (3) The Parliamentary consideration, prior to the passing of the MCA, did not expressly seek to exclude the court's inherent jurisdiction that had developed at the time. The consideration it did give to adults found to have capacity (sometimes after investigation) did not expressly exclude the court exercising its inherent jurisdiction in relation to adults as described in *SA*. The *SA* inherent jurisdiction is a protective jurisdiction that extends beyond dealing with issues on mental incapacity.
>
> (4) Each case will, of course, have to be carefully considered on its own facts, but if there is evidence to suggest that an adult who does not suffer from any kind of mental incapacity that comes within the MCA but who is, or reasonably believed to be, incapacitated from making the

relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors they may be entitled to the protection of the inherent jurisdiction (see: *SA (above)* para [79]). This may, or may not, include a vulnerable adult. I respectfully agree with Munby J in *SA* at para [83]:

"The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable."

In the cases I have been referred to, the term 'vulnerable adult' appears to have been used to include the *SA* definition, whether the adult in question is vulnerable or not. Obviously the facts in *SA* were very different to the case I am concerned with. For example, in this case ML and DL have capacity to litigate but that does not, in my judgment, mean that the inherent jurisdiction should not be available to protect ML, once the court has undertaken the correct balancing exercise.

(5) The continued existence of the *SA* jurisdiction, following implementation of the MCA, has been re-stated in a number of decisions. Whilst some of the observations may be regarded as obiter (in particular *A Local Authority v A* (above) at para [68]) they have consistently re-affirmed the existence of the jurisdiction. In particular the observations made by Bodey J in *A Local Authority v Mrs A* (above) at para [79], Macur J in *LBL v RYJ* (above) para [62] and Wood J in *LB of Ealing v KS* (above) para [148]. I reject the submission by Miss Lieven QC that the observations made by Macur J are in fact a rejection by her of the continued existence of the *SA* jurisdiction. What she was considering in para [62] was the fallback submission of the local authority in that case that if the case failed to come within the MCA the court retained a general jurisdiction to make decisions in relation to an adult's "best interests" who were not incapacitated by external forces (in the *SA* sense). I agree with Macur J when she states at para [62]:

"... the relevant case-law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decision."

As Wood J said in *LB of Ealing v KS* (above) Munby J in *SA* was talking of persons who are deemed not to have capacity in the true sense, and not of persons where a paternalistic authority considers the acts unwise. Although the Official Solicitor was not invited to make any

submissions in this case, it is of note that in the letter of instruction from the Official Solicitor to Independent Social Worker, Mr Jeff Fowler, dated 5 November 2010 there was extensive reference to Munby J's judgment in *SA*.

(6) I agree with the submissions of Mr Bowen, that the obligations on the State under the Convention and the HRA require the court to retain the inherent jurisdiction, as by refusing to

exercise it in principle the court is, in effect, creating a new "Bournewood gap". Whilst it is correct that the cases to date regarding any positive obligation on the State (including the LA) arising under Article 8 have concerned cases involving children or adults who lack mental capacity that does not mean, in principle, such positive duties cannot arise in other circumstances. There may be a heightened positive duty in cases concerning children and adults who have mental incapacity. Much will depend on the circumstances of each case and what the proportionate response is considered to be by the LA.

(7) I agree with the submissions of Miss Lieven QC (as supported by the observations of Bodey J in *A Local Authority v Mrs A* (above) para 79 and Macur J in *LBL v RYJ* (above) para 62) that in the event that I found that the jurisdiction does exist that its primary purpose is to create a situation where the person concerned can receive outside help free of coercion, to enable him or her to weigh things up and decide freely what he or she wishes to do. That is precisely what Munby J ordered in *SA*. There obviously needs to be flexibility as to how that is achieved, dependent on the facts of each case. That does not mean it can be covered by s 48 MCA, as Miss Lieven QC sought to suggest at one stage in her oral submissions as, in my judgment, s 48 by its express terms is only intended to cover the interim position pending determination of an application. As Munby J observed in *SA* (para [137]) in some circumstances it will be necessary to make orders without limit of time.

(8) The mere existence of the jurisdiction does not mean it will always be exercised. Each case will have to be considered on its own facts and a careful balance undertaken by the court of the competing (often powerful) considerations as to whether declarations or other orders should be made. As Miss Lieven QC points out the assumed facts in this case are not accepted by DL and even if they are one of the important considerations for the court to consider are the views of adults concerned; they do not support the orders being sought by the LA. In addition, the terms of the orders being sought in this case are likely to require very careful scrutiny.'

[2013] 2 FLR 511 at 527

[27] In consequence, Theis J, having determined that the inherent jurisdiction was available to be exercised in this case, gave directions for the future conduct of the litigation. Unfortunately, but perhaps inevitably, because of the progress of this preliminary issue by way of appeal, we were told that the main proceedings have been effectively suspended pending the determination of this court. It is our earnest hope now that matters can proceed to the determination of the substantive issue.

The argument on behalf of DL

[28] As was the case below, the arguments for both sides have been deployed with conspicuous clarity and skill by Miss Nathalie Lieven QC (leading Mr Alex Durance) and Mr Paul Bowen (leading in this court Miss Alison Pickup). We are extremely grateful to all counsel, and indeed to Theis J, for the way in which the issues raised by this important point of law have been teased out, described and presented for consideration. That has greatly eased the task of the analysis and determination of this point.

[29] The principal arguments deployed by Miss Lieven in this court can be summarised as follows:

(a) The only authority prior to the introduction of the MCA 2005 which indicated that the inherent jurisdiction extended to adults who maintained their mental capacity is limited to one case, namely *Re SA (Vulnerable Adult with Capacity: Marriage)*. *Re SA* was not supported by any earlier authority and is, therefore, to be seen as an isolated decision which is insufficient to bear the weight now put upon it by subsequent decisions, including that of Theis J in this case.

(b) The MCA 2005 was clearly intended to provide a comprehensive statutory code for those who lacked capacity.

(c) If a case, such as the present, does not fall within the provisions of the MCA 2005, then there is no jurisdiction for the court to make orders controlling the lives of those who do not lack capacity within the meaning of the 2005 Act.

(d) To the degree that there is any remaining inherent jurisdiction in this field, it is limited to providing a short period for the individual to be allowed to make his/her own decision, and if appropriate the provision of advice.

[30] In developing her submissions Miss Lieven understandably stressed the premium which the courts have habitually attached to the right of autonomy enjoyed by every individual in a democratic society. She relied upon the words of Lord Reid in *S v McC*: *W v W* [1972] AC 25:

> 'English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'eìtat but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions.'

[2013] 2 FLR 511 at 528

[31] The point was further illustrated by reference to a line of medical cases including *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Others* [1985] AC 871, [1985] 2 WLR 480 and *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090. Miss Lieven stressed that those cases, and indeed all the reported cases prior to *Re SA (Vulnerable Adult with Capacity: Marriage)*, were medical cases, save for a decision of Singer J a few months earlier in *Re SK (Proposed Plaintiff) (An adult by way of her litigation friend)* [2004] EWHC 3202 (Fam); [2006] 1 WLR 81. Miss Lieven also seeks to isolate the *Re SA (Vulnerable Adult with Capacity: Marriage)* decision by pointing out that the individuals in the earlier cases of *Re T (Adult: Refusal of Treatment)* and *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* were people with 'borderline capacity'.

[32] Pausing there, it is right to note that those latter submissions were in the context of counsel seeking to knock down a case that she had built up to the effect that the local authority argument meant that absolutely every person could be prone to a court overriding their decision making if it were thought to be unwise, notwithstanding that they retained full capacity. Until that submission was made, I had read neither the judgment of Munby J nor the argument of the local authority to be couched in such extravagant terms. The case-law, including *Re SA (Vulnerable Adult with Capacity: Marriage)*, is all about deploying the 'safety net' of the inherent jurisdiction to protect vulnerable individuals. To my mind the fact that the previous cases, and in fact *Re SA (Vulnerable Adult with Capacity: Marriage)* itself, involved vulnerable individuals who may have been on the borderline of lacking capacity, pointed up the potential value of the jurisdiction and, if anything, went to undermine the appellant's central case.

[33] By way of illustration of the manner in which the jurisdiction is applied in practice, which I would suggest is in clear contradiction to the manner characterised within the appellant's submissions, I draw attention to a decision of Macur J in *LBL v RYJ and VJ* where at para [62] the judge held:

> 'I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst "capacitous" for the purposes of the Act, are "incapacitated" by external forces - whatever they may be - outside their control from reaching a decision. (See *SA (A Vulnerable Adult)* [2005] EWHC 2942 at para 79; *A Local Authority and Mrs A* [2010] EWHC 1549 at para 79). However, I reject what appears to have

> been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case-law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.'

[34] Having traced the development of the MCA 2005 from the work of the Law Commission in l995, through the consideration of a draft Bill by a joint

committee of both Houses of Parliament and on to the culmination of that process by the enactment of the MCA 2005, Miss Lieven submits that the 'autonomy principle' is maintained by that legislation. Whilst reference was made (as I shall describe below) during that process to those whose capacity to make decisions may be suborned as a result of pressure or duress, the balance struck in the MCA 2005, and followed through in the Code of Practice, is that if such a person is found to have mental capacity then he or she has the right to make their own choices. Focusing on this case it is submitted that 'the fact that ML is elderly, and that she has chosen to live in a situation which, on the local authority's case may put her at risk of harm or exploitation, does not give the court any right to intervene'.

[35] Miss Lieven's approach to *Re SA (Vulnerable Adult with Capacity: Marriage)* is twofold. Firstly she submits that at the time the decision was made it represented an impermissible and erroneous extension of the inherent jurisdiction which amounted to a major infringement of the principle of autonomy which had stood as an important principle within the common law for well over a century. Had the MCA 2005 not now been in force, Miss Lieven would be submitting that *Re SA (Vulnerable Adult with Capacity: Marriage)* was wrongly decided and should be overturned. However, and this is her second submission, there is no need to take that step because the jurisdiction described by *Re SA (Vulnerable Adult with Capacity: Marriage)* has not survived the coming into force of the 2005 Act.

[36] The basis for the second submission is that where Parliament has created a statutory scheme which is intended to be exhaustive, the common law should not go behind that scheme (*Black v Forsey* 1988 SC (HL) 28, 1988 SLT 572). Reliance is placed upon Bennion on *Statutory Interpretation* (5 ed at 1250) where it is said: 'where an enactment codifies a rule of common law ... it is presumed to displace that rule altogether'. Miss Lieven submits that the MCA 2005 and the Code of Guidance provide an exhaustive test for capacity and set absolute and clear limits on the circumstances in which it is appropriate for courts to intervene in the affairs of adults. Insofar as courts have continued to rely on *Re SA (Vulnerable Adult with Capacity: Marriage)*, as Theis J has in this case, Miss Lieven submits that the balance struck by Parliament in the MCA 2005 has been subverted in an unjustifiable manner.

[37] To make good her submission Miss Lieven took the court to the background material describing the development of the principles which eventually were enacted in the MCA 2005, and, in particular, stressed the following:

> (a) In l995 the Law Commission's original proposal was for a very widely-based jurisdiction designed to protect a 'vulnerable person' which was defined to include persons in addition to those in need by reason of mental or other disability.
>
> (b) The l995 Government response concluded that, given the division of opinion which exists on this complex subject and 'given the flexibility inherent in developing case-law, the government believes it would not be appropriate to legislate at the present time and thus fix the

statutory position once and for all' ('*Making Decisions*' Cm 4465 1999, para 20).

(c) A joint committee of both Houses of Parliament considering the draft Mental Health Bill described the extant case-law in these terms (para [104]):

'It is the right of competent adults to make decisions concerning their own lives. Such decisions might include where to live, what to wear, what to eat, what to spend money on, who to be friends with and whether or not to see and accept medical advice. The decisions made by an individual at a particular point in time are likely to be influenced by factors relating to that individual and their circumstances. Under our present law, the competence of an adult to make a decision cannot be challenged if there is no evidence of any impairment or disturbance in their mental functioning. No one else can make decisions on behalf of another competent person and to force an alternative, for example by physical means, would be assault.'

(d) The joint committee considered extending the legislation to include circumstances such as those in the present case. At para 270 of the committee report it is stated:

'Professor John Williams suggested to us another approach to extend the scope of the Bill to cover the lack of capacity to make a free choice as a result of undue influence (or unacceptable pressure). It was recognised there is a precedent in the common law. As Professor Williams acknowledged, drafting such a clause would be 'immensely complex' and would have to contain significant safeguards to avoid unnecessary intervention. We do not feel confident in recommending such an approach.'

(e) The reference to Professor Williams' evidence is to that of Professor John Williams, Professor of Law at University of Wales (Aberystwyth). The transcript of his evidence shows that the reference to precedent in common law is to the case of *Re T (Adult: Refusal of Treatment)* which involved a young woman who had withdrawn her consent to a blood transfusion where there was concern that her decision had been unduly influenced by her mother. The Court of Appeal held that an adult patient's capacity to refuse to consent to treatment would be effective if his doctors were satisfied at the time of his refusal that his capacity to decide 'had not been diminished' by a number of factors including 'that his will had not been overborne by another's influence'. Professor Williams, in describing the category of individuals to whom he considered the Bill might be extended, depicted a situation not dissimilar to the present case in these terms:

'... the category in the middle is the most difficult one because there you are dealing with people who have high levels of vulnerability, who may be totally dependent on an individual for care, and of course are open to undue pressure

being placed on them to decide. At the moment they would fall outside the Bill. My argument would be that they should be within the Bill, subject to numerous safeguards.'

[38] It was apparently this category of individuals that the committee drew back from recommending should be included within the terms of the Bill.

[39] Miss Lieven, therefore, submits that the resulting Act expressly left out of its terms, as it clearly does

[see MCA 2005 s 2(1)], those individuals who do not lack mental capacity. Her case is that the inevitable conclusion must be that Parliament intended individuals outside the compass of the legislation to be free from court intervention in their ability to make decisions about their own lives. Miss Lieven did not accept the point put to her during argument by my Lord, Davis LJ, to the effect that the 2005 Act is simply a statutory scheme for adults who lack mental capacity and is not intended to deal, one way or the other, with any other individuals.

[40] Miss Lieven bolsters her submission by reference to the Mental Capacity Act Code of Practice where, at para 2.8, it is stated that:

> '... anyone supporting a person who may lack capacity should not use excessive persuasion or "undue pressure". This might include behaving in a manner which is overbearing or dominating, or seeking to influence the person's decision, and could push a person into making a decision they might not otherwise have made'.

Later, at para 2.11, further advice is given as to the possible impact of undue pressure upon someone who might lack capacity as a result of a mental condition or disorder.

[41] Supported by these references to the guidance, the submission is made that the very issue in the present case, namely alleged undue influence, is covered by the guidance and it is plain that there is only jurisdiction for the Court of Protection to take steps to override the decision of a person who has been the subject of such influence if he is found to lack mental capacity. That, submits Miss Lieven, is where Parliament has drawn the line. ML in the present case retains capacity and, despite the local authority concern about undue influence, her retention of capacity places her outside the MCA 2005 and Code and, therefore, because the statutory scheme is all encompassing, beyond the reach of the court.

[42] Finally, Miss Lieven's fallback submission, if, contrary to her primary case, some element of the inherent jurisdiction survives the advent of the MCA 2005, is that the extent of that jurisdiction is extremely limited and amounts to no more than the court having the power to make orders to protect an individual for a short period of time in order to provide 'space' within which the individual may make a fully-informed decision separated, if necessary, from the perceived source of undue influence.

[43] Orally, Miss Lieven reinforced her submission that *Re SA (Vulnerable Adult with Capacity: Marriage)* stood alone as an authority and that the previous cases were limited in subject matter to medical issues and involved those who lacked capacity, or who had borderline capacity which may have been further compromised by undue influence. She submitted that the

important Court of Appeal authority of *Re T (Adult: Refusal of Treatment)* would now be a case within the MCA 2005.

[44] Her central submission was that the MCA 2005 was not limited to those who lack mental capacity but was intended by both the Law Commission and Parliament:

> '... to create a statutory scheme setting out a comprehensive code as to whether people had capacity, and the circumstances in which the courts could interfere in the decision making of an adult'.

[45] Miss Lieven agreed that issues arising out of Art 8 of the European Convention probably do not assist either side of this argument and the case effectively turns upon the existence, or otherwise, of the inherent jurisdiction to cover individuals such as ML.

[46] A difficulty for the appellant's argument is that this court in *City of Westminster v IC (By His Friend the Official Solicitor) and KC and NN* [2008] EWCA Civ 198, [2009] Fam 11, [2009] 2 WLR 185, [2008] 2 FLR 267 (Thorpe, Wall and Hallett LJJ) roundly dismissed grounds of appeal that argued that the inherent jurisdiction relating to adults had not survived the arrival of the MCA 2005. The *City of Westminster v IC (By His Friend the Official Solicitor) and KC and NN* case concerned a 25-year-old man who suffered from autism and severe impairment of intellectual functioning. His local authority sought a declaration under the inherent jurisdiction as to his capacity to marry. It transpired that, by the time of the first instance hearing, the man had in fact been through a ceremony of marriage in Bangladesh and much of the judicial focus was upon the validity of that marriage. Nevertheless the man's parents argued that in any event the court had no jurisdiction to make orders for their son's future protection and management.

[47] Thorpe LJ, at para [12], dealt with the jurisdictional point shortly and refused permission to appeal on that ground:

> 'Although the appeal was argued extremely skilfully by Mr Luba there was little that he could make of the second and third grounds. He suggested that the commencement of the Mental Capacity Act 2005 introduced an exhaustive statutory code which excluded the court's inherent jurisdiction. He advanced no authority for that proposition and the decision of Munby J in *Local Authority X v MM & KM* [2007] EWHC 2003 (Fam) indicates otherwise (see in particular paragraphs 87, 111 and 167).'

[48] Wall LJ also refused permission to appeal on the following basis:

> '[54] Not even Mr Luba's able advocacy on behalf of IC's parents could persuade me that any of these grounds was arguable. I am in no doubt at all that the inherent jurisdiction of the High Court to protect the welfare of incapable adults, confirmed in this court in *Re F (Adult*: *Court's Jurisdictions)* [2001] Fam 38 survives, albeit that it is now reinforced by the provisions of the Mental Capacity Act 2005 (the 2005 Act). I am also in no doubt that a combination of the inherent jurisdiction and the provisions of the 2005 Act is apt to confer

> jurisdiction on the High Court to make orders about where IC should live, including the decision as to whether or not it is in his interests to go and live in Bangladesh. Mr Luba's alternative propositions, based on his default position that the jurisdiction existed, seemed to me equally unarguable.
>
> [55] The judge's approach to the prospective exercise of his jurisdiction is contained in paragraphs 110 onwards of his judgment. At paragraphs 119 to 121, having cited extensively from the decision of Munby J in *Re PS (An adult)* [2007] EWHC 623, the judge says:
>
> "119 I respectfully agree with the observations of Munby J, and, where it is necessary, lawful and proportionate I consider that this court can exercise its inherent jurisdiction in relation to mentally handicapped adults alongside, as appropriate, the Mental Capacity Act 2005. Consistent with long-standing principle, the terms of the Statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as

> expressed in the Statute or any supplementary regulatory framework.
>
> 120 When considering the issue of the court's powers (either under the 2005 Act or under the inherent jurisdiction) to inhibit the removal of IC from the jurisdiction, and thus to intrude upon the Article 8 rights which he has, and which his parents and siblings also have, under the Convention it is my judgment that this court should be extremely cautious before making an order the effect of which is to inhibit, or at times prohibit (when the return to Bangladesh either temporarily or permanently) the enjoyment of family life and the continuance of his residence with them, but is not prevented from so doing where the circumstances demand it for the protection of the vulnerable.
>
> 121 It is the submission of Mr. Knafler (counsel for the parents) that the Mental Capacity Act provides a statutory code of such a comprehensive and complex nature that it has impliedly negated the inherent jurisdiction of the High Court as exercised under common law. He submits that if there is a gap in the legislation, the common law should not step in to fill it. No part of the 2005 Act deals with the issue of preventing the mentally incapacitated person from leaving the country. I have already given my view on that passage of the Guidance issued pursuant to the provisions of sections 43 and 44 of the Act, and that in my judgment, save where to do so would be demonstrably inconsistent with the will of Parliament, the inherent jurisdiction remains alive, in appropriate cases, to meet circumstances unmet by the scope of the legislation. That is not, to state the obvious, an invitation to a court so to do unless it is lawful, necessary and proportionate so to do.'
>
> [56] In my judgment, the judge's approach in these paragraphs, and in this section of his judgment generally, cannot be faulted, and any appeal based on grounds 2 and 3 would stand no reasonable prospect of success.'
>
> *[2013] 2 FLR 511 at 534*

[49] Miss Lieven seeks to distinguish the *City of Westminster v IC (By His Friend the Official Solicitor) and KC and NN* case from the present case on the basis that the former the court was being asked to make a type of order (namely preventing an adult from leaving the jurisdiction of England and Wales) which is simply not covered within the 2005 Act, whereas the type of orders sought in respect of ML are very much the subject matter of the MCA 2005 (and indeed have been made in identical terms with respect to ML's husband under that Act).

[50] The appeal is opposed by Mr Paul Bowen on behalf of the local authority. He submits that the appeal is based on the false premise that the inherent jurisdiction argued for would permit the court to override the decision of any competent adult and thereby ignore their fundamental right to autonomy. Mr Bowen submits that the case is far more narrowly based than that and is limited to those individuals who fall outside the MCA 2005 but who nevertheless have not given, or cannot give, a 'true consent' to a particular aspect of their lives not as a result of mental incapacity but for some other reason, such as the undue influence of a third party. Mr Bowen's submissions have, therefore, been to delineate the extent of the jurisdiction so that it only covers those cases where it is necessary for the court to act because a person's capacity to make decisions for themselves has been overborne by circumstances other than those covered by the MCA 2005.

[51] Mr Bowen has the substantial benefit of being able to rely upon the analysis and conclusions of Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)* and, understandably, much of his argument was designed to highlight and support those matters. In addition he drew attention to the fact that Parliament was expressly aware of the concept of 'elder abuse' during the pre-legislative scrutiny process. The MCA 2005 makes no express provision limiting or extinguishing the use of the inherent jurisdiction. Mr Bowen, therefore, submits that Parliament can be taken as intending that, insofar as the inherent jurisdiction may

cover matters outside the 2005 Act, then the legislation leaves that jurisdiction untouched to develop under the common law as it had done prior to 2005.

Discussion

[52] Despite the diligence, elegance and skill displayed by Miss Lieven in deploying her arguments in support of the appeal, I am afraid that I have found at each turn that the case in favour of supporting the decision of Theis J (and behind that the decision of Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)*) has become stronger. Having laid out the arguments on each side and made reference to the case-law, it is not necessary for me to state my conclusions in more than short terms.

[53] I do not accept that the jurisdiction described by the judge is extensive and all-encompassing, or one which may threaten the autonomy of every adult in the country. It is, as Mr Bowen submits and as the judgments of Munby J and Theis J demonstrate, targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005. I, like Munby J before me in *Re SA (Vulnerable Adult with Capacity: Marriage)*, am determined not to offer a definition so as to limit or constrict the group of 'vulnerable adults' for whose benefit this jurisdiction may be deployed. I have already quoted paras [76] and [77] from

the judgment of Munby J (see para [22] above). I am entirely in agreement with the description of the jurisdiction that is given there.

[54] The appellant's submissions rightly place a premium upon an individual's autonomy to make his own decisions. However, this point, rather than being one against the existence of the inherent jurisdiction in these cases is, in my view, a strong argument in favour of it. The jurisdiction, as described by Munby J and as applied by Theis J in this case, is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity because they are (to adopt the list in para [77] of *Re SA (Vulnerable Adult with Capacity: Marriage)*):

> (a) under constraint; or
>
> (b) subject to coercion or undue influence; or
>
> (c) for some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

[55] I do not regard the *Re SA (Vulnerable Adult with Capacity: Marriage)* decision as a one-off determination, which is unsupported by earlier authority and not to be followed. As Munby J demonstrates in his thorough review of the earlier case-law, the organic development of the inherent jurisdiction, following its rediscovery by the House of Lords in *Re F (Mental Patient: Sterilisation)*, had led to decisions, particularly those of *Re T (Adult: Refusal of Treatment)* and *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* (above), which moved away from cases where the individuals plainly lacked mental capacity to take a particular decision themselves. The fact that the subject matter of the cases related to medical treatment, rather than some other class of decision, cannot affect the principle; either the jurisdiction exists or it does not. The question of the class of decision to which any orders are directed will be a matter of application of the jurisdiction, and of proportionality, dependent on the facts of any given case.

[56] In the same manner, the argument that in the *City of Westminster v IC (By His Friend the Official Solicitor) and KC and NN* case the court was concerned with a type of relief (preventing removal from the jurisdiction) which is not catered for in the MCA 2005 and, therefore, the existence of the inherent jurisdiction to supplement the statutory scheme is acceptable, in contrast to the present case, simply does not stand scrutiny. Either the inherent jurisdiction is there to act as a safety net for matters outside the Act or it is not. The fact that Thorpe LJ and Wall LJ were so firmly of the view that the jurisdiction had survived the implementation of the 2005 Act is a powerful indicator that the appellant's argument is wrong.

[57] Miss Lieven's submission that the MCA 2005 was intended to be a comprehensive statutory code covering all matters relating to an adult's capacity to make decisions is also unsustainable because the Act itself is expressly limited to, as its title makes plain, 'mental capacity'. The Act does establish a wide ranging and, for those matters within its compass, a comprehensive statutory code and scheme. But the Act is expressly limited to 'people who lack capacity' 'for the purposes of this Act' as s 2(1) makes plain:

[2013] 2 FLR 511 at 536

> '... s 2(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

[58] Nothing in the MCA 2005 makes express provision with respect to individuals who may lack capacity for a reason other than an impairment of, or disturbance in the functioning of, the mind or brain. Neither is there any express reference to the inherent jurisdiction of the High Court. This latter state of affairs is in contrast to both the Children Act 1989 and the Family Law Act 1996 Part 4A (implementing the Forced Marriage (Civil Protection) Act 2007).

[59] Insofar as it is relevant, CA 1989, s 100 provides:

> '(1) ...
>
> (2) No court shall exercise the High Court's inherent jurisdiction with respect to children--
>
> (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
>
> (b) so as to require a child to be accommodated by or on behalf of a local authority;
>
> (c) so as to make a child who is the subject of a care order a ward of court; or
>
> (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that--

(a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.'

[60] FLA 1996, s 63R provides:

's 63R(1) This Part does not affect any other protection or assistance available to a person who--

(a) is being, or may be, forced into a marriage or subjected to an attempt to be forced into a marriage; or

(b) has been forced into a marriage.

(2) In particular, it does not affect--

(a) the inherent jurisdiction of the High Court; ...'

[61] It would have been open to Parliament to include a similar provision, either permitting or restricting the use of the inherent jurisdiction in cases relating to the capacity to make decisions which are not within the MCA 2005. In the absence of any express provision, the clear implication is that if there are matters outside the statutory scheme to which the inherent jurisdiction applies then that jurisdiction continues to be available to continue to act as the 'great safety net' described by Lord Donaldson.

[62] An example of the utilisation of the inherent jurisdiction for this very purpose is provided by the case of *City of Westminster v IC (By His Friend the Official Solicitor) and KC and NN* (see para [46] above). For my part, I consider that the description given in that case at first instance by Roderic Wood J of the jurisdictional relationship between the statutory scheme and the High Court's power was entirely apt. I would not attempt to improve upon it and, therefore, simply repeat it here:

'... where it is necessary, lawful and proportionate I consider that this court can exercise its inherent jurisdiction in relation to mentally handicapped adults alongside, as appropriate, the Mental Capacity Act 2005. Consistent with long-standing principle, the terms of the Statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as expressed in the Statute or any supplementary regulatory framework.'

[63] My conclusion that the inherent jurisdiction remains available for use in cases to which it may apply that fall outside the MCA 2005 is not merely arrived at on the negative basis that the words of the statute are self-limiting and there is no reference within it to the inherent jurisdiction. There is, in my view, a sound and strong public policy justification for this to be so. The existence of 'elder abuse', as described by Professor Williams, is sadly all too easy to contemplate. Indeed the use of the term 'elder' in that label may inadvertently limit it to a particular age group whereas, as the cases demonstrate, the will of a vulnerable adult of any age may, in certain circumstances, be overborne. Where the facts justify it, such individuals

require and deserve the protection of the authorities and the law so that they may regain the very autonomy that the appellant rightly prizes. The young woman in *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* (above) who would, as Bennett J described, lose her mental capacity if she were once again exposed to the unbridled and adverse influence of her father is a striking example of precisely this point.

[64] For the reasons given by Munby J at para [77] and elsewhere in *Re SA (Vulnerable Adult with Capacity: Marriage)*, it is not easy to define and delineate this group of vulnerable adults, as, in contrast, it is when the yardstick of vulnerability relates to an impairment or disturbance in the functioning of the mind or brain. Nor is it wise or helpful to place a finite limit on those who may, or may not, attract the court's protection in this regard. The establishment of a statutory scheme to bring the cases in this hinterland before the Court of Protection would (as Professor Williams described) represent an

almost impossible task, whereas the ability of the common law to develop and adapt its jurisdiction, on a case-by-case basis, as may be required, may meet this need more readily.

[65] In this context, again, Miss Lieven's submissions point up the converse of the outcome for which she argues. The individuals, for example, in the cases of *Re T (Adult: Refusal of Treatment)*, *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* and *Re SA (Vulnerable Adult with Capacity: Marriage)* can be categorised, to use Miss Lieven's term, as 'borderline lack of capacity' cases. That state of affairs flags up the very vulnerability described by Munby J. Where, on a strict mental health appraisal, such an individual does not lack capacity in the terms of the MCA 2005 and, therefore, falls outside the statutory scheme, but other factors, for example coercion and undue influence, may combine with his borderline capacity to remove his autonomy to make an important decision, why, one may ask, should that individual not be able to access the protection now afforded to adults whose mental capacity puts them on the other side of that borderline?

[66] In terms of the European Convention, the use of the inherent jurisdiction in this context is compatible with Art 8 in just the same manner as the MCA 2005 is compatible. Any interference with the right to respect for an individual's private or family life is justified to protect his health and/or to protect his right to enjoy his Art 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party. Any orders made by the court in a particular case must be only those which are necessary and proportionate to the facts of that case, again in like manner to the approach under the MCA 2005. In this respect it is not irrelevant that the judges of the High Court Family Division to whom the exercise of this aspect of the inherent jurisdiction is assigned, are all also judges of the Court of Protection and well used to the approach under the statutory scheme.

[67] Furthermore, in terms of the manner in which the jurisdiction should be exercised, I would expressly commend the approach described by Macur J in *LBL v RYJ and VJ*, para [62], which I have set out at para [33] above. The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their European Convention Art 8 rights.

[68] It follows that, despite the clarity and skill with which it has been argued, I have no hesitation in dismissing the appellant's primary grounds of appeal and upholding the decision of Theis J in this case. Although argued as a separate, fallback, ground, it must follow from my unreserved endorsement of the full jurisdiction described by Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)* and applied subsequently in a number of cases at first instance that I reject the idea that, if it exists, the exercise of the inherent jurisdiction in these cases is limited to providing interim relief designed to permit the vulnerable individual the 'space' to make decisions for themselves, removed from any alleged source of undue influence. Whilst such interim provision may be of benefit in any given case, it does not represent the totality of the High Court's inherent powers.

[69] For the reasons that I have given I would, therefore, dismiss this appeal.

DAVIS LJ:

[70] Where cases fall precisely within the ambit of the MCA 2005 and are capable of being dealt with under its provisions there is no room for - as well as no need for - invocation of the inherent jurisdiction. However, even in the case of an adult who lacks capacity within the meaning of the MCA 2005, it appears that the inherent jurisdiction remains available to cover situations not precisely within the reach of the statute: see the observations of Roderic Wood J endorsed by the Court of Appeal in *City of Westminster v IC (By His Friend the Official Solicitor) and KC and NN* (op cit).

[71] That authority is in itself against the argument of Miss Lieven, which necessarily has to presuppose that the inherent jurisdiction has been entirely ousted in the case of incapacitated adults.

[72] But there is, in my view, an even more fundamental objection. Miss Lieven's argument of course has to go further and say that the introduction of the MCA 2005 has ousted the inherent jurisdiction altogether with regard to adults, whether incapacitated or not. But there simply is no such provision to that effect contained in the MCA 2005 - which, as I read it, is concerned only with adults who lack capacity (as defined in the statute).

[73] Miss Lieven's argument in fact goes against the ordinary rule of statutory interpretation, most clearly enunciated by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 2 WLR 28 at 725 and 39 respectively in these terms:

> 'In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law. To suppose otherwise involves the conclusion that an existing jurisdiction has been cut down by implication, by an enactment moreover which is positive in character ... rather than negative.'

[74] In the present case there was, prior to the passing of the MCA 2005 undoubtedly an inherent jurisdiction established at common law enabling the High Court to intervene, where appropriate, in cases of the present kind (the 1993 case of *Re T (Adult: Refusal of Treatment)* is one illustration). The MCA 2005 does not purport to displace that jurisdiction. In my view, therefore, the required approach to statutory interpretation provides a principled basis for arriving at a thoroughly desirable conclusion.

[75] Miss Lieven also carefully took us through background materials leading up to the enactment of the MCA 2005. Assuming them to be admissible for this purpose of statutory interpretation, they in fact confirm that Parliament was alive to potential issues relating to adults who might be described as vulnerable but who are not mentally incapacitated. It is clear that Parliament decided not to intervene in such cases: being content, it is to be inferred, to leave such cases to be determined as appropriate under the established inherent jurisdiction.

[76] Miss Lieven stressed the importance of personal autonomy. She expressed concern to the effect that the retention of the inherent jurisdiction might for the future be resorted to by public authorities, pursuing a 'Big Brother' agenda, with a view to ensuring that adults make decisions which

conform to an acceptable, State decided, norm (I put it in my words, not hers). I acknowledge the point but do not share the concern. It is, of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are. But the decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision, or to tolerate a state of affairs, which most would consider neither wise nor sensible. There has to be much more than simply that for any intervention to be justified: and any such intervention will indeed need to be justified as necessary and proportionate. I am sure local authorities, as much as the courts, appreciate that. It is at all events neither possible nor appropriate exhaustively to define 'vulnerability' for this purpose. Cases which are close to the line can safely be left to be dealt with under the inherent jurisdiction by the judges of the Family Division on the particular facts and circumstances arising in each instance.

[77] At the conclusion of the arguments before us, I was in no doubt that the decision of Theis J was correct and that the appeal should be dismissed. The above represents my essential thinking for reaching that view. I have now read the comprehensive judgment of McFarlane LJ, with which I wholly agree. The substantive issues arising, on facts yet to be determined, are accordingly to be dealt with by Theis J, so far as concerns ML, under the inherent jurisdiction of the High Court.

MAURICE KAY LJ:

[78] I entirely agree with both judgments.

[79] Where a person lacks capacity in the sense of s 2(1) of the MCA 2005, he has the protection provided by that statute. A person at the other end of the scale, who has that capacity and is not otherwise vulnerable, is able to protect himself against unscrupulous manipulation, if necessary by obtaining an injunction against his oppressor. This case is concerned with a category of people who, in reality, have neither of those remedies available for their protection. It would be most unfortunate if, by reference to their personal autonomy, they were to be beyond the reach of judicial protection. For the reasons given by my Lords, they are not. The inherent jurisdiction continues to exist. I have nothing to add as to its scope.

[80] It follows that this appeal is dismissed.

Order accordingly.

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SAMANTHA BANGHAM Law Reporter