Neutral Citation Number: [2015] EWCOP 3

Case No: 11680949

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2015

Before :

MR JUSTICE HAYDEN

- -

Between :

MASM	**Applicant**
- and -	
MMAM	**1st Respondent**
(by her litigation friend, the Official Solicitor)	
-and-	
MM	**2ndRespondent**
-and-	
LONDON BOROUGH OF HACKNEY	**3rd Respondent**
-and-	
HOMERTON UNIVERSITY HOSPITAL NHS FOUNDATION TRUST	**4th Respondent**

- -
- -

Mr Nicholas Elcombe (instructed by **Rudlings & Wakeham Solicitors**) for the **Applicant**
Mr John McKendrick (instructed by **Bindman Solicitors instructed by the Official Solicitor**) for the **1st Respondent**
2nd Respondent (Unrepresented)
Mr Rhys Hadden (instructed by **London borough of Hackney**) for the **3rd Respondent**
Mr Peter Mant (instructed by **Bevan Brittan LLP**) for the **4th Respondent**

Hearing dates: 21st July 2014 & 30th October 2014

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Judgment

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Hayden :

1. It is not necessary for me to burden this judgment with anything greater than an outline summary of the background history. The point the case raises is a short but important one: namely the legal status of declaratory orders in the Court of Protection and the consequences, if any, for deliberate defiance of them.

The Background

2. These proceedings were brought pursuant to the Mental Capacity Act 2005 and concern Mrs MMAM who is now 76 years of age. Although it is not possible to be entirely precise, it seems likely that she has lived here in the United Kingdom since approximately 1963, she comes originally from Saudi Arabia.

3. The Second Respondent in these proceedings is MM who is Mrs MMAM's grandson. It appears that MM moved to live with his grandmother in 2010 but has now relocated to New York which has been his stated objective for some time.

4. Mrs MMAM lived for very many years in Stoke Newington. It is her own property, mortgage free and of significant value. Some of that time she lived with her sister and then for a period on her own, joined later, as I have said, by her grandson in 2010. It is clear by September 2013 Mrs MMAM was living in parlous conditions. A statement prepared by a social worker records her as having been 'severely self neglecting'. On the 29th October 2013 District Judge Batten declared that Mrs MMAM should live at a residential care home and she was admitted to such a home on the 2nd November 2013. It was intended that such admission should be temporary, rehabilitative in its objectives and permit Mrs MMAM's dilapidated home to be cleaned and repaired. Shortly after her arrival there she was assessed by a Dr Natasha Arnold who found her to be suffering from 'significant malnutrition' and 'chronic self neglect'. It also emerged that she had been known to the Older People Community Mental Health Team since 2007 and had been assessed on five separate occasions concerning presumptive mental health diagnosis and personality disorder which had led to a period of detention under the Mental Health Act 1983 in April 2007. Ultimately in her report of the 14th February 2014 Dr Natasha Arnold, Consultant Geriatric Nutritionist with a special interest in intermediate care, concluded as follows:

> *"[MMAM] has been shown in my view to lack capacity for all significant decisions around her healthcare to date. She dismisses her personal welfare needs and hence is unable to consider and weigh them in her considerations how and who would look after her. She does however seem to understand the cultural impact of taking a decision to move to Saudi Arabia away from the U.K. where she has lived for 40 years and actively wishes to be with or near her family, provided her welfare is managed for her. [MMAM] also lacks capacity to engage meaningfully with the litigation process. Although [MMAM] is increasingly able to express her wishes coherently and may well be supported to take decisions of increasing gravity with adequate support. At the moment that is not the case in my view and she dismisses information through abnormal belief".*

5. It was also noted that:

> *"Her psychological parameters are near normal enough to expect her to regain capacity were in not for her abnormal beliefs. She has become more engaged and more willing to talk and express her wishes whilst failing to acknowledge the importance of feeling dignified as part of this change by feeling clean and looked after, that in my view has enabled her to engage with people and her environment more."*

6. Mrs MMAM has been passive at times and equally has been verbally abusive and resistant to care.

> *"She has responded favourably to clear supportive instruction set out in her care plan in a structured environment. She is eating, washing, dressing in clean clothes and engaging with other residents, although not consistently without escalated prompts. She is likely to self neglect without skilled care that can be delivered 24/7 flexibly to her needs. Her family believe that she is more likely to conform to her care in Saudi Arabia but the evidence of her progress in X road suggests that she is likely to need skilled carers at times to ensure her basic welfare is managed when she is feeling particularly resistant. Provided her needs can be met in Saudi Arabia and her wishes are very much to be near or with her family. Her son and grandson show love and respect when observed with [MMAM] and she responds with an emotion to their attention."*

7. Her son has expressed a wish to take her across countries between family members.

> *"I had advised her son a stable environment will be essential for a minimum of 3 to 6 months, given her progress at X Road, to ensure her welfare is managed adequately. A changing environment will risk destabilising [MMAM]'s relationship with her carers, her care plan and her welfare."*

8. No doubt with that report in mind by the time the case came before me on the 20th February 2014 all the parties were able to agree and I was ultimately satisfied that it was in MMAM's best interests to reside at the identified residential home. The relevant terms of the declaration were as follows:

> *"It is hereby declared pursuant to S.48 of the Mental Capacity Act 2005 that: it is lawful and in the First Respondents best interest to continue to reside and receive care at X residential home and any deprivation of her liberty occasioned by residing there is approved by the Court pursuant to S.4 A16 of the Mental Capacity Act 2005."*

Section 16 is addressed below, Section 4A relates to restriction on deprivation of liberty and provides:

> *(1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.*
>
> *(2) But that is subject to—*
>
> *(a) the following provisions of this section, and*
>
> *(b) section 4B.*
>
> *(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.*
>
> *(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.*
>
> *(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).*

9. On the 1st April 2014 Mrs MMAM left the jurisdiction. I have been told she is currently residing in Saudi Arabia. On the morning 1st April the Second Respondent (Grandson) took Mrs MMAM from the X road residential home. He did so with the compliance of the manager who believed that he had no legal basis to prevent such a course. He was apparently told that Mrs MMAM was going with her grandson to the Saudi Arabian Embassy. She was taken there and her travel documents were provided which appeared to have enabled her to be booked on the very next available flight from London to Jeddah which left that evening. The grandson purports to outline the events of that day in his statement dated the 13th May. I say without hesitation that I found his account to be self serving and disingenuous. The description of what is said to be Mrs MMAM's behaviour on that day bears absolutely no relationship to anything I have read about her in any other document. At paragraph 8 the grandson states

> *"We took a taxi to the Embassy arriving just before 10am, my grandmother, without entering security, had found the way to the meeting ahead of me. Once I had introduced her, I left her to discuss her affairs as I had understood from my father I should not participate in discussing the case with officials and her in any detail. A few hours went by, I was summoned and asked to accompany my grandmother to a place where food was given to her and then we were taken to a rest facility. Little later someone from the embassy came to take her and I was told to return home and that they would contact me as required."*

10. If that was indeed in any way accurate and Mrs MMAM had been left on her own at the Embassy, in my view, she would have been, on the basis of everything I have read, confused and probably rather frightened. The statement is entirely unconvincing. In the paragraphs that follow any aspiration to credibility is lost, if not abandoned.

> *"That night the manager from X road called me regarding my grandmother, I said she must still be with the embassy staff if she wasn't back at X road. Someone from the Local Authority also contacted me, he asked me whether I felt she was safe or not? I told them I believe she was and would contact them if I heard anything. I then received a call to let me know that my grandmother was safe, 'not to worry' and I relayed the message to staff…. the next day I heard news that my grandmother was in Saudi Arabia."*

Later he states:

> *"The manner and speed of her repatriation has taken me by surprise. I do not want to speculate on the matter but I'm aware the situation has pleased my grandmother and family. Perhaps with the benefit of hindsight, the time constrained medical condition made the embassy action inevitable; though I do not believe any of the people aware of my grandmother's appointment with the embassy expected it and I certainly did not.*
>
> *'I would like to thank the court for its measured consideration and on behalf of both myself and my grandmother I want to express our gratitude to Judge Batton, the staff of* X *Road and the doctors. I am eternally grateful to found, in all of them, definitely the living personification of the oath undertaken by each of them."*

11. The picture presented is a complete fabrication. This old, sick, largely incapacitous lady further burdened by an 'abnormal belief system' would simply not have been able to function effectively or autonomously in the way the grandson asserts. It is clear from the above passages that the grandson was acting entirely on his father's instructions. That is the dynamic of their relationship which I have observed for myself in the courtroom at previous hearings. The reference to "*the time constrained medical condition"* sadly relates to the fact that Mrs MMAM is suffering from metastasised bowel cancer. The statement requires recasting in reality. Mr MASM and his son have plainly colluded to defeat the declaration made by this court. Mr MASM has done so notwithstanding that he acquiesced to the declaration made and drafted in the terms that it was. He was the applicant in this litigation. In my judgement he has acted with cynical disregard to the objectives of this process and, in the light of the declarations drawn, it must follow that his actions are entirely inconsistent with the best interests of this vulnerable and incapacitous woman, who is of course his own mother. The reasons for this planned deception are not immediately clear, but I draw from this history and from the actions of these two men that their motivation is likely family's financial self-interest. It seems to me that if Mr MASM had genuinely believed that his mother's interest did not lie in her remaining in the residential unit for the reasons Dr Arnold said then he had every opportunity to put those conclusions to the assay by cross examination. He chose not to do so despite being represented by counsel.

12. Two questions have fallen for consideration here in the light of this background:

    i) What is the legal status of a declaration of best interests in the Court of Protection?

    ii) Can a party who deliberately acts in defiance of a declaration be held to be in contempt of court?

Enforcement

13. The Court of Protection's powers of enforcement are extensive. The Court has in connection with its jurisdiction the same powers, rights and privileges and authority as the High Court (COPR 2007, R89) which means that it may find or commit to prison for contempt, grant injunctions where appropriate, summons witnesses when needed and order the production of evidence. (COPR 2007, part 21 makes further provision RR183-194). The relevant practice directions (PD21A) and "practice guidance notes" deal with Contempt of Court, Applications for enforcement may also be made; the CPR relating to third party debt orders and charging orders are applied as are the remaining rules of the Supreme Court 1965 in relation to enforcement of judgments and orders and writs of execution fieri facias (writs and warrants of control, post April 2014) All this said the Court of Protection jurisdiction is limited to the promotion of '**the purposes of**' (*my emphasis*) the Mental Capacity Act 2005 (MCA) and, it follows, the appropriate order may be, from time to time, to direct the Deputy or some other person to take proceedings of a different kind in another court where the objectives fall outside the remit of the MCA.

14. Finally, of course, the court may direct penal notices to be attached to any order, warning the person of the consequences of disobedience to the order i.e. that it would be a contempt of court punishable by imprisonment and or a fine (or where relevant

sequestration of assets). An application for committal of a person for contempt can be made to any judge of the Court of Protection by issuing an Application Notice stating the grounds of the application supported by affidavit in accordance with practice directions. (COPR 2007 makes additional provisions). In addition to this the court may make an order for committal **on its own initiative** against a person guilty of contempt of court which may include **misbehaviour in the face of the court.**

15. Initially the Local Authority considered that it had been comprehensively thwarted by Mr MASM's unilateral actions. In a response which I considered to be supine, they advance no opposition to Mr MASM's application to withdraw the proceedings. I was roundly critical of that reaction. Mrs MMAM had been rescued from squalor and neglect. I have been shown photographs of her previous living conditions. Her grandson, the man who negotiated what he calls her "repatriation" was living in the same house as his grandmother whilst her circumstances had reduced to the parlous conditions that I have described. In addition, Mrs MMAM lacked capacity in relation to medical, welfare and litigation decisions. Moreover she was in addition gravely ill physically. Local Authority's simply have to absorb the extent of their responsibilities in these challenging cases. Vulnerable adults must be protected every bit as sedulously as vulnerable children. I emphasise that it is the safeguarding obligation that is similar- I do not suggest that vulnerable adults and children should be regarded as the same. Accordingly, I asked the Local Authority, the Official Solicitor and Mr MASM to reflect on the questions identified in paragraph 13 above.

The Local Authority's Submissions

Mr Rhys Hadden, on behalf of the Local Authority submits:

i) The declaratory jurisdiction of the High Court can only declare upon lawfulness of a state of affairs. It cannot provide judicial sanctions or order a specific act to be done;

ii) The position adopted within civil proceedings is that a refusal to comply with an order which is declaratory rather than coercive does not constitute a contempt of court. The Local Authority points to ***Webster v Southwark London Borough Council [1983] QB 698*** Forbes J. That proposition they contend was endorsed by the Court of Appeal in ***St Georges Healthcare NHS Trust v S [1999] (Fam) 26;***

iii) In written submissions dated 29th October 2014:

> *"There is no clear authority on the scope of contempt in the statutory jurisdiction of the Court of Protection. There is no reported decision where the breach of a bare declaration as to the lawfulness of any act done has been subsequently enforced by way of committal proceedings, whether in the Court of Protection or elsewhere."*

iv) In the present case, as a matter of fact, the terms of the material part of the order of 20th February were declaratory not injunctive. The applicant was not

personally present at the hearing, it is said, and although he subsequently became aware of the order, his absence from the hearing and the absence of any penal notice warning to any party of the consequences of defiance of the declaratory provision fell short of alerting a possible contempt and accordingly could not be punished by committal;

v) Even if that was wrong and it was possible to commit, in principle, a breach of declaratory provision, the evidence was simply not good enough or sufficiently cogent to pursue contempt proceedings, nor did the Local Authority consider it ever likely to be.

16. In relation to v) above, as I have already made clear, I reject that submission. Indeed, I regard the statement of the grandson, skilfully avoided by Mr Elcombe, as an admission of active resistance to the court's declaration. As a submission this point is not merely misconceived, it is defensive and as such unedifying.

The Applicant's Submissions

17. On behalf of Mr MASM, Mr Elcombe distils six short points:

i) The Applicant has returned to England and Wales so as to be present to assist this court;

ii) Mrs MMAM (it is asserted) remains in Saudi Arabia, apparently resident in a flat with medical and social support;

iii) There would not be power to commit to prison or take other enforcement routes for not abiding by a declaration of the court;

iv) There would not appear to be power to commit to prison for not abiding by a declaration pursuant to S.15 of the Mental Capacity Act 2005;

v) In any event the declaratory order in these proceedings does not contain a warning/penal notice in the form that might be attached to an injunction whether made in Court of Protection proceedings or otherwise;

vi) These proceeding should be brought to an end either by way of the applicant being permitted to withdraw his application or a final order being made.

18. At paragraph 6 of his Position Statement Mr Elcombe makes the following realistic concession:

> *"The wording of the declaration refers to lawfulness and best interest. It further authorises any deprivation of liberty concomitant to that residence. It is axiomatic that Mrs MMAM should remain living in the UK but it is not explicitly set out as such, likewise, there is no order that explicitly restricts Mrs MMAM movement either within or with outside the jurisdiction of England and Wales."*

The Official Solicitor's submissions

19. Mr McKendrick, on behalf of the Official Solicitor, submits

i) No order or injunction (as opposed to declaration) was made at all in relation to Mrs MMAM's residence at the Median Road Residential Home;

ii) In addition, no order or injunction was made preventing a party or non party from removing MRs MMAM from either Median Road Residential Home or the jurisdiction;

iii) A declaration was however made to

(a) authorise the deprivation of her liberty occasioned by requiring her to reside at Median Road Residential Home and

(b) to clarify that residing at Median Road was in her best interests.

iv) In ***Webster v Southwark London Borough Council [1983] Q.B. 698*** Forbes J held:

> "*I readily accept the proposition that where a court makes only a declaratory order it is not contempt for the party affected by the order to refuse to abide by it. If he does so refuse no doubt the other party can go back to the court and seek an injunction to enforce the order; but mere refusal of one party to an action to abide by a declaratory order is not, as I understand it, contempt of court. On the other hand there are dicta, particularly in* ***Seaward v Paterson [1897] 1 Ch. 545****, which appear to indicate that persons who are not parties to the action may be guilty of contempt in certain circumstances even where the order was not a coercive one. Those passages appear to show that there is a more general sense in which a contempt of court may be committed, namely, when persons other than the defendant contumaciously incite the defendant to defy the court's order*".

No less an authority than Lindley L.J. said, at p. 554:

> *"Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him - he is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this - not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning. Mr. Seward Brice has endeavoured to persuade us that there is no such jurisdiction; and that the only course to pursue would be to proceed against him by indictment. I confess that it startled me, as an old equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been familiar doctrine to my brother Rigby and myself that the orders of the court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who were bound by its orders."*

Later, at pp. 555-556:

> *"A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is*

> *another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the court for the benefit of the person who got it. In the other case the court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls."*

> "*Despite the fact that in that case there was in fact an injunction binding the defendant, the law is expressed in very general terms which might. I think, be said to cover the following proposition: that persons who contumaciously incite others to defy a court order in such a way that they show that they are -and I quote - "deliberately treating the order of the court as unworthy of notice" are themselves in contempt whether the order of the court is mandatory or merely declaratory. "*

20. These principles it is recognised were adopted by the Court of Appeal in

    i) ***St George's Healthcare NHS Trust v S [1999] (Fam) 26,*** the Court of Appeal (Judge LJ (as he then was)) held at 60 C:

    > *"Non-compliance with a declaration cannot be punished as a contempt of court. Nor can a declaration be enforced by any normal form of execution,* ***although exceptionally a writ of sequestration might be appropriate:*** *see* **Webster v. Southwark London Borough Council [1983] Q.B. 698."**

21. Mr McKendrick emphasis that the Court of Protection operates in an essentially non-adversarial, investigative, sui generis jurisdiction. In such an arena he argues interference with the supervisory or protective jurisdiction of the court has been viewed differently. He adopts the analysis of the Learned authors of Arlidge Eady and Smith on Contempt (4th edition) in particular chapter 11 11-338 to 342:

    11-338

    > *"It is long established that interference with the inherent parens patriae jurisdiction can amount to contempt. This will be classified as criminal contempt, even though in some cases consisting in disobedience to an order of the court. The reasoning appears to be that where the court represents the sovereign as parens patriae it is not resolving contested issues as between parties. "*

    11-339

    > *"In Long Wellesley's case, for example, an infant daughter of Wellesley was made a ward of court, and guardians were appointed, who placed the girl in the care of relatives. Wellesley removed her from their care. He was ordered by the court to bring her to the bar of the court, but he failed to do so and refused to disclose her whereabouts. He was committed to the Fleet. He was, however, a member of Parliament and reported the matter to the Speaker of the Commons, claiming privilege. The Committee of Privileges took the view that his actions constituted a criminal contempt, which fell within the principle under which persons committing indictable offences were considered not to be entitled to privilege. The matter then came before Lord Brougham L.C. on a motion to discharge the committal order. He held that Wellesley was not entitled to privilege, for such a claim was of no avail*

> *where the object of the process was the delivery up of a person wrongfully detained. "*

11-340

> *"Even where no order of the court is directly involved, it was recognised that it would constitute contempt to marry a ward without leave. It was regarded as a contempt on the part of the ward as well as on that of the person who married her. It would likewise be a contempt of the part of anyone who assisted at that marriage. "*

11-341

> *"In Crump an infant girl was made a ward of court on her parents' motion. A later order was made restraining the ward and one Kearney from marrying. In breach of this order they married. At the Register Office they produced a forged form of consent, purporting to be by the girl's parents. The parents accepted the position and took no further action, but the Attorney-General moved the court to commit the ward and Kearney for contempt. Counsel for the Attorney-General stated that it was the first time he had intervened in a wardship case, but the marriage was ipso facto criminal contempt and it was therefore proper that the motions for committal should be brought in this way. Faulks J took a similar view, and sentenced both contemnors to 28 days' imprisonment, because he felt it necessary to show that such an order of the court could not be deliberately flouted. "*

11-342

> *"It was also a contempt to take a ward outside the jurisdiction without the consent of the court, to refuse to deliver a ward to a guardian appointed by the court, or to refuse to disclose the whereabouts of a ward. "*

22. The Official Solicitor distils from these authorities the following propositions, namely that where:

    i) an application was issued in the Court of Protection specifically seeking the Court's permission to remove P from the jurisdiction;

    ii) the court was seized of the matter;

    iii) the court declared on an interim basis that it is in P's best interests to live at a certain address within the jurisdiction;

    iv) it follows that a party, with knowledge of the application and court's orders would commit a contempt of court by removing or organising for the removal of P from the jurisdiction without the court's permission.

23. It is contended that this amounts to a contempt of court, even when no injunctive order has been made. In essence the argument is:

    i) the principles of wardship and *parens patriae* should apply to the Court of Protection, given the supervisory and protective nature of the Court of

Protection's jurisdiction, and P should be protected as would a ward of court and/or because;

ii) such a person would be deliberately treating the declaratory order of the court as unworthy of notice.

24. All the parties at the conclusion of the hearing on the 30th October felt that they needed further time to research this point. In his supplemental submission dated 14th November 2014 Mr McKendrick had widened his research into the relevant case law. Particular emphasis was placed on ***Attorney General v Times Newspapers [1992] 1 AC 191.*** In that case the House of Lords considered whether publication by the Sunday Times of material from the book *Spycatcher* amounted to a contempt of court in circumstances where no injunction had been made against the Sunday Times, but injunctive relief had been granted against other newspapers. Mr McKendrick suggests that it is instructive to consider the argument made by the Attorney General as set out in the law report, thus:

> *"The whole thrust of the appellants' case confuses two different questions:*
>
> *(1) Who in any given case is bound by an injunction?*
>
> *(2) What acts may constitute an interference with the course of justice so as to be contemptuous?*
>
> *It is necessary to emphasise two points.*
>
> *(i) The case is not concerned with whether third parties are bound by injunctions granted against other persons.*
>
> *(ii) Contempt of court consists of an interference with the due administration of justice: see* ***Attorney-General v. Newspaper Publishing Plc. [1988] Ch. 333, 361F and Borrie & Lowe's Law of Contempt , 2nd ed. (1983), p. 1."***

25. This is said to be, by parity of analysis, a strikingly similar point to that advanced by the Official Solicitor in these proceedings. Mr McKendrick further draws my attention to the speech of Lord Ackner at page 208

> Nearly 70 years ago a similar comment was made by Lord President Clyde in ***Johnson v. Grant, 1923 S.C. 789*** . He said, at p. 790:
>
> > *"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned . . . The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice. . . . It is not the dignity of the court which is offended - a petty and misleading view of the issues involved - it is the fundamental supremacy of the law which is challenged."*
>
> More recently Lord Diplock in ***Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440*** thus summarised the position, at p. 449:
>
> > *"Although criminal contempts of court may take a variety of forms they all share a common characteristic; they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court . . ."*

26. Lord Ackner drew a distinction between 'criminal contempt' and 'civil contempt'. At page 211 he observes:

> *"From the very outset of this litigation, Mr. Laws, for the Attorney-General, has accepted that the publication which he contends was "contemptuous" did not constitute a breach of the 1986 orders made against "The Guardian" and the "Observer," since the publication was not made by the only persons restrained by the 1986 order, but independently by other newspapers. Mr. Laws has consistently contended that there are two types of contempt. The first is civil contempt, which consists of a breach by a party to proceedings of an order made against him; that is not the present case. The second type is a criminal contempt which consists of conduct which frustrates or impedes the due administration of justice and that, said Mr. Laws, is the present case."*

27. In his speech, Lord Oliver of Aylmerton analyses the issues at pages 221-222:

> *"My Lords, there can be no logical distinction between a case where the court seeks to protect or preserve the interests of justice by a procedural ruling in the course of a hearing and one where it seeks to achieve the same end by a formal prohibition directed to one of the parties. Once one gets away, as these authorities compel, from the notion that the binding effect of an order is an essential ingredient in the offence of contempt, Mr. Lester's proposition that the actus reus of contempt is narrowly confined solely to those who aid, abet or incite breaches by the party bound is seen to be untenable. It could not have made the slightest difference to the liability of Murray and Shepherd in Seaward v. Paterson [1897] 1 Ch. 545 ,…*
>
> *Once the conclusion is reached that the fact that the alleged contemnor is not party to or personally bound by the court's order then, given the intention on his part to interfere with or obstruct the course of justice, the sole remaining question is whether what he has done has that effect in the particular circumstances of the case. In the Court of Appeal it was said that the administration of justice was interfered with because the publication, as it was variously put, "rendered nugatory the trial of the action" (* ***[1988] Ch. 333 , 358, 373,*** *per Sir John Donaldson M.R.), "destroyed in whole or in part the subject matter of the action" (Lloyd L.J., at pp. 378-380) or "rendered the trial . . . pointless" (Balcombe L.J., at p. 387)."*

And further at page 224:

> *"The appellants argue that to invoke the jurisdiction in contempt against a person who is neither a party to the order nor an aider or abettor but who has done what the defendant in the action was forbidden by the order to do, is, in effect, to make the order operate in rem, or contramundum, if that expression is preferred. If, then, it is argued, that is assumed to be the purpose of the court in making the order, the purpose is one which the court cannot legitimately achieve because, as the authorities referred to demonstrate, the order is only properly made inter partes. There is an appealing logic in this but the answer is, I think, that it confuses two quite different things, that is to say, the scope of an order made in private litigation inter partes and the public law question of the proper administration of justice. If the court has taken into its hands the conduct of the matter to the extent of ordering the interim preservation of the interest of the plaintiff so that the issue between him and the defendant can be properly and fairly tried, it has to be accepted that that is what the court had determined that the interests of justice require. The gratuitous intervention of a third party intended to result in that purpose being frustrated and the outcome of the trial prejudiced, must manifestly interfere with and obstruct what the court has determined to be the interests of justice. Those interests are not dependent upon the scope of the order."*

28. The decision in ***Attorney General v Times*** was further considered in ***Harrow London Borough Council v Johnstone [1997] 1 WLR 459*** by Lord Mustill (with whom the rest of the judicial committee of the House of Lords agreed) at 468-469:

> *"My Lords, the decision in Attorney-General v. Times Newspapers Ltd. could not by any stretch be applied directly to the present appeal. It depended on four circumstances. There were proceedings in existence between the Attorney-General and the first group of defendant newspapers which would be fruitless if anyone made public the information whose confidentiality the proceedings were brought to assert. There was in force an injunction, admittedly not directed to anyone except the first group of newspapers, but obviously intended to stop the publication by any medium of materials which would compromise the pending proceedings. The editor and publishers of "The Sunday Times" knew of the injunction and understood its purpose. Accordingly they knew that if they published extracts from the book they would frustrate both the purpose of the injunction and the purpose of the action itself. Their choice to publish was treated by the courts below (and this was no longer challenged before the House) as justifying the inference of an intention to interfere with the course of justice.*
>
> *None of these features is present here. It could not I think seriously be maintained that* ***Attorney-General v. Times Newspapers Ltd****. binds the House to decide in favour of the husband. The argument on his behalf is more oblique. Before addressing it I must point out one feature which does not stand in its way. At first sight the most conspicuous difference between* ***Attorney-General v. Times Newspapers Ltd.*** *and the present lies in the existence of an injunction which although not directed to other newspapers had the obvious purpose of preventing just the kind of act which "The Sunday Times" deliberately carried out. References to this injunction recur throughout the arguments and judgments, and its presence overshadows the entire case. Nevertheless it was not the mainspring of the decision, for every member of the House was at pains to emphasise that the submission for the Attorney-General did not depend on giving the injunction any binding effect on "The Sunday Times." It is not perhaps entirely clear what the reasoning of the House would have been if the injunction had not existed at all. A lead towards the answer is, I believe, given by Lord Oliver of Aylmerton, at p. 224:*
>
>> *"If the court has taken into its hands the conduct of the matter to the extent of ordering the interim preservation in the interest of the plaintiff so that the issue between him and the defendant can be properly and fairly tried, it has to be accepted that that is what the court had determined that the interests of justice require. The gratuitous intervention of a third party intended to result in that purpose being frustrated and the outcome of the trial prejudiced, must manifestly interfere with and obstruct what the court has determined to be the interests of justice. Those interests are not dependent upon the scope of the order."*
>
> *"This reasoning shows, I believe, that even where there is no injunction to make explicit the importance of preserving the subject matter of an action until trial a wanton destruction of that subject matter, with the intention of impeding a fair and fruitful trial, is capable of being a contempt of court; and indeed I would myself have been willing to recognise this possibility even without the guidance of the House. "*

29. On behalf of the Official Solicitor it is submitted that these principles find resonance in the judgment of Forbes J in ***Webster v Southwark LBC [1983] QB 698.***

> *"Despite the fact that in that case there was in fact an injunction binding the defendant, the law is expressed in very general terms which might, I think, be said to cover the following proposition: that persons who contumaciously incite others to defy a court order in such a way that they show that they are - and I quote - "deliberately treating the order of the court as unworthy of notice" are themselves in contempt whether the order of the court is mandatory or merely declaratory."*

30. On my reading of the supplemental submissions presented on behalf of the Official Solicitor it is essentially contended that the case law supports three propositions. These can be stated shortly:

    i) a contempt, which is of a criminal complexion, may be committed by a party deemed to have notice of an injunction but not having been actually served with it. This requires evidence of conduct calculated to frustrate or impede the intention of the court;

    ii) it follows that even though there may be no existing injunction against a **party** to the proceedings behaving in a way designed to frustrate or impede the intentions of the court, or causing 'wanton destruction' (per Lord Mustill (Supra,)) to the subject matter of the litigation a contempt may nonetheless be committed;

    iii) It is the deliberate obstruction of the court's intentions that amounts to a contempt not the breach of any injunction (which need not, in any event, be a prerequisite).

31. Whilst many of the principles considered above continue to have resonance in our approach to Committal Applications, it nonetheless must be recognised that the law has evolved in contempt proceedings with much greater emphasis now being placed on the fact that they involve the liberty and autonomy of the individual. As such, there has been a growing appreciation of the importance of both procedural and evidential precision. These are aspects of 'fairness' brought into sharper focus by Article 6 ECHR via the Human Rights Act 1998. I took some effort to emphasise these points in Re *Whiting* [*2014] C.O.P.L. R 107* paragraph 12 1 - 6 and paragraph 13

> ***[12]*** *It seems to me to be important to note some crucial features of the committal process:*
>
> *(1) the procedure has an essentially criminal law complexion. That is to say, contempt of court must be proved to the criminal standard, ie so that the judge is sure. The burden of proof rests throughout on the applicant (see Mubarak v Mubarak [2001] 1 FLR 698);*

(2) contempt of court involves a deliberate contumelious disobedience to the court (see A (Abduction: Contempt), Re [2008] EWCA Civ 1138, [2009] 1 FLR 1, [2009] 1 WLR 1482);

(3) it is not enough to suspect recalcitrance; it must be proved (see London Borough of Southwark v B [1993] 2 FLR 559);

(4) committal is not the automatic consequence of a contempt, though the options before the court are limited – for example:
(a) do nothing;
(b) adjourn where appropriate;
(c) levy a fine;
(d) sequester assets;

(e) where relevant, make orders under the Mental Health Act (see Hale v Tanner [2000] 1 WLR 2377, [2000] 2 FLR 879);

(5) the objectives of the application are usually dual, ie to punish for the breach and to ensure future compliance;

(6) bearing in mind the dual purpose of many committal proceedings, they should be brought expeditiously, whilst primary evidence is available and the incidents are fresh in the mind of the relevant witness. This is particularly important in the Court of Protection where there may be reliance on a vulnerable witness and where capacity might have to be assessed.

***[13]** It follows, therefore, that where injunctive orders are made, they should be clear, unambivalent and drafted with care. In my judgment, simplicity should be the guide. Similarly, where breaches are alleged, they should be particularised with care, both so that the alleged contemnor knows exactly what, where, when and how it is contended that he is in breach, so as to be able to marshal his defence, but also to help the applicant focus on what evidence is likely to be required to establish the breach to the requisite standard of proof.*

32. In ***Justice for Families Ltd*** v ***Secretary of State for Justice*** **[2014] EWCA Civ 1477**, a case which concerned an application for a writ of habeas corpus ad subjiciendum, Sir James Munby, President of the Family Division, emphasises the importance of transparency in such applications, in all but the most exceptional cases. In the President's judgment it is described as ***'fundamental to the administration of justice'***. These principles, which should be taken to apply to the Court of Protection too, serve again to underscore procedural fairness as a vital aspect of the integrity of the process.

33. The rules which apply to proceedings for contempt of court are governed by PD21A (Contempt of Court). There is important guidance in the Practice Guidance dated 3rd May 2013 and the Practice Guidance dated 4th June 2013 which also set out the accepted practice for an order of committal. In cases in the Family Court where it is thought that there is a prospect of or likelihood of non compliance with an order, a penal notice will be added to the order. In the Court of Protection the court may direct that penal notices may be attached to any order warning the person on whom the copy of the order is served that disobeying the order would be a contempt of court punishable by imprisonment or a fine (Court of Protection Rules 2007 r192 (1)). r192 (2) provides

> *"unless the court gives out directions under paragraph (1), a penal notice may not be attached to any order."*

34. Rule 192 (3) provides:

> *'a penal notice is to be in the following terms:*
>
> *you must obey this order. If you do not, you may be sent to prison for contempt of court. "*

35. Finally rule 194 makes it plain that the proceeding provisions within the rules are not to be taken as affecting the power of the court to make an order for contempt on its own initiative against a person guilty of contempt of court.

36. In ***E&K v SB & JB* [2012] EWHC 4161 (COP)** the District Judge there made declarations as to E&K's best interests and made detailed orders regulating contact with SB & JB. In particular, paragraph 6 of the order reads

> *'JB/SB shall not whether by himself and/or herself, or by encouraging others, seek to remove or attempt to remove E or K from H house, T by T, S works, or any day placement centre they are attending, or seek to remove them from, or interfere in anyway with their planned activities or abduct them'.*

37. In that case, unlike here, there was a lengthy history of SB and JB breaching orders of the court by way of abduction and unauthorised contact. By the time of the hearing very significant admissions had been made. It is recorded that the Local Authority sought

> "'to prove the breaches of the courts order by JB in order to support an application for an injunction with a penal notice'. "

38. The best interest orders were perceived as needing to be supported both by injunction and a Penal Notice in order to give them the necessary force. Finally, by way of completeness I should observe that though expressed in declaratory terms as if it were in effect made pursuant to section 15 of the Mental Capacity Act 2005 the order of 20th February is an order under Section 16 of the Act which permits decision making in relation to P's personal welfare, property or affairs.

Sections 15 & 16 Mental Capacity Act 2005 read as follows:

15 Power to make declarations

(1) The court may make declarations as to—

(a) whether a person has or lacks capacity to make a decision specified in the declaration;

(b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) "Act" includes an omission and a course of conduct.

16 Powers to make decisions and appoint deputies: general

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

(a) P's personal welfare, or

(b) P's property and affairs.

(2)The court may—

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

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

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

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—

(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

(5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.

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

(8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy—

(a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or

(b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

39. Section 16 it must be noted is framed in terms of the court making 'orders' and 'decisions' rather than the 'declarations' contemplated by Section 15. In this area Section 15 largely replaces the High Court's Inherent Jurisdictional powers under which aegis the Family Division, prior to the Mental Capacity Act 2005, made declarations in respect of mentally incapacitated adults in regard to medical treatment and personal welfare. The order of 20th February, drafted in what I believe to be largely standard terms, now seems to me to conflate the language and concepts of Section 15 and 16.

40. Drawing the strands of the case law, the legal framework and the agreed facts together, the following points emerge:-

    i) The Court made clear personal welfare decisions on behalf of an incapacitated woman which every party agreed to be in her best interests;

    ii) Breach of Court Orders even in the absence of a Penal Notice may nonetheless potentially be a contempt where there is a wanton disregard for the court's decision;

    iii) Some case law also suggests that in the exercise of the parens patriae **any action hampering the objectives of the court** is an interference with the administration of justice and therefore a criminal contempt see ***RE B(JA) (an infant)*** **1965 CH1112** at P1117:

    > *'any action which tends to hamper the court in carrying out its duty [to protects it's ward] is an interference with the administration of justice and a criminal contempt'*

41. The Official Solicitor contends that this last point, at (iii) above, applies, with equal vigour in the Court of Protection where the Court's jurisdiction in relation to incapacitous adults should be regarded as 'indistinguishable' from its wardship jurisdiction in relation to children. They rely there on ***Re SA; a Local Authority v MA [2005] EWHC 2942 (Fam)*** per Munby J (as he then was).

42. Though the Official Solicitor's supplementary submissions were filed by the 18th November 2014 I did not receive any indication that the Local Authority intended to file any further document. However, on the 18th January 2015 when, as will be obvious, the outline of this judgment had already been completed, I received a document in which the Local Authority had largely adopted the analysis of the Official Solicitor in relation to the law. Doing the best I can to summarise the Local Authority's position, it would seem that they do not abandon their earlier submissions but, as I understand it, relegate them to secondary status. Accordingly, their earlier position still requires to be stated (as above). It is necessary for me only to record two of their supplemental submissions given that they now largely mirror those of the Official Solicitor.

43. At paragraph 9 of his skeleton Mr Rhys Hadden states:

    > "it is a well established principle that a person may well be in contempt of court even in the absence of a court order or injunction prohibiting or compelling specific behaviour."

    Later at paragraph 13 he states

    > "It is clear that a criminal contempt may be committed in circumstances where a person, whether a party to the proceedings or not, knowingly acts in such a way that a

> amounts to a destruction of the very subject matter of the litigation and there by impedes the due administration of justice. This remains a contempt irrespective of whether any order is in place prohibiting such behaviour or not"

44. However though the Local Authority has now adopted the analysis of the law advanced by the Official Solicitor it concludes merely that "there is a prima facie case of criminal contempt attributable, at least to the actions of the second respondent (i.e. the grandson)". Ultimately their final position is stated to be as follows.

> "if the court determines that it is appropriate to pursue an investigation of the facts, further consideration will need to be given about whether it can be demonstrated to the criminal standard that the second respondent (or the applicant) knowingly intended to interfere with the course of justice."

45. For the reasons I have already said at para 17 above the Local Authority's understanding of the cogency of the evidence does not accord with my own.

46. Addressing the Official Solicitor's argument in relation to actions hampering the exercise of the parens patriae I do not consider that the jurisdiction I am exercising here equates seamlessly with the exercise of the parens patriae or wardship jurisdiction in relation to children. Nor do I consider that Munby J intended to go so far in Re *SA* (supra). Whilst both jurisdictions require there to be a sedulous protection of the vulnerable, there is a paternalistic quality to wardship which does not easily equate to and is perhaps even inconsistent with the protection of the incapacitous adult, in respect of whom capacity will or may vary from day to day or on issue to issue. There is in addition, the obligation to promote a return to capacity wherever possible. The Court of Protection has a protective and supervisory role but wardship goes much further, it invests the judge with ultimate responsibility. The child becomes the judge's ward. There is no parallel in the Court of Protection and it would be wrong, in my view, to rely on this now dated and limited case law (identified by Mr McKendrick) to permit this Court to reach for a power which is not specifically provided for in the comprehensive legislative framework of the Mental Capacity Act 2005.

47. The law in relation to children has also moved on from the landscape surveyed by Lord Atkinson in Scott v Scott [1913] AC 417, particularly since the inception of the Children Act 1989, drafted of course, with ECHR compatibility in mind. Lord Atkinson's description of a 'paternal and quasi domestic jurisdiction over the person and property of the wards' has little resonance for practitioners for whom 'family life', protected under Article 8 of the ECHR, is evaluated by analysing competing rights and interests, where the autonomy of the child is also afforded great respect. Unsurprisingly and partly in response to the range of these principles the scope and ambit of wardship has reduced very considerably (Section 100 Children Act 1989 repealed Section 7 of the Family Law Reform Act 1969, the route by which the High Court had derived its power to place a ward of court in the care, or under the supervision of a Local Authority). Whilst Mr McKendrick is entirely right to draw this line of authority to my attention, the position in relation to wardship is, to my mind, largely anomalous, predicated as it is on the somewhat artificial premise that the court represents the Sovereign as parens patriae and cannot therefore be resolving

contested issues as between the parties in an non adversarial arena (see Arlidge, Eady and Smith on contempt (4 edition) (Para 11-338). Mr McKendrick put much emphasis on the judgment of Munby J in Re SA (Vulnerable Adult with Capacity: Marriage) [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para 84. In particular he referred me to par 84:

> *"As I have said, 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 jurisdiction in relation to children. There is little, if any, practical difference between the types of orders that can be made in exercise of the two jurisdictions."*

It is important to emphasise that Munby J whilst emphasising the similarity of the two jurisdictions 'for all practical purposes' also notes the essentially different, indeed unique, nature of the wardship jurisdiction, later in the same paragraph:

> *"The main difference is that the court cannot make an adult a ward of court. So the particular status which wardship automatically confers on a child who is a ward of court – for example, the fact that a ward of court cannot marry or leave the jurisdiction without the consent of the court – has no parallel in the case of the adult jurisdiction. In the absence of express orders, the attributes or incidents of wardship do not attach to an adult."*

48. Ultimately, a declaration of best interests connotes the superlative or extreme quality of welfare options. It by no means follows automatically that an alternative course of action to that determined in the Declaration, is contrary to an individual's welfare. There may, in simple terms, be a 'second best' option. For this reason, such a declaration cannot be of the same complexion as a Court Order. It lacks both the necessary clarity and fails to carry any element of mandatory imperative. I am ultimately not prepared to go as far as Mr McKendrick urges me to and elevate the remit of the Court of Protection, in its welfare decision making, to such a level that anything hampering the court in the exercise of its duty, or perpetrated in wanton defiance of its objectives is capable, without more, of being an interference with the administration of justice and therefore criminal contempt. Such an approach would it seems to me be entirely out of step with the development of our understanding of the importance of proper and fair process where the liberty of the individual is concerned. I would add that this has long been foreshadowed by the recognition that the necessary standard of proof in a application to commit is the criminal standard.

49. Moreover, though my order of 20th February 2015 was expressed to have been made pursuant to section 16, it was drafted in declaratory terms. As such, for the reasons I have set out above, it cannot, in my judgement, trigger contempt proceedings. There cannot be 'defiance' of a 'declaration' nor can there be an 'enforcement' of one. A declaration is ultimately no more than a formal, explicit statement or announcement.

That said I emphasise that Mr MASM, in fact acted, through the agency of his son, in a way which was cynically contrary to his mother's best interests. The course he took was not a 'second best' option but one entirely inimical to his mother's welfare, physically, mentally and emotionally. He has frustrated the objectives of the litigation but he is not, as I ultimately find, acting in defiance of an order and therefore is not exposed to contempt proceedings.

50. I must finally deal with a further point raised by the Local Authority in their lamentably late submissions. They state:

> "The Local Authority does not agree with the general proposition that the court's permission is required to remove an incapacitous adult from the jurisdiction. There is no authority to support this as a broad statement of principle. In *Re PO: JO v GO* [2013] EWHC 3932 (COP), Sir James Munby P held at paragraph 18 that:"
>
> > *"In the case of an adult who lacks the capacity to decide where to live, habitual residence can in principle be lost and another habitual residence acquired without the need for any court order or other formal process, such as the appointment of an attorney or deputy. Here, as in other contexts, the doctrine of necessity as explained by Lord Goff of Chieveley in In re F (Mental Patient: Sterilisation) [1990] 2 AC 1, 75, applies…Put shortly, what the doctrine of necessity requires is a decision taken by a relative or carer which is reasonable, arrived at in good faith and taken in the best interests of the assisted person. There is, in my judgment, nothing in the 2005 Act to displace this approach. Sections 4 and 5, after all, pre-suppose that such actions are not unlawful per se; they merely, though very importantly, elaborate what must be done and provide, if certain conditions are satisfied, a statutory defence against liability…"*

Had Mr Rhys Hadden read on he would have seen at para 20 the President identify a distinction to the proposition set out above:

> *Of course, the doctrine of necessity is not a licence to be irresponsible. It will not protect someone who is an officious busybody. And it will not apply where there is bad faith or where what is done is unreasonable or not in the best interests of the assisted person. Thus there will be no change in P's habitual residence if, for example, the removal has been wrongful in the kind of circumstances with which Hedley J was confronted in Re MN or if, to take another example, the removal is, as in Re HM (Vulnerable Adult: Abduction) [2010] EWHC 870 (Fam), [2010] 2 FLR 1057, in breach of a court order.*

51. Given that I have found Mr MASM to be acting 'in bad faith' and 'contrary to the best interest of the assisted person' the broad statement of principle highlighted by the Local Authority is irrelevant and I need say no more in respect of it.

52. Though this case raises important issues of law and practice it must be emphasised that conduct of the kind seen here is rare, indeed in my experience it is unprecedented. Many of the litigants who come before the Court of Protection are at a time of acute distress in their lives, as a cursory glance at the case law of this still fledgling court will show. The issues could not be more challenging, not infrequently they quite literally involve decisions relating to life and death. Inevitably, some litigants do not achieve their objectives neither wholly nor in part but they respect the process. More than once I have observed that the importance to a family of being heard in decisions of this magnitude matters almost as much as the outcome itself. Sometimes the medical and ethical issues raised are such that NHS Trusts seek the authorisation of the court to endorse or reject a particular course of action. The court ultimately gives its conclusion by declaration both in relation to lawfulness and best interests. The terms of these declarations often cannot and indeed should not seek to be too prescriptive.

53. Another category of case which frequently arises (as here) is where an elderly relative suffering from dementia requires specialist and residential care. Partners or relatives sometimes struggle to accept the privations that are often necessary in such circumstances and there occasionally can be conflict. Frequently, these issues resolve themselves but it would to my mind be disproportionate and indeed corrosive of the cooperation ultimately required, for the shadow of potential contempt proceedings to fall too darkly over cases such as this. It would not be an appropriate response to this judgment for the profession to over burden future orders too readily with Penal Notices.

54. Such guidance as I can give can only be limited:

    i) Many orders pursuant to Section 16 seem to me to be perfectly capable of being drafted in clear unequivocal and even, where appropriate, prescriptive language. This Section provides for the 'making of orders' as well as 'taking decisions' in relation to P's personal welfare, property or affairs. Where the issues are highly specific or indeed capable of being drafted succinctly as an order they should be so, rather than as more nebulous declarations. Where a determination of the court is capable of being expressed with clarity there are many and obvious reasons why it should be so;

    ii) In cases which require that P, for whatever reason, reside at a particular place the parties and the court should always consider whether to reinforce that order, under Section 16, by a declaration, pursuant to Section 15, clarifying that it will be unlawful to remove P or to permit or facilitate removal other than by order of the court;

    iii) In cases where the evidence suggests there may be potential for a party to disobey the order or frustrate the plans for P approved by the court as in his best interest, the Official Solicitor or Local Authority should consider inviting the court to seek undertakings from the relevant party. If there is a refusal to give undertakings then orders may be appropriate;

iv) Where a potential breach is identified the Local Authority and/or the Official Solicitor should regard it as professional duty to bring the matter to the immediate attention to the court. This obligation is a facet of the requirement to act sedulously in the protection of the vulnerable;

v) Thought must always be given to the objectives and proportionality of any committal proceedings see ***Re Whiting (supra)***.

55. Finally, in this case Mr MASM brought the proceedings, acquiesced to a declaration and then disregarded the outcome entirely. I can see no reason why he should not be responsible for the entire costs of the proceedings at every stage and for every party. I will afford his counsel every opportunity to make any representations on the point. I emphasise that such costs should be borne by Mr MASM personally and not taken from his mother's funds. At the conclusion of the hearing I also invited the Local Authority to take measures to secure Mr MASM's removal as his mother's deputy. I hope to hear soon that has been done.