



Welcome to the April 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal overturns the conventional understanding of deprivation of liberty under the MHA; children, consent and deprivation of liberty, changes to inquest requirements in relation to DoLS/Re X orders;

(2) In the Property and Affairs Report: new guidance on access to and disclosure of the wills of those lacking capacity, the OPG's good practice guide for professional attorneys and new fixed fees for deputies;

(3) In the Practice and Procedure Report: the Supreme Court pronounces on best interests, available options and case management, a new Senior Judge for the Court of Protection, and updates on case-law relating to funding and HRA damages;

(4) In the Wider Context Report: a new approach to advance care planning and the European Court of Human Rights grapples with Article 12 CRPD;

(5) In the Scotland Report: Scottish powers and English banks, the Scottish OPG cracks down and a review of the second edition of a leading textbook.

We have also published a special report upon the Law Commission's Mental Capacity and Deprivation of Liberty project, with a detailed summary and responses from a range of perspectives. And remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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New Law Society Guidance on Access and Disclosure of an Incapacitated Person’s Will

On 1 March 2017, the Law Society issued new guidance on when solicitors who have acted for and hold the will of a person who has lost capacity and in respect of whom there is a property and financial affairs attorney or deputy, should disclose that will to such attorney or deputy.

The Court of Protection has made it clear that attorneys and deputies owe a duty when making financial decisions, so far as is reasonably possible, not to interfere with P’s succession plans (see *Re Joan Treadwell* [2013] EWHC 2409 (COP); paragraphs 81 to 88 in the judgment of Senior Judge Lush).

It follows from this that, generally speaking, it will be the duty of the attorney or deputy to discover what, if any, testamentary dispositions P has made. Thus, if at the time of making the will, the testator has provided no contrary instructions, the deputy or attorney is entitled to a copy of the will. The guidance suggests that it is best practice for the solicitor to discuss this issue and record any decision made at the time the will is made. Ideally, this should also be confirmed when any LPA is made.

The guidance then states that if the instructions are not to disclose the will in such circumstances, then the solicitor should not disclose the will without a specific court order. The solicitor could oppose such an order (or seek its variation if already made) if the solicitor thought that disclosure was not in P’s best interests. The guidance suggests that the solicitor should do so by making a witness statement in form COP24, seeking authority for his costs to come out of P’s estate.

The guidance deals with what the solicitor ought to do if he has concerns about whether the attorney or deputy is acting in P’s best interests, referring to the safeguarding role of the OPG.

The guidance ends with a reminder that the attorney or deputy ought to, so far as practicable, engage P in this, like any other, best interests decision.

New OPG Good Practice Guide for Professional Attorneys

On 3 March 2017, the OPG published a new good practice guide for professional attorneys. It covers everything from taking instructions from donors, preparing to act under the LPA, what happens after the LPA is created to record-keeping. It ends with a helpful checklist which summarizes the guidance in the four main categories, choice of attorney, capacity and

execution of the LPA, fees and relationship management. With greater emphasis on the need for proportionality in relation to fees for the work of attorneys (and deputies), the guidance in relation to fees is especially welcome.

New Fixed Fes for Deputies

From 1 April 2017, there are new (increased) fixed fees for deputies. They apply when the deputy is a solicitor or office holder of a public authority and the court can apply them to other deputies as well.

The fees are fixed by [PD19B](#), and a handy comparison table can be found [here](#).

Short Note: Testamentary Capacity and the Effect of Medication

In *White v Philips* [2017] EWHC (Ch) 386 HHJ Saffman, sitting as a Judge of the Chancery Division, heard a somewhat unusual challenge to a will. The deceased was the husband of the claimant who sought an order against the deceased's will. The will was professionally drawn whilst the deceased was in the last stages of terminal cancer taking strong opiates and other drugs. The will left the deceased's share of the main asset (the former matrimonial home) in trust for his daughter from a previous marriage giving the widow the right to live there whilst she remained single. The home had been bought in joint names and at the same time as making the will, the deceased severed the joint tenancy.

The widow challenged the will on the basis of capacity and want of knowledge and approval. So far as the former was concerned, her case essentially was that the deceased was suffering from drug induced delusions that made him

believe that his wife had turned against him and, indeed, the social services had been involved pursuant to their safeguarding responsibilities and the deceased had moved to live with his daughter cutting off all contact with his wife.

The wife denied any wrong doing and at one stage alleged undue influence (presumably on the part of the daughter).

There was no dispute as to the law, nor the effect of the shifting burden of proof. The Judge heard from lay witnesses, together with the lawyer who took the will instructions and a social worker who had been involved. Experts were called.

In the end, the Judge pronounced in favour of the will. The evidence suggested that the deceased was clear about his intentions, knew and approved of the contents of the will so the only real question was whether a delusion about his wife had robbed him of capacity to make the will in the form he did.

The Judge preferred the expert evidence of the daughter's consultant psychiatrist. The widow's expert had been unable to say that the chances of the deceased not having capacity were better than 50:50. He did not, however, make any finding about the evidence that the widow had given to the effect that she was innocent of all the claims of misbehaviour (some quite serious) that the deceased had made against her. In the end, the effect of the judgment was that whatever the rights and wrongs of the deceased's beliefs, the will had not been brought about by an "*insane delusion*".

Short Note: SCCO follows *Blankley*

In *Mole v Parkdean Holiday Parks Limited* [2017] EWHC B10 (Costs) the SCCO (Master Brown)

applied *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18.

The claimant suffered severe brain injuries and lacked capacity to litigate. Initially his mother was litigation friend but she found it too much and the Official Solicitor took over.

The case was run on a conditional fee agreement which stated that the mother was the client. When the OS took over, he and the solicitor entered into a deed of affirmation and ratification.

An issue arose as to the recoverability of the success fee thereafter as that deed was entered into after 31st March 2013 and the coming into force of LASPO which stopped the recovery of success fees.

The Master held that the proper analysis was that the claimant was the client throughout with the litigation friend in effect the claimant's agent. Thus the deed was unnecessary and the original CFA simply continued and the success fee was recoverable.

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Alex is recommended as a 'star junior' in Chambers & Partners 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, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



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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](#).



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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](#).



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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](#).

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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](#).



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Conferences

Conferences at which editors/contributors are speaking

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity at this conference in Glasgow on 20 April 2017. For more details, and to book, see [here](#).

Deprivation of liberty: what does the future hold?

Alex will be speaking at this event on 5 May in Consett, County Durham on 5 May. For more details, and to book, see [here](#).

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.

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 Report in the future please contact: marketing@39essex.com.

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