

## Court of Protection: Property and Affairs

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### Introduction

Welcome to the July issue of the Mental Capacity Law Newsletter family. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult case on the line between the MHA/the MCA, safeguarding gone wrong, and updates on post-*Cheshire West* developments;
- (2) In the Property and Affairs Newsletter: cases on deputies, undue influence and the COP and the duty of attorneys in continuing healthcare disputes;
- (3) In the Practice and Procedure Newsletter: a focus on different aspects of access by the media to the court;
- (4) In the Capacity outside the COP newsletter: an update on DNACPR notices, a case on charging in relation to monies managed by a Deputy, and updates on the Government's response to the House of Lords Select Committee's post-legislative scrutiny of the MCA 2005;
- (5) In the Scotland Newsletter: an update on the legal consequences of delaying reporting by MHOs in welfare guardianship applications, a case on the proper duration of guardianship and an update on the Mental Health Bill.

In this issue, we also introduce two changes. The first is that we are delighted to introduce [Simon Edwards](#) as our Property and Affairs editor. The second is that, to reflect that many more decisions are now being reported pursuant to the President's Transparency [Practice Guidance](#), we are introducing 'Short Notes' on cases which do not merit reporting in full here but where one or more short points of wider interest appear. As ever, we welcome feedback to the editors.

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### Editors

Alex Ruck Keene  
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Neil Allen  
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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk).

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## Short Note: Wishes, feelings and the appointment of deputies

*Re BM; JB v AG* [2014] EWCOP B20 Senior Judge Lush

### *Deputies – Financial and property affairs*

In the context of a dispute as to who should be appointed BM's deputy for property and affairs, Senior Judge Lush restated the approach as to who should be appointed as deputy thus:

*"46. No one has an automatic right to be appointed as deputy. The Court of Protection has a discretion as to whom it appoints and, as I have said before in other judgments, traditionally the court has preferred to appoint a relative or friend as deputy (if it is satisfied that it is in P's best interests to do so), rather than appoint a complete stranger.*

*47. This is because a relative or friend is usually familiar with P's affairs and aware of their wishes and feelings. Someone with a close personal knowledge of P is also likely to be in a better position to meet the obligation of a deputy to consult with P, and to permit and encourage them to participate, or to improve their ability to participate, as fully as possible in any act or decision affecting them. And, because professionals charge for their services, the appointment of a relative or friend is preferred for reasons of economy.*

*48. There are, however, cases in which the court wouldn't contemplate appointing a particular family member or friend as deputy. These include situations where:*

(a) *the proposed deputy has physically, psychologically, financially or emotionally abused P;*

- (b) *there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;*
- (c) *there is a real conflict of interests;*
- (d) *the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs; and*
- (e) *there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs.*

*49. For a completely different set of reasons, which need not concern us here, the court generally prefers to appoint an independent, professional deputy, rather than a family member, in cases where P has been awarded substantial compensation for personal injury or clinical negligence."*

On the facts of the case before him, Senior Judge Lush held that he was left with a straight choice between two candidates, essentially the polarisation being "between two different 'support networks' or 'circles of support': BM's church, on the one hand, and his family, friends and neighbours on the other hand" (paragraph 53). He held that

*"55... the factor of magnetic importance is not BM's very deep faith (though I am sure that his faith is, indeed, very deep), but the fact that AG is the candidate proposed by a support network of friends and neighbours, who represent the status quo in terms of being the persons in whom BM had placed trust and confidence immediately before he became incapacitated."*

One of those in the support group was EO, whom BM had appointed to be his sole executrix in his last will dated 23 October 2008. In an entirely 'CRPD-compliant' construction of s.4 MCA 2005, Senior Judge Lush noted that:

*“58. Although it has been said that there is no hierarchy of factors in the checklist in section 4 of the Mental Capacity Act, I attach weight to EO’s views, because section 4(6)(a) refers ‘in particular’ (my emphasis) to ‘any relevant written statement made by him when he had capacity.’ There are few written statements more relevant than a will and EO is adamant that it would be in BM’s best interests to appoint AG to be his deputy.”*

## The CRPD, undue influence and the COP

*Re GW; LB Haringey v CM* [\[2014\] EWCOP B23](#)  
Senior Judge Lush

*Deputies – Financial and property affairs*

### Summary

This case concerns an objection by a family member to the appointment of a local authority as property and affairs deputy. It is of note for being the first time in which the [General Comment](#) on Article 12 to the Convention on the Rights of Persons with Disabilities (‘CRPD’) has been prayed in aid in a judgment. In short terms, GW, who had served in the RAF in the Second World War, and then worked as a bricklayer, had been diagnosed with late onset Alzheimer’s dementia in 2009. He was sectioned under the MHA 1983 before ultimately being placed in a residential care home. Whilst still in hospital, a safeguarding alert was raised on the basis of disclosures made by GW about his finances, which suggested that his niece, CM, was withdrawing monies from his bank account without his consent. In June 2013, GW purported to make a will, CW being the sole beneficiary; at that point he was unaware that he had made a previous will, shortly after receiving a formal diagnosis that he had Alzheimer’s, in which he had left his estate to all his nephews and nieces

in equal shares. In October 2013, the LB Haringey applied to be appointed GW’s property and affairs deputy. CM objected, and sought herself to be appointed as the deputy. Directions were made for the listing of a hearing and, in advance, the preparation of a report by a Special Visitor, who confirmed (inter alia) that GM had not had testamentary capacity in June 2013, lacked capacity to make decisions as to his property and affairs, did not wish his niece to act as deputy because he did not trust her, but was also opposed to the idea of the Court of Protection appointing an independent deputy. The Special Visitor concluded, however, that GW would be likely to be reconciled gradually to the idea of the appointment of an independent deputy should the court decide this course of action, especially if matters are explained to him clearly and where he is given the assurance that he can have ready cash at his disposal. The matter came on for determination by Senior Judge Lush. He did not reiterate the law relating to the appointment of a deputy, that he had recently set out in [Re BM](#), but noted that

*“29. There is, however, one matter I did not mention in Re BM, and this regards the need to ensure that P is not subjected to undue influence.*

*30. On 13 December 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (‘CRPD’). This convention came into force on 3 May 2008 and it was ratified by the United Kingdom on 8 June 2009. Although it does not form part of our domestic law, it may have an interpretative influence, particularly in cases affecting the rights of a person with a disability. Any application for the appointment of a deputy affects P’s rights.*

*31. Article 12.4 of the CRPD requires that:*

*'States Parties ... shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, [and] are free of conflict of interest and undue influence.'*

32. In its General Comment No 1 (2014), published on 11 April 2014, the Committee on the Rights of Persons with Disabilities stated, at paragraph 18, that:

*'All people risk being subject to 'undue influence' yet this may be exacerbated for those who rely on the supports of others to make decisions. Undue influence is characterized where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise of legal capacity must include protection against undue influence – however the protection must also respect the rights, will and preferences of the person, including the right to take risks and make mistakes.'"*

Senior Judge Lush held that the factor of magnetic importance was GW's statement that he did not want CM to manage his property and financial affairs. Senior Judge Lush quoted a number of extracts from the interview with the Special Visitor, including one where GW described her as being "like a witch to [him]" Senior Judge acknowledged that "GW's views are neither reliable nor consistent, but having regard to the strength of feeling he displayed in his interview with Dr Fagin, I would be reluctant, unless it were absolutely necessary (which it is not), to override his rights and his expressed will and preference that CM should not be appointed as his deputy" (paragraph 42). Further, quite apart from GW's present wishes and feelings, or his rights, will and

preferences, Senior Judge Lush noted that he "would be wary of appointing CM as his deputy in circumstances which by no stretch of the imagination can be described as free of conflict of interest and undue influence, whereas I have no such reservations about appointing Haringey Council."

Importantly, in line with the recommendation of the Special Visitor, Senior Judge Lush granted the deputyship order on the understanding that it was in GW's best interests, and less restrictive of his rights and freedom of action, for him to retain control over his own expenditure to a limit of £200 a week.

As to costs, whilst Senior Judge Lush expressed his surprise that CM persisted with her application to manage her uncle's property and finances after he had expressed such trenchant opposition to her in his interview with the Special Visitor, noting that "[m]ost people would have thrown in the towel at that stage." However, he noted that GW's views had not always been consistent and this matter was listed for an attended hearing on 22 May 2014, anyway. In the circumstances, he saw no reason to depart from the usual order for costs in property and affairs cases as set out in rule 156 of the Court of Protection Rules 2007, i.e. that the costs should be paid by P or charged to his estate.

## Comment

Even though the CRPD is not incorporated into English law, it is nonetheless being referred to with increasing frequency in decisions up to and including that of the Supreme Court (in [Cheshire West](#)). The weight placed upon GW's wishes in this case determining the application is also undoubtedly 'CPRD-friendly.' This, though, is the first time that the General Comment upon Article 12 to the Convention has been relied upon in a judgment, and it is of particular interest to note in

this context that Senior Judge Lush alighted upon the discussion in the General Comment in relation to undue influence as opposed to the (relatively) more familiar ground of the importance of the promotion of the individual's will and preferences. It is, in this context, a useful reminder that the CRPD seeks to balance a number of rights including (under Article 16) the right to be free (inter alia) from exploitation and abuse. The Government's [response](#) to the House of Lords Select Committee's post-legislative scrutiny report under the MCA 2005 notes "the work that Government is undertaking as it continues to assess the compatibility of the Mental Capacity Act with the Convention. The Committee on the Rights of Persons with Disabilities will be reviewing the compatibility of both the MCA 2005 and the Adults with Incapacity (Scotland) Act 2000 with the CRPD next year, and it is fair to say that there are very significant grounds to doubt whether the MCA 2005 is compliant with the CPRD, especially given the interpretation given to Article 12 in the General Comment issued by the Committee (see this detailed and extremely helpful [discussion paper](#)).

### **Short Note: attorneys and continuing healthcare disputes**

On a successful application by the Public Guardian to revoke and cancel the registration of a property and affairs LPA, Senior Judge Lush noted – in the context of holding that an attorney had not acted in the donor's best interests by refusing to pay care home fees on her behalf – that:

*"40. It is the Public Guardian's view, with which I fully agree, that in a dispute regarding NHS Continuing Healthcare, an attorney acting on behalf of an incapacitated donor has a duty to pursue all the standard dispute resolution procedures and, if need be, have the matter referred to the Parliamentary and Health*

*Service Ombudsman. The Ombudsman's role is to investigate complaints that individuals have been treated unfairly or have received poor service from government departments and other public organisations, including the NHS. Whilst these attempts to resolve the dispute are taking place, the attorney should continue to pay the donor's care fees. If it transpires that the donor qualifies for NHS Continuing Healthcare, and has been eligible for some time, the NHS will refund any overpayment of care fees."*

## Conferences at which editors/contributors are speaking

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### The duty of patient involvement in DNACPR decisions

Tor is speaking at a seminar at 39 Essex Street at the Hall in Gray's Inn at 6pm on 3 July on the implications of the decision in *Tracey*. The seminar is chaired by Fenella Morris QC, and the other speakers are Vikram Sachdeva Professor Penney Lewis of King's College London, and Dr Jerry Nolan, Royal United Hospital, Bath. For more details and to reserve a place, please email [beth.williams@39essex.com](mailto:beth.williams@39essex.com).

### 'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available [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.

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Our next Newsletter will be out in early August. 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](mailto:marketing@39essex.com).

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (forthcoming, 2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website [www.mentalcapacitylawandpolicy.org.uk](http://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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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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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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Adrian is a practising Scottish solicitor, a partner of 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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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**