



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

(1) In the Health, Welfare and Deprivation of Liberty Report: standing in the shoes of P in a difficult decision as to cancer treatment, s.21A and the LAA, Welsh DoLS and Sir James Munby P on the warpath;

(2) In the Property and Affairs Report: Charles J puts statutory wills under the spotlight and new OPG guidance on travel costs;

(2) In the Practice and Procedure Report: the minutes of the Court of Protection Court Use Group;

(3) In the Wider Context Report: an election corner special report, new resources for GPs and about ADRTs, psychiatric treatment under scrutiny from Europe and moves to secure greater cross-border protection for adults;

(4) In the Scotland Report: important perspectives on supported decision-making, independent living and legislative reform;

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](#).

You are also invited to our 10th birthday party for the MCA 2005 to be held on 29 June, with the keynote speech to be delivered by Baker J and a packed programme of talks and masterclasses concerned with key aspects of the Court of Protection's work and future. For details, and to book, see [here](#).

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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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Statutory wills under scrutiny

ADS v DMS & Ors [2017] EWCOP 8 (Charles J)

Statutory wills

Summary

In this case Charles J heard an appeal lasting three days with an additional day for judgment against an order authorising the making of a statutory will. On the appeal, each of the four parties appeared by counsel, P by her litigation friend, the Official Solicitor, was represented by leading and junior counsel. Charles J allowed the appeal principally on the grounds of very serious procedural errors. The judgment is critical of all parties. The criticisms of the Official Solicitor are particularly sharp.

The facts are complex and unlikely to be repeated. The parties to the statutory will application were JKS (P), MH (P's property and affairs deputy and the applicant) and JKS's two sons (ADS, the appellant), and DSM.

The key background to the application for the statutory will was the fact that JKS, whilst still capacitous, had taken proceedings in the Chancery Division against one of her sons (ADS). In those proceedings, JKS made serious allegations against ADS and his wife alleging undue influence concerning the transfer of various properties.

During the course of the Chancery proceedings, JKS lost her capacity to litigate and MH was appointed her litigation friend. In June 2014, the Chancery proceedings were settled and the settlement was, of course, approved by a Chancery Division judge. One of the terms of the agreement was that MH would

apply to the Court of Protection to be appointed deputy for JKS to manage her property and affairs and, once appointed, apply for a statutory will to be made on behalf of JKS that divided JKS's estate in the United Kingdom between ADS and DSM equally.

MH duly applied to the Court of Protection for a statutory will to be made on JKS's behalf in those terms. The Court of Protection made an order that JKS be a respondent to that application and that she be represented by the Official Solicitor as her litigation friend.

The Official Solicitor, strongly, took the view that the proposed statutory will was inappropriate because it did not reflect JKS's wishes and feelings. Charles J summarised the Official Solicitor's submissions at paragraph 67 of his judgment, namely that the settlement agreement was a factor but not a magnetic factor and did not preclude JKS from relying without any change in circumstances on expressions of JKS's wishes and feelings based on the allegations made in the Chancery Division proceedings and that it was not in JKS's best interest for her will to make the provisions set out in the Chancery Division settlement.

At paragraph 68, Charles J indicated that if that approach was right, it introduced into the Court of Protection proceedings a need to consider whether, and if so, which of the wide ranging disputed allegations that had been made in the Chancery Division proceedings needed to be resolved and the need to distinguish between agreed and established facts and allegations and the need to consider what if any influence the background disputes and JKS's

family were having over JKS's expressions of her wishes and feelings from time to time.

At paragraph 69, Charles J stated that there had been a continuing failure by the Official Solicitor as JKS's litigation friend to recognise or sufficiently recognise these points.

Of general interest are early passages in the judgment concerning the approach of the court to the making of a statutory will. These are at paragraphs 9 to 25. Of particular importance are the passages that deal with how the court should approach P's wishes and feelings especially in circumstances where those wishes and feelings had been expressed at a time when P has lost capacity or where P may have been the subject of influence. At paragraph 15, Charles J said,

So, in my judgment an approach to the respective weight to be given to expressions of P's testamentary wishes that failed to take account of P's capacity when they were made and so, amongst other things:

- (i) *P's ability at the relevant times to take account of relevant past and present circumstances;*
- (ii) *The factual accuracy of reasons expressed by P at the relevant times;*
- (iii) *Any influences to which P may be subject at the relevant times and*
- (iv) *The way in which P's wishes and feelings have been obtained*

would not comply with the approach dictated by the MCA.

At paragraphs 23 to 25, Charles J applied those principles to the particular facts of this case and held at paragraph 26 that the judge had erred in principle by failing to carry out the approach he described or failed to take relevant features of the case into account. Of particular interest is the statement

Charles J made at paragraph 25 to the effect that the Court of Protection (and thus P's litigation friend) when making or advancing a decision under s.16 MCA 2005 on behalf of P ought to be as honest as other people and so should take into account whether giving weight or effect to any of P's statements of wishes and intentions would found an unconscionable result. Here he drew on the role of a trustee in bankruptcy and the *ex parte James* principle that requires trustees in bankruptcy not to act unconscionably (see *Re Condon, ex parte James* [1874] 9 Ch. App. 609 at 614).

Charles J then analyses at length what happened before the Court of Protection judge and what went wrong and, principally, that is that the Court of Protection judge placed too little weight on the Chancery Division settlement agreement, failed to distinguish between allegations and facts and held, at paragraph 134, that a decision on the terms of JKS's will that was founded or placed weight on expressions of testamentary wishes that ADS should not inherit for reasons based on the allegations in the Chancery Division proceedings would be unconscionable. He went on to say at paragraph 135, however, that what would be a relevant change of circumstances to trigger the ability of JKS to rely on these allegations would be fact sensitive and might include further problems in the relationship between ADS and his mother which might be a trigger to return to the history.

Paragraphs 153 to 157 deal with what the result of allowing the appeal should be. Charles J indicated that he would deal with interim relief at the handing down of the judgment and then he dealt with the submission that he should settle the terms of the statutory will himself on the basis of additional information that had been provided to him and the evidence before the Court of Protection judge. He said, however, he could not do that without the parties addressing what facts they were seeking to prove and what matters should be left as allegations and so addressing the basic litigation need to distinguish between agreed and established facts and allegations and so the facts that each litigant seeks to

prove. The judgment does not reveal what happened next.

At paragraph 159, Charles J made some final comments of lessons to be learnt which included:

1. The need to identify the issues of fact and law;
2. The need to carefully consider how professionals who are asked to ascertain the wishes and feelings of P should be instructed and approach their task;
3. When a settlement of civil proceedings is approved on behalf of a protected party who will or may become the subject of proceedings before the COP, the need to consider carefully what should be explained to a civil court asked to approve the settlement on behalf of P, what that court should be invited to consider and explain about its approach to the approval of the settlement, how that is to be recorded, whether the settlement is dependent on a particular outcome in the COP and more generally how the COP will be invited to approach the settlement that P has entered into with court approval, how P's wishes and feelings (as a protected party) about the settlement should be sought and recorded, and who the likely parties to the COP proceedings will be and

Although I understand that the approach taken in this case of joining P as a respondent and inviting the Official Solicitor to act as P's litigation friend works well in a great number of applications for a statutory will, there may be a need in some cases for the COP when making that invitation to the Official Solicitor and for the Official Solicitor when deciding whether or not to accept it to consider whether a professional deputy should make the application for P or act for P at least until it is made clear whether there is or is not a dispute.

Further in Part 3 of the Second Schedule to the judgment, Charles J listed what were the lack of

directions identifying the issues. This had led in this case to no proper identification of the issues of fact and law and had put the trial judge in a difficult position which was compounded by the fact that she had not received a copy of the bundles before the start of the hearing and had to rise to read them.

At paragraph 36, Charles J made a list of fourteen matters which the representatives of the parties needed to consider with care arising from the background to that particular case and its wide ranging disputes. Critically, Charles J stated that none of the represented parties had taken into account any of the factors. The factors included such basic matters as what facts were common ground or could be established without oral evidence, what facts needed to be proved, what oral evidence should be given and so how Rule 90 was to be applied (concerning hearings in private) and what matters could be left as disputed allegations.

Comment

The judgment is silent as to the costs of the appeal but the costs of these proceedings must have been very substantial. As noted, it is not clear from the judgment either whether the parties were able to come to an agreement as to the court's approach to allow Charles J to settle a statutory will or whether the matter will, now, go off for a very extensive fact finding exercise. Perhaps the most important lesson to be learned from this very sorry tale is that where it is said that P's stated wishes and feelings are the result of want of capacity or possibly influence, the court should not blindly act on those stated wishes and feelings but may need to investigate the extent to which those wishes and feelings are soundly based or the product of influence.

OPG Practice Note on travel costs

The OPG published on 1 June a [Practice Note](#) (PN9) outlining how it will supervise claims made under Paragraph 21 of PD19B by public authorities and other third sector deputies for travel costs. Any potential claims made for such costs will need to

follow the guidance in this note to avoid potential problems.

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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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Adrian is a 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](#).



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Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project Summer School

Alex is speaking at the Essex Autonomy Project Summer School in July, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the [Summer School website](#).

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, 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 July. 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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