



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

(1) In the Health, Welfare and Deprivation of Liberty Report: a rare appellate level decision considering best interests (and confirming that they should be rare);

(2) In the Property and Affairs Report: (partially) endorsing an attorney's actions after the event;

(3) In the Practice and Procedure Report: choosing litigation friends;

(4) In the Wider Context Report: the National Mental Capacity Forum reports, and an important Strasbourg re-cap of the principles applying to capacity;

(5) In the Scotland Report: a new Public Guardian and the MWC is cautious about attorneys consenting to restrictions on liberty;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#).

Editors

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Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors

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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.

Contents

Endorsing after the event 2

Endorsing after the event

TH v JH & Ors [2018] EWCOP 13 (HHJ Vincent)

Best interests – property and affairs – CoP jurisdiction – costs – interface with civil proceedings

Summary

This was an application by the holder of an EPA for retrospective approval of gifts and payments for voluntary care. P at the time of the application was 95 and suffering from advanced dementia and living in a residential home. He was a widower and his assets consisted of his interest in his former home and a reasonable income.

The applicant was one of his sons and the application was opposed by the other son. There was a good deal of enmity involved between the two.

The payments in question had taken place over a number of years during which time for a substantial period the applicant was his father’s full time carer. Unfortunately, he had kept no proper records of his dealings with his father’s money nor accounts of why he was “paying” himself or his family what he did. He agreed that he should be replaced by a panel deputy.

In the result, the court gave retrospective approval for a substantial part of the payments

whether as gifts or proper payment for voluntary care.

As regards the non-approved sums, the court stated that the Court of Protection has no jurisdiction to make an order for repayment (see paragraph 112). The court held that it would not be in P’s best interests to order the to be appointed deputy to set about recovery proceedings (113) and directed instead that the outstanding debt be taken from the applicant’s putative share of P’s residuary estate and if insufficient as a debt owed to that estate.

As regards costs, despite criticisms of the applicant’s defaults, there was no finding of bad faith and the resulting sum approved was much nearer the applicant’s contentions than those of his brother. Thus, the court refused to depart from the usual rule that the parties’ costs be paid from P’s estate.

Comment

This case illustrates the problems that ensue when an attorney does not keep proper records and document decisions to make gratuitous care payments etc. As regards the jurisdiction to make an order for repayment, it is right that there is no express power and this is a deficiency that could be remedied. In *Re PP* [2017] EWCOP 29 (January and March 2018 Reports) however, the court, in effect, made retrospective approval conditional on repayment and bringing into hotchpot and that could, if appropriate, have been a practice followed here.

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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

Court of Protection seminar: The capacity to marry and divorce, and damages in the Court of Protection

Tor is speaking, with Fenella Morris QC, at a seminar organised by Irwin Mitchell on 21 June in London. For more details, and to book, please use this [email address](#).

Other conferences of interest

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, see [here](#).

Towards Liberty Protection Safeguards

This conference being held on 24 September 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](#).

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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