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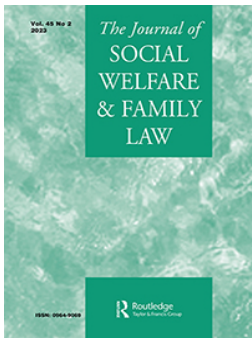
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Section 48 orders in the Court of Protection: undermining autonomy or an honest account of interim judging?

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ABSTRACT

This case note considers the role of section 48 orders under the Mental Capacity Act 2005 following the decision by Mostyn J in *A Local Authority v LD and RD* [2023] EWHC 1258 (Fam). The case concerned an application for removal from home for a man in his 40s with learning disability, autism and Down's Syndrome for the purposes of assessment of mental capacity. The case note considers the role and function of interim orders under section 48 as well as the wider problem of removing adults from their own home in the name of safeguarding.

KEYWORDS

Autonomy; best interests; Court of protection; interim orders; mental capacity

A Local Authority v LD and RD [2023] EWHC 1258 (Fam) concerned a local authority's application for an order to remove a man, LD, from his home for assessment of his mental capacity under the Mental Capacity Act 2005 (MCA). LD, a man in his 40s, was described as having Down's Syndrome, severe learning disability, autism traits and atrio-ventricular septal heart defect. His care needs were extensive, requiring full support on a 24-hour basis. LD lived with his mother, RD, who was in her eighties. A key feature of the case was that LD had very rarely been seen by anyone in the past three years and generally had a history of not effectively engaging with services. For example, LD had needed a cardiology review due to his heart defect but had not been seen for cardiology assessment since 2018. The exacerbating factor for LD's withdrawal from services appears to have been the COVID-19 pandemic, since which RD would only allow carers to speak at the doorstep of her home and drop off supplies. According to the judgment 'LD . . . is kept upstairs at all times confined to his bedroom and bathroom. It is believed that LD sleeps in a chair with no daily/night time routine'. (para 9).

Clearly there were legitimate concerns about the provision of care to LD and issues came to a head when a safeguarding referral was made in April 2023 by an adult congenital nurse specialist. This led to further investigations and ultimately an application to the Court of Protection (CoP) by the local authority to determine LD's mental capacity to make decisions regarding his health and welfare. Concerns were that he was 'suffering emotional and physical harm and that his health and welfare are being seriously impacted'. (para 13).

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The reported judgment does not deal with the question of whether it was in LD's best interests for such an order to be made; its significance is in Mostyn J's comments regarding the use of section 48 MCA, which states:

Interim orders and directions

The court may, pending the determination of an application to it in relation to a person ('P'), make an order or give directions in respect of any matter if:

- (a) there is reason to believe that P lacks capacity in relation to the matter,
- (b) the matter is one to which its powers under this Act extend, and
- (c) it is in P's best interests to make the order, or give the directions, without delay.

This provision is used to enable the CoP to make interim declarations of incapacity in P's best interests, while full evidence is adduced. The key wording is whether there is 'reason to believe that P lacks capacity': see *DP (By His Accredited Legal Representative) v London Borough of Hillingdon* [2020] EWCOP 45. The distinction between the interim (section 48 MCA) and the substantive (section 15 MCA) questions about capacity, is that, as Hayden J put it in *DP* (para 62(vi) and (iv) respectively): 'The former [s 48] requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter [s 15] requires an evaluation as to whether P, in fact, lacks capacity'; as he further explains, 'Section 48 is a permissive provision in the context of an emergency jurisdiction which can only result in an order being made where it is identifiably in P's best interests'.

In my view, Hayden J's approach is the most persuasive interpretation of the distinction between sections 15 and 48 MCA, particularly as it is reinforced by section 2(4) MCA which states 'In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities'. On the evidence available at the interim stage, there might, on the balance of probabilities, be good reason to believe that P lacks capacity. However, as mental capacity is a factual question to be determined by the court, it is possible, upon further investigation, that P is, in fact, capacitous at the final stage. The two findings are not mutually exclusive and are based on evidential differences at points in time, analogous with the tests for interim and final care orders in public law children proceedings.

Despite this, Mostyn J engaged in an extensive discussion regarding the meaning of section 48, ultimately concluding that it is not to be determined on the civil standard of the balance of probabilities, but instead is comparable to that of an interim injunction, to be determined on a likelihood of not less than 25% (para 29).

There are numerous difficulties with Mostyn J's approach. Firstly, and as I suggest above, whether that is indeed the right approach to section 48 as a matter of law is uncertain, with no case law specifically on the point and most of Mostyn J's arguments drawn from case law in quite different contexts. Hayden J's view in *DP* shows how the balance of probabilities standard can apply to both sections 15 and 48 MCA.

Secondly, it is questionable whether it was necessary to set out such detailed guidance on section 48's use at all. Mostyn J quotes Hayden J in *DP* that the wording needs 'no gloss' (para 62), and yet that is precisely what he goes on to apply. However, where I think he is right is in making the point that there is nothing in the law to suggest that a section 48 declaration has to be 'strongly' in P's best interests (para 22), something perhaps implied by Hayden J's use of the word 'identifiably', as quoted above. The reality of CoP practice is that section 48 determinations of incapacity *are* made on a routine basis, so to

suggest that some sort of special consideration is given that requires the judge to be sure it is strongly in P's best interests does not reflect reality, nor is it practical. As I have written elsewhere, the CoP makes declarations of incapacity routinely in the early stages of proceedings, sometimes based on very little evidence (Lindsey 2022a, pp. 180–181, 210). Arguably, Mostyn J's analysis serves to highlight how the provision is actually used by judges, who apply a much lower threshold of analysis to interim decisions. His honesty in this regard is something for which he ought not be criticised.

Thirdly, it is concerning that section 48 MCA should be used to remove an adult from their home for the purposes of a capacity assessment. Reassuringly, Mostyn J does at least acknowledge that the inherent jurisdiction could not be used to deprive the adult of his liberty in these circumstances (paras 36–42). However, the notion of removing a person from their home, potentially against their will and with the use of force, is controversial to say the least, with many expressing concern about this as a way of supposedly securing a person's autonomy (Dunn *et al.* 2008, Lindsey 2016, 2020).

Finally, it is important to emphasise that other options are open to local authorities who want to take steps to protect those adults they deem to be at risk of abuse. For example, they could seek an order to conduct a capacity assessment, which does not have to involve forcibly removing P from their home, or take action against the alleged perpetrator. Of course, these approaches are imperfect and the need for stronger safeguarding provisions has been discussed elsewhere (Williams 2002, Dunn *et al.* 2008, Lindsey 2016, 2020, 2022b).

This decision raises many difficulties: the question of the interpretation of section 48, the impact on an adult's autonomy and the potential lowering of a threshold to enforce coercive intervention against vulnerable people. However, it is possible that Mostyn J has merely articulated the operation of section 48 by judges in practice, and this will now open a debate regarding the appropriate use of interim orders which can have such intrusive effects for those impacted by them.

Disclosure statement

No potential conflict of interest was reported by the author.

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