

Court of Protection: Property and Affairs

Welcome to the October 2016 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: getting tangled up in ineligibility, survey and statistical data relating to DOLS and news of a new COPDOL10 form;
- (2) In the Property and Affairs Newsletter: deputies and remuneration, capacity and influence, and updates from the OPG;
- (3) In the Practice and Procedure Newsletter: participation of P, extending the great safety net abroad, the limits of the coercive power of the inherent jurisdiction, and an expert beyond bounds;
- (4) In the Capacity outside the COP Newsletter: a report from the World Guardianship Congress, a new Jersey capacity law and a report on what Singapore can teach us about the MCA 2005;
- (5) In the Scotland Newsletter: case notes shedding light on practice in relation to adults with incapacity, new MWC reports and new supervision practices by the OPG.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#). 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE [website](#).

Editors

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

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward
Jill Stavert

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Deputies and remuneration

The Friendly Trust's Bulk Application [\[2016\] EWCOP 40](#) (District Judge Eldergill)

Deputies – Property and Financial Affairs

Summary

In this case the District Judge had to consider a “bulk application” for approval (retrospective and prospective) of its charges for deputyship functions.

The long and impressively detailed judgment reveals a muddle. The Friendly Trust (‘TFT’) is a charity that, amongst other functions, takes on the role of deputy of small estates especially where the relevant local authority wants to outsource such work.

It seems, though much judicial digging was needed to establish this, that TFT had been charging at least in some cases the fixed charges that solicitors can charge under PD19B rather than the lower fixed charges allowed to local authority deputies. It also seems that officers in the OPG may have allowed that practice to persist.

Section 19(7) MCA provides for a deputy’s remuneration. He is allowed reimbursement of reasonable expenses and, *if the court so directs*, remuneration out of P’s estate for carrying out deputy functions.

Rules 167 and 168 make further provision. The court can fix an amount (rare), allow a specified rate, fix fees according to a schedule in a practice direction or order a detailed assessment (usually reserved for larger or more complex estates).

PD19B makes yet further provision. It provides for fixed fees for solicitors and lower fixed fees for public authority deputies. It also provides that solicitors have no right to a detailed assessment unless the court so orders and public authorities have none unless the estate is worth over £16,000. From February 2011 the PD included a paragraph that specifically dealt with not for profit deputies and other professionals, stating that the court could apply its provisions to them.

Thus, if the order appointing the deputy is silent as to remuneration, the deputy is entitled to none. Some of the orders in this case were in this form.

Some of the orders simply provided for fixed costs. The District Judge stated that orders should specify the rate (solicitor’s or public authority’s), see 93 (e) unless the appointee is a solicitor or a public authority.

Where the order is silent or in relation to new orders and the appointee is not a solicitor but is taking over public authority work (as here) the starting point is that the rate is that allowed to public authorities, see 94 (a) to (c) as P should not put at a disadvantage because of a local authority decision to outsource work, but the appointee can apply for a higher rate with suitable justification, see 93 (d).

The District Judge also considered the question of accountants, saying that where they are appointed, the appropriate fixed fees are likely to be those of a solicitor with the right to seek an assessment. It is interesting to note at this point that in the SCCO report it was revealed that accountants’ bills were usually lower than solicitors’ because of lower charging rates and a greater propensity to delegate.

The District Judge then considered individual cases. In relation to prospective charging in new cases, he ordered fixed fees on public authority rates with, in a few cases, the right to seek a detailed assessment.

In relation to existing cases, he made preliminary orders. Where there had been no provision for remuneration, he proposed an amendment to allow remuneration at public authority fixed rates. Where the appointing order allowed fixed fees but did not specify which, he proposed an amendment to clarify that the rate was that of a public authority. In such cases, if that meant there had been an overcharge, he directed TFT to quantify the excess and state why the excess should not be repaid.

In some cases, the appointing order allowed a detailed assessment. The District Judge expressed the view that such a provision may or may not be appropriate.

Finally, at 132, the District Judge emphasised that the original “*bulk application*” which envisaged a paper disposal by an authorised court officer without individual notification was inappropriate (although this had been at the OPG’s suggestion and the ACO had also acceded to the view that notification was unnecessary). He considered that as the Ps’ estates stood to be affected, it was necessary that each affected P be notified to comply with section 4 MCA and the rules of natural justice.

Comment

This case underlines the need for the appointing order to be clear about remuneration and the approach that the court is likely to take to cases where remuneration is sought above public authority rates in out sourced cases, namely that

P should be at no disadvantage. It also presages an amendment to PD19B which will expressly state that in respect of out sourced deputyships, it is expected that no more will be charged than if the public authority had carried out the work.

In the case of professional guardians holding five or more financial guardianships, in future the Office of the Public Guardian will no longer undertake a full annual account review in every case. Instead, random samples will be selected. If the outcome of the audits of these is satisfactory, for all other guardianships and other years the Office of the Public Guardian will accept a covering one-page summary sheet only.

Capacity and influence

Poole v Everall [[2016](#)] EWHC 2126 (Ch) (Chancery Division (HHJ David Cooke))

Mental Capacity – Testamentary Capacity

Summary

In this case the court had to consider 2 wills, one made in February 2012 and the other made in December 2012. The testator had suffered serious brain injury in a road traffic accident and for a long time had been looked after by Mr Everall, acting as carer. T had received a substantial damages award and the Public Guardian had been appointed receiver and subsequently a solicitor (Mr Lloyd) was appointed deputy.

A medical assessment in February 2012 stated that T had capacity to make a will and that will was drawn up by Mr Lloyd who had the issue of capacity very much in mind.

Mr Everall drew up the December will. Mr Lloyd was not involved. The only other person involved

was Mr Everall's partner. The will left 95% of T's estate to Mr Everall.

Not without hesitation (as there had been contradictory statements), the judge held that the December will had been duly executed. He also held that though there had been no medical assessment in December, the one in February still was sufficient to establish capacity.

He held, however, that Mr Everall fell far short of being able to establish that T knew and approved of the will's contents. At 120-121, the judge referred to the heightened vigilance that the court will employ where the will is drawn and elicited by the main beneficiary especially where T is vulnerable and suggestible and dependent on that person.

The December will was also attacked on the grounds of undue influence. The judge held that in effect, this was excluded by the finding that T had not known and approved of the contents as T could only have been coerced into doing something he did not want to do if he knew what he was doing. See 137.

The result was that the February will was proved in solemn form.

Comment

This case underlines the need for anyone making a will for a person with capacity issues to seek independent advice. More interestingly, it provides a good illustration of the shifting and different burdens of proof and the overlaps and boundaries between capacity, knowledge and approval and undue influence.

Samples of deputy orders and EPA

The OPG has published two sample documents to help people check whether a document purporting to be a [deputy court order](#) or an [enduring power of attorney](#) is in fact valid.

Security bond provider changed

From 1 October 2016, the OPG and the Court of Protection will only direct deputies to Howden Group UK Ltd for any new security bonds. Those who hold existing bonds with any previously approved suppliers, such as Deputy Bond Services (DBS), do not have to transfer these to Howden UK Ltd. These suppliers will continue to honour and manage all bonds that have been taken out with them after their contract with OPG has ended.

For more details, and for the OPG's (updated) surety bond Practice Note, see [here](#).

OPG proposal for new procedures for to allow variation of security

As set out in this note (reproduced from the STEP website), the OPG is considering whether it should be able to vary the amount of security following a review of the annual report of a property and affairs deputy.

Conferences at which editors/contributors are speaking

Switalskis' Annual Review of the Mental Capacity Act

Neil and Annabel will be speaking at the Annual Review of the Mental Capacity Act in York on 13 October 2016. For more details, and to book, see [here](#).

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester, which this year has the theme 'The five guiding principles of the Mental Health Act.' For more details, and to book, see [here](#).

Human Rights and Humanity

Jill is a keynote speaker at the SASW MHO Forum Annual Study Conference in Perth on 29 October, talking on "Supporting and extending the exercise of legal capacity." For more details, see [here](#).

Law (and the Place of Law) at the End of Life

Alex will be speaking alongside Sir Mark Hedley at this free seminar organised by the Royal College of Nursing on 1 November. For more details, see [here](#).

Alzheimer Europe Conference

Adrian will be speaking at the 26th Annual Conference of Alzheimer Europe which takes place in Copenhagen, Denmark from 31 October–2 November 2016, which has the theme "Excellence in dementia research and care." For more details, see [here](#).

Jordans Court of Protection Conference

Simon will be speaking on the law and practice relating to property and affairs deputies at the Jordans annual COP Practice and Procedure conference on 3 November. For more details and to book see [here](#).

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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.

Our next Newsletter will be out in early November. 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.

David Barnes

Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson

Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle

Practice Manager
sheraton.doyle@39essex.com

Peter Campbell

Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
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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Use this QR code to take you directly to the CoP Cases Online section of our website





Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 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. He is on secondment to the Law Commission working on the replacement for DOLS. **To view full CV click here.**



Victoria Butler-Cole: 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. 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

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

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.**



Anna Bicarregui: anna.bicarregui@39essex.com

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.**



Simon Edwards: 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 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.**



Jill Stavert: J.Stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. 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 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**