

## Court of Protection: Property and Affairs

### Introduction

Welcome to the May 2015 Newsletters, which are a little late, but delayed so as to be able to bring you the crucial Court of Appeal decision in *Re MN*, handed down on Thursday. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult decision on DOLS and Guardianship and best interests in the real world
- (2) In the Property and Affairs Newsletter: when (and what) deputies can pay themselves for care and clarification as to when an LPA can be revoked on the basis of animosity between the attorneys;
- (3) In the Practice and Procedure Newsletter: *Re MN*, setting out the boundary between the Court of Protection and the Administrative Court; revisiting litigation capacity; and transparency and the Court of Protection ;
- (4) In the Capacity outside the COP Newsletter: the new POST note on Vegetative and Minimally Conscious States;
- (5) In the Scotland Newsletter: the importance of careful drafting when it comes to powers of attorney and an appreciation of two recently retired members of staff of the MWC.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#).

### Editors

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

### Guest contributor

Beverley Taylor

### Scottish contributors

Adrian Ward  
Jill Stavert

### Table of Contents

Introduction	1
Care and the deputy	2
Short note: removing attorneys	2
Conferences at which editors/contributors are speaking	4
For all our mental capacity resources, click <a href="#">here</a> . Transcripts not available at time of writing are likely to be soon at <a href="http://www.mentalhealthlaw.co.uk">www.mentalhealthlaw.co.uk</a> .	

## Care and the deputy

*Re HC* [\[2015\] EWCOP 29](#) (Senior Judge Lush)

*Best interests – deputies – property and affairs*

### Summary

In this case the Senior Judge was faced with the Public Guardian's application for the revocation of a deputyship order in favour of P's son.

The Public Guardian brought the application because of the deputy's failures properly to account for expenditure on the renovation of P's house and payments he had made to himself and (to a lesser extent) his sister for caring for P.

P suffered from vascular dementia and had moved from Bristol to London to live with the deputy. The deputy gave up his work as a quantity surveyor to look after P. He explained that the work to P's home in Bristol had been necessary and the decision not to sell the property had been made after consulting other family members and because the property was P's pride and joy. It had originally been the intention that P should return to Bristol but that was no longer possible.

The Senior Judge was obviously impressed with the deputy who was supported by his siblings. He gave retrospective approval for the expenditure on the house and the payments to the deputy and his sister. He did not revoke the deputyship order though he did set out clear accounting requirements.

Of general interest was the Senior Judge's treatment of the payments for care. He approached these in the same way as would be done by a court hearing a personal injury claim

allowing a commercial rate discounted by 20% because the payment is not taxable in the recipient's hands (though commonly in personal injury claims the deduction is 25%).

He also provided for annual increases in line with Annual Survey of Hours and Earnings (ASHE) 6145 – carers and home carers.

The amount approved was £1,500 per month for the deputy and £100 per month for his sister. Expenditure, as the Senior Judge noted, significantly less than any alternative care package that might be available.

### Comment

It is a pleasant change to see a case before the Court of Protection in which the court was able to bless rather than condemn the actions of a deputy. The approach to payments for care is of wider application than to the facts of the individual case and can be read with other cases in which Senior Judge Lush has sought to give specific guidance to deputies and attorneys as to the discharge of their duties as regards the management and use of P's assets (see, in this regard, in particular, [Re Buckley](#), [Re Treadwell](#) and [Re GM](#)).

### Short note: removing attorneys

In *Re EL* [\[2015\] EWCOP 30](#), Senior Judge Lush helpfully confirmed that, where there is "corrosive animosity" between attorneys under an LPA, leading to an impasse as to the management of the donor's affairs, the court has the power to revoke the LPA. As he noted, the law relating to revocation of LPAs is different to that relating to EPA (rehearsed in *Re ED* [\[2015\] EWCOP 26](#)):

1. An EPA can be revoked on the ground that, having regard to all the circumstances and in particular their relationship to or connection with the donor, the attorneys were unsuitable to be the donor's attorneys: MCA 2005, Schedule 4, paragraph 16(g);
2. An LPA cannot be revoked on the ground of unsuitability of the attorney(s), but on the "narrower and more focused" (Re J v [2011] Con Vol 716) basis set out in s.22(3) MCA 2005, namely that the donee (i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or (ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.

At paragraph 39, Senior Judge Lush confirmed, however, that where the conduct of attorneys under an LPA towards each other shows that they cannot be *"be trusted to act in the manner and for the purposes for which the LPA was intended,"* this can serve to satisfy the court that the *"attorneys have behaved in a way that is not in the donor's best interests,"* and hence a ground for revocation under s.22(3)(i).

In the instant case, Senior Judge revoked the LPA on the grounds not merely of the attorneys' conduct to each other, but also on the basis that they had contravened their authority by making gifts to themselves from their donor mother's funds, which are far in excess of the limited authority conferred upon attorneys generally by s.12 MCA 2005. He made clear that the outcome was the same *"as it would have been if EL had executed an EPA, instead of an LPA, and I had found that, having regard to all the circumstances, the attorneys are unsuitable to be*

*her attorneys, but the methodology is different"* (paragraph 40).

As if to prove, however, that sibling 'bickering' is insufficient, Senior Judge Lush declined to revoke an LPA several days later in *Re MC* [\[2015\] EW COP 32](#) where this contention was, in part, advanced as a basis for revocation.

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### Conferences at which editors/contributors are speaking

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#### **Mentally Disordered Offenders – disposals, risk and remedies**

Jill is speaking at this Legal Services Agency seminar “Mentally Disordered Offenders - disposals, risk and remedies” on 18 May in Glasgow, addressing “The Mental health Bill and Mentally Disordered Offenders.”

#### **‘In Whose Best Interests?’ Determining best interests in health and social care**

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see [here](#).

#### **Editors**

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
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#### **Guest contributor**

Beverley Taylor

#### **Scottish contributors**

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Jill Stavert

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### Advertising conferences and training events

If you would like your conference or training event to be included in this section in a 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.

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Our next Newsletter will be out in early June. 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](mailto:marketing@39essex.com).

## David Barnes

Chief Executive and Director of Clerking  
[david.barnes@39essex.com](mailto:david.barnes@39essex.com)

## Alastair Davidson

Senior Clerk  
[alastair.davidson@39essex.com](mailto:alastair.davidson@39essex.com)

## Sheraton Doyle

Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

## Peter Campbell

Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)

**London** 39 Essex Street, London WC2R 3AT  
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

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## Editors

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Jill Stavert

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**Alex Ruck Keene**  
[alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)

Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (2015, Oxford University Press) and Jordan's 'Court of Protection Practice.' He is the general editor of the fourth edition of 'Assessment of Mental Capacity' (Law Society/BMA, forthcoming). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). **To view full CV click here.**



**Victoria Butler-Cole**  
[vb@39essex.com](mailto: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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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](mailto: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](mailto: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.**



**Simon Edwards**  
[simon.edwards@39essex.com](mailto: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 partner of 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

Dr 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**