

Property and Affairs

Introduction

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

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: Charles J and the DOL impasse, sex and marriage, grappling with anorexia, and wishes and feelings in different contexts;
- (2) In the Property and Affairs Newsletter: revoking and suspending LPAs, Law Society guidance on fiduciary duties and the OPG on delegation;
- (3) In the Practice and Procedure Newsletter: Court of Protection statistics, the appointment of the Chief Assessor for the Law Society Mental Capacity accreditation scheme, statutory charges, contempt of court, and the admissibility of expert evidence;
- (4) In the Capacity outside the COP Newsletter: follow-up from the Mental Capacity Action Day, obstructive family members and safeguarding, and end of life care and capacity;
- (5) In the Scotland Newsletter: capacity, facility and circumvention, the new Edinburgh Sheriff Court Practice Note, an important case on the ability to apply for appointment as a guardian, and key responses to the Scottish Government consultation on incapacity law.

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](#).

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Alex Ruck Keene
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Annabel Lee
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Guest contributor

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For all our mental capacity resources, click [here](#).

Revocation and suspension

The Public Guardian v TW, KW, HF and SC [\[2016\] EWCOP 18](#) (Senior Judge Lush)

Lasting powers of attorney – revocation – suspension

Summary

In this case the Senior Judge was dealing with an application for the revocation of an LPA and the appointment of a deputy.

The evidence about P’s capacity to revoke the LPA was ambivalent and the power to revoke cannot be exercised unless P lacks such capacity (s. 22(4)(b) MCA).

The Senior Judge, seemingly on his own initiative, ordered a report from a Court of Protection Visitor and, in the meantime, “suspended” the LPA pursuant to s.23(2)(a) MCA and made an interim deputyship order.

Comment

It is curious that the MCA does not provide the court with an express power to suspend an LPA, because such will on occasion clearly be necessary (the automatic suspension under s.13(4) upon the making of an interim bankruptcy or debt relief restrictions order is different).

Section 23(2)(a) does not, on its face, allow the court to suspend an LPA. Rather, it enables the court to give directions with respect to decisions which the donee of a lasting power of attorney has authority to make. In this case, the court in effect appears to have directed the attorney to make no such decisions thus leaving the way clear for the interim deputy to take over.

We are aware that this section is regularly used in this fashion but there are no reported cases of which we are aware in which the basis (or width) of the power to do so has been analysed. We hope that in another case this issue might be explored in more depth.

Law Society Guidance on fiduciary roles and retirement from practice by a private client practitioner

The Law Society has published new [guidance](#) on fiduciary roles and retirement from practice by a private client practitioner. The Law Society’s website gives the following brief indication of its contents.

This practice note provides guidance to assist firms to address the issues that arise when a solicitor, who has held fiduciary roles, retires or departs from a practice.

It also looks at ways in which a practice can plan ahead for succession, so that when retirement or departure arises, there may be fewer problems to face, or better solutions available.

The OPG and delegation of investment decisions

As reported by STEP, the Public Guardian is to review its new guidance concerning delegation of investment decisions to discretionary fund managers.

In Part A7 (page 28) of the guidance that the OPG gives relating to LPAs, the OPG states that unless the LPA gives express power to use discretionary management schemes, an attorney must apply to the Court of Protection to allow the use of a discretionary fund manager.

This was new and represented a change from the OPG's previous position. Practitioners were concerned and made representations. Hence the announcement of a review and the possibility of a test case.

It would be anomalous if donees of LPAs had to have court approval for using such a ubiquitous form of investment. Trustees can do so pursuant to sections 11 and 15 of the Trustee Act 2000. As regards the position of agents generally (and the donee of a LPA is no more than an agent whose agency survives the incapacity of the donor and is subject to the court's control under the MCA) *Bowstead and Reynolds on Agency 20th Edn* Article 34 states that an agent may delegate:

Where, from the conduct of the principal or of the principal and the agent, it may reasonably be presumed to have been intended that the agent should have power to employ a sub-agent"

An echo of the guidance can be seen, however, in what Senior Judge Lush said in *Northamptonshire County Council v RG and others* [2015] EWCOP 66 (noted in the [November 2015](#) newsletter) at paragraph 43:

Attorneys cannot usually delegate their authority to someone else. They must carry out their duties personally. Of course, they may seek professional or expert advice when appropriate (for example, investment advice from a financial adviser or legal advice from a solicitor), but they cannot as a general rule allow someone else to make a decision that they have been appointed to make".

It is to be hoped that donees of LPAs will be able to use discretionary investment schemes without the need for court sanction. Otherwise, every time an investment manager wants to make a

change in a portfolio, he will have to get the attorney's consent or the Court of Protection will have to make orders in any case where, quite reasonably, an attorney wants to use a discretionary fund. Indeed the guidance seems to suggest that court approval is needed even for the attorney to continue to use such funds.

Conferences at which editors/contributors are speaking

CoPPA London seminar

Alex will be speaking at the CoPPA London seminar on 20 April on the recent (and prospective) changes to the COP rules. The seminar will also cover the transparency pilot. To book a place or to join COPPA, or the COPPA London mailing list, please email jackie.vanhinsbergh@nqpltd.com.

Scottish Paralegal Association

Adrian will be speaking at the SPA Conference on Adults with Incapacity on 21 April in Glasgow. For more details, see [here](#).

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The second and third seminars in the series will be on "New" categories of abuse and neglect' (20 May) and 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see [here](#).

Adults with Incapacity

Adrian will be speaking on Adults with Incapacity at the Royal Faculty of Procurators in Glasgow private client half day conference on 18 May 2016. For more details, and to book, see [here](#).

CoPPA South West launch event

CoPPA South West is holding a launch event on 19 May at Bevan Brittan in Bristol, at which HHJ Marston will be the keynote speaker, and Alex will also be speaking. For more details, see [here](#).

Mental Health Lawyers Association 3rd Annual COP Conference

Charles J will be the keynote speaker, and Alex will be speaking at, the MHLA annual CoP conference on 24 June, in Manchester. For more details, and to book, see [here](#).

Click [here](#) for all our mental capacity resources

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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 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 Newsletter in the future please contact marketing@39essex.com.

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CoP Cases Online



Use this QR code to take you directly to the CoP Cases Online section of our website





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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 and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 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.**



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Professor 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 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**