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MENTAL CAPACITY REPORT:
PROPERTY AND AFFAIRS

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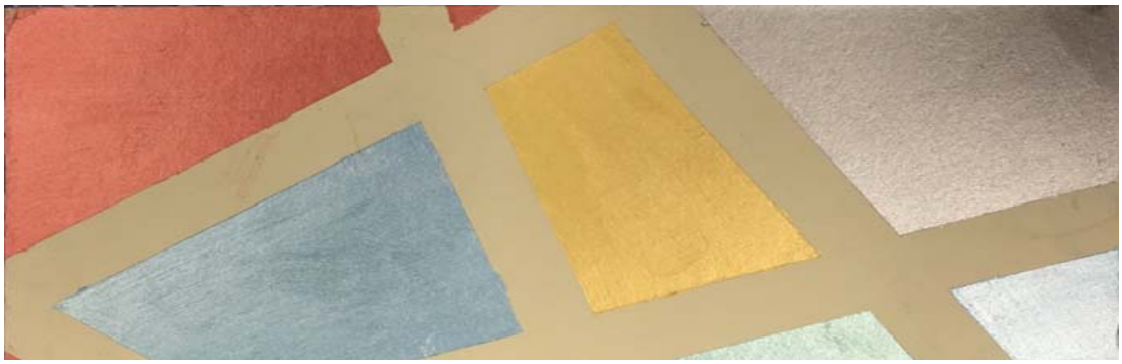

Welcome to the April 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Government responds to the Law Commission's *Mental Capacity and Deprivation of Liberty* report, the Joint Committee on Human Rights rolls up its sleeves, and exploring the outer limits of best interests;

(2) In the Property and Affairs Report: a guest article by Denzil Lush on statutory wills and substituted judgment and the *Dunhill v Burgin* saga concludes;

(2) In the Practice and Procedure Report: an unfortunate judicial wrong turn on 'foreign' powers of attorney, the new Equal Treatment Bench book, and robust case management gone too far;

(3) In the Wider Context Report: appointeeship under the spotlight again, a CRPD update and the Indian Supreme Court considers life-sustaining treatment;

(4) In the Scotland Report: the Mental Welfare Commission examines advocacy, a new Practice Note from the Edinburgh Sheriff Court and a Scottish perspective on the judicial wrong turn on 'foreign' powers;

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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Substituted Judgment and Statutory Wills

[*We are delighted to be able to publish this guest article by Denzil Lush, former Senior Judge of the Court of Protection*]

The Law Commission's consultation paper on *Making a will*, published on 13 July 2017, is informative, stimulating, and a pleasure to read. It was summarised briefly in the property and affairs section of 39 Essex Chambers' Mental Capacity Report Issue 79 in September 2017, which drew attention to the provisional proposals that:

(a) testamentary capacity should be governed by the capacity test in the Mental Capacity Act 2005, rather than by *Banks v Goodfellow* (1870) 5 QB 549;

(b) steps should be taken to reduce the cost and length of statutory will proceedings;

(c) a scheme of supported will-making should be introduced; and

(d) there should be a statutory doctrine of testamentary undue influence.

The consultation period ended on 10 November 2017 and I submitted my response four days before the deadline. I managed to answer only eight of the sixty-five consultation questions, but one of those I did answer was number 12, which said: "*We take the view that reform is not required of the best interests rationale that underpins the exercise of the discretion to make a statutory will. Do consultees agree?*"

No, I don't agree. I believe that substituted judgment, rather than best interests, should be the rationale that underpins the exercise of the court's discretion to make a statutory will, and I have set out my reasons in greater detail in an article entitled *Standing in the testator's shoes,* which appeared in Trusts and Estates Law & Tax Journal, March 2018, pages 4-7.

Very briefly, the difference between best interests and substituted judgment is as follows:

- best interests is derived from child care law and represents a more paternalistic and, sometimes, restrictive approach. The decision made is that which the decision-maker thinks is best for the person who lacks capacity.
- substituted judgment attempts to arrive at the choice that the person who lacks capacity would have made if he or she had capacity.

English law invented substituted judgment or, rather, Lord Chancellor Eldon did, in the case of *Ex parte Whitbread, In the Matter of Hinde, a Lunatic* (1816) 2 Mer 99, which involved an application for substantial allowances to be made from the estate of John Jacob Hinde to family members who were not legally dependent on him. Mr Hinde was a wealthy 60-year-old bachelor with

an intellectual impairment, and Lord Eldon held that the court should *"act with reference to the lunatic and for his benefit as it is probable that the lunatic himself would have acted if of sound mind*." His decision became a footnote in the textbooks on lunacy law until the 1970s, when American courts began to cite it when they were developing the jurisprudence on end-of-life decision-making.

English law also created the concept of a statutory will in 1969 and substituted judgment was adopted as the correct approach for making a will on behalf of someone who lacks testamentary capacity. In the leading case, Re D(J) [1982] Ch 237, the Vice-Chancellor, Sir Robert Megarry, said: "It is the actual patient who has to be considered and not a hypothetical patient. … The court must seek to make the will which the actual patient would have made." Substituted judgment sat comfortably within the overall framework and objectives of the Mental Health Act 1983, s. 96, and its antecedents, of doing "*all such things as appear necessary or expedient:*

(a) for the maintenance or other benefit of the patient;

(b) for the maintenance or other benefit of members of the patient's family;

(c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered, or

(d) *otherwise for administering the patient's affairs*."

However, when it reviewed the law relating to mental capacity in its report on *Mental Incapacity* (1995), the Law Commission rejected substituted judgment as the basis for making decisions on behalf of incapacitated adults for the following reason (para. 4.23):

> *The substituted judgment standard is generally thought preferable to the best interests test in principle. Attractive though it may be in theory, however, applying it in practice raises problems. It is more difficult to apply in the case of someone who has never had capacity, for example, someone suffering from severe mental handicap.*

Consequently, the Law Commission's draft Bill, which appeared in the appendix to its 1995 report, and eventually entered the statute book as the Mental Capacity Act 2005, required the best interests test to be applied to all decisions made on behalf of an incapacitated adult, including the creation of a statutory will.

The Mental Capacity Act came into force on 1 October 2007 and in the first reported decision on a statutory will, *Re P* [2009] EWHC 163 (Ch), Mr Justice Lewison, held that the earlier law regarding the making of statutory wills was no longer good law because it applied a substituted judgment test, rather than the best interests test. In the next reported decision on a statutory will, *Re M*: *ITW v Z* [2009] 1 FLR 443, Mr Justice Munby agreed with Lewison J. and declared that "*such well-known authorities [as Re D(J)] are best consigned to history*." He also commented that "*the statute lays down no hierarchy as between the various factors which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's 'best interests'*." These two decisions created

a polarisation between best interests and substituted judgment, particularly in the context of statutory wills and lifetime gifts, which several other judges sought to play down; in particular, Morgan J. in *Re G(TJ)* [2010] EWHC 3005 (COP), when he considered an application for a further gift in a case he had previously dealt with under the old regime.

Since 2009 there have been three developments, which indicate that the pendulum is swinging away from best interests and back towards substituted judgment. They are as follows.

(1) The United Nations Convention on the Rights of Persons with Disabilities, which the United Kingdom ratified on 8 June 2009, requires states parties to replace the best interests paradigm with respect for the individual's rights, will and preferences (see Article 12(4) and the General Comment on Article 12 published in 2014).

(2) In *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67 - the first Court of Protection case to reach the United Kingdom Supreme Court – at paragraph 45, Baroness Hale stated that "*The purpose of the best interests test is to consider matters from the patient's point of view*."

(3) In its report on *Mental Capacity and Deprivation of Liberty*, [2017] EWLC 372, the Law Commission proposed (as Recommendation 40) that section 4(6) of the Mental Capacity Act 2005 should be amended to require the individual making the best interests determination to *"give particular weight to any wishes or feelings ascertained*." It explained that: "*Circumstances have changed greatly since the introduction of the Mental Capacity Act; much of the Act was based on the work of the Law Commission in the 1990s and predates more recent developments such as the Human Rights Act 1998 and the ratification of the UN Convention on the Rights of Persons with Disabilities. The trend in national and international developments in the context of decision-making on behalf of others is firmly towards requiring greater account to be taken of the wishes and feelings (or will and preferences) of the individual concerned. In our view these developments need to be reflected at the core of the Mental Capacity Act*."

I was the Master of the Court of Protection for eleven years before the Mental Capacity Act 2005 came into force, and I have to say that exercising my discretion by applying substituted judgment – whereby I sought to stand in the testator's shoes and authorise the execution of the will that he would make, if he had testamentary capacity - seemed a more realistic, relevant and respectful process than my experiences under the Mental Capacity Act, where I struggled to compile a balance sheet of pros and cons in order to identify one or more factors of magnetic importance that may shine a light on what would be in the testator's best interests.

As much as I welcome the Law Commission's Recommendation 40, I don't think it goes far enough as far as statutory wills are concerned, and I can't see why making a will, which speaks from death, should follow exactly the same rationale as urgent health and welfare decisions, which are qualitatively quite different. Having regard to the direction of travel since 2009, it would take an audacious judge to order the

execution of a will which overrides a testator's rights, will and preferences, but such an order remains a possibility as long as best interests is still the rationale that underpins the exercise of the court's discretion to make a statutory will.

Short Note: an end to the *Dunhill v Burgin* saga

The Court of Appeal (Sir Brian Leveson PQBD, Underhill and Leggatt LLJ) has dismissed [2018] EWCA Civ 505 the claimant's appeal against the dismissal of her claim for damages against her former solicitors and counsel for under settlement of her personal injury claim.

The claimant had suffered a brain injury in a road traffic accident and at a trial on liability only and without a litigation friend having been appointed her claim was settled for £12,500. She was swiftly dissatisfied with that result and, with new legal representation and a litigation friend, sought to set aside the settlement. After a trip to the Supreme Court, she was successful and ultimately settled her claim for damages against the driver for a very substantial sum.

She brought these proceedings for damages against her first set of legal advisers claiming her unrecovered costs in the subsequent litigation and damages for the loss she suffered being untreated for so long whilst she waited for proper compensation.

Her claim was dismissed at first instance by Elizabeth Laing J. That dismissal was upheld by the Court of Appeal, essentially on the grounds that the trial judge was entitled to hold that counsel was entitled to take the view that, if the case on liability was tried, the probability was that the claimant would lose so a settlement was imperative.

At the end the President said this about capacity, in comments that we would strongly endorse:

> *I cannot leave the case without observing that those who act in the field of personal injury litigation should always be alert to potential difficulties about capacity when serious head injuries have been sustained.*

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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 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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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.

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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 has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. 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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Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Conferences at which editors/contributors are speaking

Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see here.

Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in London on 9 May and Manchester on 24 May.

Other conferences of interest

Towards Liberty Protection Safeguards: Implications of the 2017 Law Commission Report

This conference being held on 20 April in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, see here, quoting HCUK250dols for a discounted rate.

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next report 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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