Mental Capacity Law Newsletter April 2016: Issue 64

Capacity outside the Court of Protection

Introduction

Welcome to the April 2016 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: Charles J and the DOL impasse, sex and marriage, grappling with anorexia, and wishes and feelings in different contexts;
- (2) In the Property and Affairs Newsletter: revoking and suspending LPAs, Law Society guidance on fiduciary duties and the OPG on delegation;
- (3) In the Practice and Procedure Newsletter: Court of Protection statistics, the appointment of the Chief Assessor for the Law Society Mental Capacity accreditation scheme, statutory charges, contempt of court, and the admissibility of expert evidence;
- (4) In the Capacity outside the COP Newsletter: follow-up from the Mental Capacity Action Day, obstructive family members and safeguarding, and end of life care and capacity;
- (5) In the Scotland Newsletter: capacity, facility and circumvention, the new Edinburgh Sheriff Court Practice Note, an important case on the ability to apply for appointment as a guardian, and key responses to the Scottish Government consultation on incapacity law.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site <u>here</u>. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE <u>website</u>.



Editors

Alex Ruck Keene Victoria Butler-Cole Neil Allen Annabel Lee Anna Bicarregui Simon Edwards (P&A)

Guest contributor Beverley Taylor

Scottish contributors Adrian Ward Jill Stavert

Table of Contents

Introduction 1 National Mental Capacity Action Day 2 Updated Care Act Guidance published 2 Call for guidance on dealing with 2 obstructive family members BMA report on end of life care and physician-assisted dying 3 Report of the House of Lords Select Committee: The Equality Act 2010: the impact on disabled people 3 Local Government Ombudsman: disabled facilities grant problems 5 Guidance for social workers working with people with an ABI 6 ATU Days of Action 6 Money and mental health: new institute and survey 6 Children and life-limiting illnesses 6 Short note: Strasbourg, deprivation of liberty and children 7 Conferences at which editors/contributors are speaking 8

Essex CHAMBERS

National Mental Capacity Action Day

The newsletter editors were represented at the Action Day, at which many examples of innovative and effective methods of implementing the MCA were highlighted. In her address to the delegates (see also this Community Care article, the Chief Social Worker for Children noted that the MCA was valuable in children's services, in particular in relation to the involvement of people in decisions that concern them, and the need to avoid being unnecessarily risk averse. The Chief Social Worker for Adults was clear that the MCA was a core aspect of social work which every social work student needed to be fully trained in. The editors were interested to learn that at least one local authority now routinely trains all adult social workers as best interests assessors.

Updated Care Act Guidance published

The Statutory guidance to support local authorities implement the Care Act 2014 was updated on 24 March 2016. The guidance is now available <u>online</u> in a format that defies easy downloading, but a "hacked" composite version can be found <u>here</u>.

A helpful table identifying the amendments and additions can be found <u>here</u>, and Luke Clements has updated his invaluable briefing <u>here</u>. Many of the amendments are minor, but the chapters on safeguarding and ordinary residence have been more substantially revised and amended to reflect developments in caselaw and practical experience. The focus on safeguarding is perhaps unsurprising in light of the recent publication of <u>figures</u> from the Local Government Association showing that there has been a large increase in safeguarding referrals since the coming into force of s.42 of the Care Act (see also in this regard the recent and troubling *Times* <u>investigation</u> in conjunction with Action on Elder Abuse as regards the increase in financial abuse). We note with a degree of concern that "clarification" has been added to chapter 14 on safeguarding to "to reinforce that, ordinarily, an enquiry under Section 42 of the Act is not appropriate where people are failing to care for themselves. Section 42 is primarily aimed at those suffering abuse or neglect from a third party." We cannot help but feel that self-neglect is likely to fall back into the "too difficult" category as a result of this step.

Call for guidance on dealing with obstructive family members

In 2014 Newcastle Safeguarding Adults Board published a case review arising from the death of an elderly man whose son was subsequently convicted of wilful neglect under the MCA 2005, which has only just hit the headlines. The man himself had a history of non-engagement with medical services, and was supported in this by his son. When concerns about the man's capacity arose, the local authority made an application to the Court of Protection, but sadly the man died before any substantive progress was made with the application, which was strongly resisted by the man's son. The case review concludes that an earlier application to the Court of Protection would have made a difference, and recommends improved MCA training and awareness. While that is no doubt to be supported, the case review contains the following paragraph, which the editors respectfully suggest contains the entirely incorrect assertion that it can never be in P's best interests for an unwise decision to be taken:

It has been questioned whether a successful and/or quicker application to the Court of Protection would have made any difference to

Essex CHAMBERS

the safeguarding of Adult D, given his previous lack of engagement with services. In determining Adult D's best interests the Court of Protection would have been required to consider his previous behaviour and his current wishes and feelings amongst a number of other factors; however these would not have significantly influenced the outcome as the Mental Capacity Act does not allow any decision-maker, including the Court, to make an unwise decision as being in the best interests of an incapacitated person. Given the unique circumstances of this case the factor of magnetic importance for the Court would have been ensuring Health and Adult Social Care were given access to Adult D in his own home for the purposes of assessment and care provision.

This extract from the case review highlights the tension between the MCA as a method of protection, and as a way of empowering people who lack capacity to make their own decisions but wish their preferences to be respected. The editors suggest that while written guidance as to managing obstructive family members may be useful, addressing the wider issue of the interface between the MCA and safeguarding responsibilities is something which may be more helpful.

BMA report on end of life care and physician-assisted dying

The third part of the BMA's report on end of life care and physician-assisted dying was <u>published</u> in March. The report contains the 'reflections and recommendations' of the BMA's enquiry. The following key points of direct relevance to MCA practitioners arose:

• Current training on mental capacity does not always address all of the complexities involved in assessing decision-specific capacity in patients.

- Training should look to emphasise specific issues associated with mental capacity which are particularly applicable to the end of life – such as fluctuating capacity, patients with cognitive impairments, and recognising that capacity must be assessed for specific decisions.
- Doctors should understand how to best maximise decision-making capabilities.

Report of the House of Lords Select Committee: The Equality Act 2010: the impact on disabled people

The Equality Act 2010 received the Royal Assent on 8 April 2010. The Act brought together a number of statutes relating to discrimination into one statute. Most of the main provisions of the Act were brought into force by 1 October 2010 while other provisions relating to the Public Sector Equality duty of care come into force on 5 April 2011. A number of provisions of the Act however have still not been brought into force 6 years later.

A Committee was appointed in June last year under the chairmanship of Baroness Deech to conduct post legislative scrutiny of the disability provisions of the Act. During the course of the enquiry the Committee hear evidence from a range of people and organisations. The report of the committee was <u>published</u> on 24 March 2016. It made dismal reading.

Commenting on the report, the Chair of the Commission, Baroness Deech, said:

Over the course of our inquiry we have been struck by how disabled people are let down across the whole spectrum of life.

Access to public buildings remains an unnecessary challenge to disabled people. Public authorities can easily side-step their legal obligations to disabled people, and recent changes in the courts have led to disabled people finding it harder to fight discrimination.

When it comes to the law requiring reasonable adjustments to prevent discrimination, we found that there are problems in almost every part of society, from disabled toilets in restaurants being used for storage, to schools refusing interpreters for deaf parents, to reasonable adjustments simply not being made.

In the field of transport alone, we heard of an urgent need to meet disabled people's requirements – whether it's training for staff or implementing improvements to trains and buses - and we're calling for all new rail infrastructure to incorporate step-free access in its design from the outset.

Government bears the ultimate The responsibility for enabling disabled people to participate in society on equal terms, and we believe it is simply not discharging that responsibility. Not only has the Government dragged its heels in bringing long-standing provisions of the Act into force, such as those requiring taxi drivers to take passengers in wheelchairs, but has in fact repealed some provisions which had protected disabled people. Intended to reduce the regulatory burden on business, the reality has been an increase in the burden on disabled people.

The Committee would like to see changes right at the top of Government and is calling for the Minister for Disabled People to be given a place on the Cabinet's Social Justice Committee.

It's time to reverse the attitude that disabled people are an afterthought. Many of the changes we suggest are simple and do not require legislation. We hope the Government will implement them quickly.

The report reached a number of conclusions and made a number of detailed recommendations. Although it concluded that combining disabilities with the other protected characteristics in one act did not in practice benefit disabled people, it also found that separating them out would be impractical. The committee preferred to concentrate on improvements to the Equality Act 2010 which would increase the protection of disabled people.

Of particular interest was the discussion of the role of the UN Convention on the Rights of Persons with Disabilities. The Committee was at pains to clarify the position and status of the CRPD in light of "confusion" manifested by some who gave evidence to it, and in light of submissions that the Convention should be incorporated into English law. The Committee noted that:

Incorporation of the Convention is a step of a wholly different order from implementation, and would result in every provision of the Convention becoming a provision of English law, justiciable and enforceable in the courts of this country. A recommendation by the Committee that the Convention should be incorporated into United Kingdom law would certainly, as the Law Society said, "give an important signal about government commitment to equalities legislation". But the Government, in its evidence to the inquiry by the Joint Committee on Human Rights into the UN Convention on the Rights of the Child





(UNCRC), has argued that incorporation is unnecessary.

Rather, the Committee noted that there was an alternative, namely to give an equivalent commitment to that given by the Government in relation to the UN Convention on the Rights of the Child (which, as with the UNCRPD, is ratified, but not incorporated) to "give due consideration to the UNCRC articles when making new policy and legislation. In doing so, we will always consider the UN Committee on the Rights of the Child's recommendations but recognise that, like other state signatories, the UK Government and the UN committee may at times disagree on what compliance with certain articles entails."

The Committee noted that the Government had given no equivalent commitment in relation to the CRPD, and recommended that it do so. Such would "would be a recognition by the Government of its obligation 'to take sufficient steps, including legislative steps, to realise the rights enshrined in the Convention.' We agree with the [Joint Committee on Human Rights] that this would also render the debate about incorporation an irrelevance."

The reported noted with regret the decision of the Government in 2015 to downgrade the role of the Minister for Disabled People from Minister of State to under Secretary of State, commenting that *"it seemed to suggest to the disability movement that disability issues were less important."* The report made various suggestions to make the role more effective.

The report made a number of specific recommendations, of which we pick out solely that relating to the law and enforcement. The Committee concluded that developments in recent years have made fighting discrimination more difficult for disabled people. New tribunal fees, less access to legal aid, and procedural changes have combined to create barriers to the effective enforcement of disabled people's rights. Changes are recommended to combat these developments, including the collection of data relating to disability discrimination claims and reviewing the fee structure for tribunal claims for disability discrimination. It also recommends that the government amend the mandates of those regulators, inspectorates and Ombudsmen that deal with services most often accessed by disabled people to make the securing of compliance with the Equality Act 2010 a specific statutory duty.

The government is expected to respond to the Lords report within two months of the date of the report.

Beverley Taylor

Local Government Ombudsman: disabled facilities grant problems

The Local Government Ombudsman published a report on 21 March 2016 called "*Making a house a home: local authorities and disabled adaptations*" which stated that people with disabilities were being left too long in unsuitable homes because of problems with councils' Disabled Facilities Grant (DFG) processes.

The report details that in 2015, *Leonard Cheshire Disability* found that every year almost 2,500 disabled people wait longer than they should to receive their DFG. The charity's research found that 62% of councils surveyed were not funding agreed adaptations within set timescales. It further set out research from *Foundations* which oversees the national network of Home Improvement Agencies which found that older people were able to stay in their own homes and postpone moving into a care home by an average

Click <u>here</u> for all our mental capacity resources

of four years following adaptations. The *Foundations* research suggested that the average cost of a placement in residential care is around £29,000 per year whereas the average cost of providing adaptation is less than £7,000 (although the editors note that making adaptations does not rule out the need for further in-home support).

The report sets out common issues and complaints by means of individuals complaints to the LGO: delay in making a referral, failure to complete an OT assessment and make clear recommendations; failure to consult other professionals; delay in provision of disabled adaptations etc and provides a useful summary of the DFG process in Appendix 1.

Guidance for social workers working with people with an ABI

The Brain Injury Social Work Group and the British Association of Social Workers issued "Practical Guidance for Social Workers working with people with an acquired Brain Injury" in February 2016. The guidance can be found here.

The aim of the guide is to increase awareness of ABI among social workers and to provide guidance about what an ABI is and how intervention by social workers can benefit individuals. It also contains useful information for COP practitioners who may have clients with an ABI. The guidance contains an interesting case study at appendix 1 which raises issues around a potential, previously undiagnosed ABI.

ATU Days of Action

Beginning on Monday 18 April there will be seven days of action intended *"to raise awareness of the thousands of learning disabled people* *currently being held against their wishes in assessment and treatment units.*" See <u>here</u> for more details.

The site also contains statistics about young people resident in ATUs (taken from the Learning Disability Census 2015). See <u>here</u>.

Money and mental health: new institute and survey

A new Money and Mental Policy Institute has been set up, and is running a major survey to gather stories and information from people who've experienced mental illness or mental distress about their finances. More details can be found <u>here</u>.

Children and life-limiting illnesses

In County Durham & Darlington NHS Foundation Trust v SS & Ors [2016] EWHC 535 (Fam), the court was concerned with a profoundly disabled 7 year old girl who was in the care of the local authority, and who was thought to be on a downward trajectory in view of her many serious physical and neurological disabilities. The relevant NHS Trust sought declarations that it was lawful for their clinicians to treat SS in accordance with their clinical discretion, effectively to impose a ceiling of care such that resuscitation and admission to intensive care would be most unlikely to be offered. The child's guardian supported the Trust's application; SS's parents opposed it. Granting the declarations sought, Cobb J commented on and approved the usefulness of the Royal College of Paediatrics and Child Health guidance "Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice" (2015).



Short note: Strasbourg, deprivation of liberty and children

In Blohkin v Russia [2016] ECHR 300, the Grand Chamber of the ECtHR has decided that Russia breached Article 3 of the ECHR when it detained a 12 year old boy with disabilities for 30 days in a temporary detention centre for juvenile offenders. The applicant complained that he had not received adequate medical care while in the temporary detention centre for juvenile offenders and that the conditions of his detention there had been inhuman. The Grand Chamber concluded that "there has been a violation of the applicant's rights under Article 3 on account of the lack of necessary medical treatment at the temporary detention centre for juvenile offenders, having regard to his young age and particularly vulnerable situation, suffering as he was from ADHD".

Further, the Grand Chamber confirmed the earlier Chamber decision (which the Russian Government did not contest) that "the applicant's placement for thirty days in the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5 § 1, noting in particular that the centre was closed and guarded, with twenty-four-hour surveillance of inmates to ensure that they did not leave the premises without authorisation, and with a disciplinary regime enforced by a duty It held that that there had been a sauad." violation of Article 5(1) of the ECHR as his placement in the centre could not be justified under Article 5(1)(d) as "detention of a minor by lawful order for the purpose of educational supervision", as it had not served an educational purpose. The Russian courts on deciding on his placement referred to behaviour correction and the need to prevent the boy from committing

further delinquent acts, neither of which constituted 'educational supervision'.

The court held that there had been a violation of the boy's Article 6 rights. The proceedings which had led to the boy being placed in the detention centre should have been considered criminal proceedings for the purpose of Article 6 despite the fact that they were not classified as criminal under Russian law. A majority of the court held that the child's defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as the basis for his placement in the detention centre.

The UK based charity, the Mental Disability Advocacy Centre (MDAC) was granted permission to intervene in the case. The editors note that the intervention held weight with the judges of the Grand Chamber. The judgment quotes the submissions made by MDAC and adopts some key aspects of the submissions.

For a further important Strasbourg decision this month, see also the report on <u>Kocherov and</u> <u>Sergeyeva v Russia</u> in the Scotland Newsletter.



Conferences at which editors/contributors are speaking

CoPPA London seminar

Alex will be speaking at the CoPPA London seminar on 20 April on the recent (and prospective) changes to the COP rules. The seminar will also cover the transparency pilot. To book a place or to join COPPA, or the COPPA London mailing list, please email jackie.vanhinsbergh@nqpltd.com.

Scottish Paralegal Association

Adrian will be speaking at the SPA Conference on Adults with Incapacity on 21 April in Glasgow. For more details, see <u>here</u>.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The second and third seminars in the series will be on "New" categories of abuse and neglect' (20 May) and 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Adults with Incapacity

Adrian will be speaking on Adults with Incapacity at the Royal Faculty of Procurators in Glasgow private client half day conference on 18 May 2016. For more details, and to book, see <u>here</u>.

CoPPA South West launch event

CoPPA South West is holding a launch event on 19 May at Bevan Brittan in Bristol, at which HHJ Marston will be the keynote speaker, and Alex will also be speaking. For more details, see <u>here</u>.

Mental Health Lawyers Association 3rd Annual COP Conference

Charles J will be the keynote speaker, and Alex will be speaking at, the MHLA annual CoP conference on 24 June, in Manchester. For more details, and to book, see <u>here</u>.



Editors

Alex Ruck Keene Victoria Butler-Cole Neil Allen Annabel Lee Anna Bicarregui Simon Edwards (P&A)

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward Jill Stavert

Advertising conferences and training events

If you would like your conference or training event to be included in section in this а subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

David Barnes

Chief Executive and Director of Clerking david.barnes@39essex.com

Alastair Davidson

Senior Clerk alastair.davidson@39essex.com

Sheraton Doyle

Practice Manager sheraton.doyle@39essex.com

Peter Campbell

Practice Manager peter.campbell@39essex.com

- London 81 Chancery Lane, London, WC1A 1DD Tel: +44 (0)20 7832 1111 Fax: +44 (0)20 7353 3978
- Manchester
 82 King Street, Manchester M2 4WQ

 Tel: +44 (0)161 870 0333

 Fax: +44 (0)20 7353 3978
- Singapore Maxwell Chambers, 32 Maxwell Road, #02-16, Singapore 069115 Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

Thirty Nine Essex Street LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 39 Essex Street, London WC2R 3AT. Thirty Nine Essex Street's members provide legal and advocacy services as independent, selfemployed barristers and no entity connected with Thirty Nine Essex Street provides any legal services. Thirty Nine Essex Street (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 39 Essex Street, London WC2R 3AT.



CoP Cases Online

Use this QR code to take you directly to the CoP Cases Online section of our website





Alex Ruck Keene Victoria Butler-Cole Neil Allen Annabel Lee Anna Bicarregui Simon Edwards (P&A)

Scottish contributors

Adrian Ward Jill Stavert

Click <u>here</u> for all our mental capacity resources



Editors and Contributors







Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. **To view full CV click here.**

Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). **To view full CV click here.**



Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. **To view full CV click here.**



Annabel Lee: annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. **To view full CV click here.**



Anna Bicarregui: anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

Editors and Contributors





Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. **To view full CV click here.**



Adrian Ward adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *"the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,"* he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. **To view full CV click here.**



Jill Stavert: J.Stavert@napier.ac.uk

Professor Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.