Mental Capacity Law Newsletter August 2016: Issue 68

Essex CHAMBERS

Court of Protection: Practice and Procedure

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: covert medication and deprivation and further findings in relation to state imputability;

(2) In the Property and Affairs Newsletter: statutory wills and charitable giving and OPG guidance on professional deputy costs;

(3) In the Practice and Procedure Newsletter: an update on Case Management, s.49 and Transparency pilots and habitual residence strikes again;

(4) In the Capacity outside the COP Newsletter: assistance wanted with questionnaires on powers of attorneys/advance decisions and mediation and relevant law reform developments around the world;

(5) In the Scotland Newsletter: the first AWI appeal determined by the Sheriff Appeal Court and Scottish observations on habitual vs ordinary residence.

With this Newsletter, we also roll out the next iteration of our capacity assessment guide, including a re-ordering of the stages of the test and summaries of (ir)relevant information for the most important decisions. You can find it on our dedicated sub-site here, along with all our past issues, our case summaries, and much more. And you can find 'one-pagers' of the key cases on the SCIE website.

We are now taking our usual summer break, but will return in early October with all the mental capacity news that is fit to print.

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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capacity resources, click here.

Case Management Pilot starts 1 September

The Case Management Pilot will start on 1 September, to run until 31 August 2017 (alongside the s.49 Pilot and the extended Transparency Pilot, both discussed further below).[1]

The Case Management Pilot can be found here. It introduces three distinct pathways for COP proceedings: 1) a Property and Affairs pathway, 2) a Health and Welfare pathway, and 3) a hybrid pathway for cases that have elements of both. The expectations of practitioners will be different depending upon which pathway is engaged. Common to each, though, is an expectation of much greater 'front-loading' and cooperation to narrow the issues.

The Case Management Pilot is accompanied by a revised set of Rules which foreshadow a re-numbering of the Rules that is anticipated as part of the second tranche of rules changes (moving to the same model as in the CPR and FPR). For ease of reference, all the Rules that will apply for purposes of the Pilot are set out in an annex – with suitably highlighted amendments – to the Pilot practice direction. They are also found collected together on the Court of Protection Handbook website here. There are six Pilot Parts:

- Pilot Part 1: the overriding objective, including the participation of P, heightened duties upon the court and upon parties, and new duties upon both legal representatives and litigants in person;
- Pilot Part 2: interpretation and general provisions;
- Pilot Part 3: managing the case;
- Pilot Part 4: hearings;
- Pilot Part 5: court documents;
- Pilot Part 15: experts.

As these parts cover the majority of relevant matters that arise during the life of an application, the intention is that practitioners (and the judiciary) will have to do the minimum of cross-referencing to the current iteration of the Rules during the life of the Pilot. However, an unfortunate consequence of the fact that for reasons beyond the control of the ad hoc Rules Committee the renumbering of the Rules cannot take place at present is that there will be parallel Rules for the life of the Pilot depending on whether cases are within or outside the Pilot. This means, for instance, that Rule 3A representatives are actually Pilot Rule 1.2A representatives in cases on the Case Management Pilot.

Before highlighting the key points of the three pathways, it is important to note the types of applications which the Pilot will not affect, which include: uncontested applications, applications for statutory wills and gifts, applications relating to serious medical treatment and deprivation of liberty applications (both *Re X* applications and s.21A applications). However, even for such cases, we strongly suggest that it is prudent to proceed in any case on the basis of any stricter

[1] What follows is an updated version of the note that appeared in our March 2016 newsletter. Alex as a member of the ad hoc Rules Committee has been involved in developing the Pilot. As before, this note does not, represent an official comment upon behalf of the Rules Committee.

obligation/test that would apply if the case were on the Pilot. If the Case Management Pilot achieves its aim of changing the culture of the Court of Protection, then it is likely that the judiciary will seek to follow its spirit even where its letter does not apply.

It should also be noted that the intention is that the Case Management Pilot sits alongside and does not displace the Transparency Pilot, so the expectation will be that all of the hearings noted below, with the express exception of the Dispute Resolution Hearing provided for in the property and affairs pathway, will be listed according to the Transparency Pilot rules as regards public/media attendance.

Personal welfare pathway

The personal welfare pathway starts pre-issue, with a set of requirements designed to ensure that only those applications which actually require resolution by court proceedings come to court, and those which do, do so in circumstances where the issues are clearly delineated from the outset. The Pilot Practice Direction then specifies in some detail what must be included with or accompany the application upon issue including – importantly – a statement as to how it is proposed P will be involved in the case.

The next stage is for matters to be considered by a judge on the papers both for gatekeeping purposes (i.e. allocating to the correct level of judiciary) and the making of initial directions including, importantly, listing a Case Management Conference within 28 days (unless the matter is urgent). The judge can also direct that there be an advocates' meeting before the CMC.

The CMC will be the first attended hearing and a vital step in the proceedings because of the obligations placed upon the court (not just the parties) to ensure that the issues are narrowed and directions set for the proportionate resolution of those that are in dispute. Importantly, one of the matters that the court will do is to allocate a judge to the matter – judicial continuity being recognised as crucial to the success of the pilot. It is also important to note that this Pilot is running alongside the s.49 pilot discussed further below, and also includes a tightening of the rules in relation to experts (where the Pilot applies) so as to limit permission to circumstances where their evidence (1) is necessary to assist the court to resolve the issues in the proceedings; and (2) cannot otherwise be provided.

The intention is that in the ordinary run of the events there would then only be (at most) two more hearings, a Final Management Hearing and the Final Hearing. Ahead of the Final Management Hearing, whose purpose is to determine whether the case can be resolved by consent and, if not to ensure proper preparation for trial, an advocates' meeting is to be listed at least 5 days in advance for purposes of – inter alia – preparing a draft order for the court to consider at the FMH. Matters that are likely to be covered at the FMH will include such things as the trial timetable and a witness template, as well as the contents of the trial bundle: in line with the injunction given by the Court of Appeal in *Re MN*, the expectation is that the trial bundle for the Final Hearing will not generally exceed 350 pages, and must not include more than one copy of the same document.

It is important to note that, unlike the Public Law Outline, there is no fixed timeframe within which

proceedings must be concluded, the only fixed date being the listing of the Case Management Conference. The intention, however, is that the process set down in the Pilot is will mean dramatically shorter resolution of welfare applications.

Property and Affairs pathway

The property and affairs pathway does not start pre-issue because it is recognised that it is often only upon issue that it becomes clear that a property and affairs application is contentious. It therefore compromises four stages.

The first stage is when the application becomes contested, i.e. when the court is notified in the COP5 that the application is contested or a respondent wishes to seek a different order.

The case management stage takes place on the papers, and includes either: (1) listing for a Dispute Resolution Hearing; or (2) transfer to a suitable regional court for listing of the DRH and future case management. If the respondent has not given sufficiently clear reasons for opposing/seeking a different order, the judge will also at that stage require such reasons to be given.

The Dispute Resolution Hearing is a major innovation, and represents – in essence – judicial mediation in a form familiar to family practitioners. A DRH, which will normally take place before a District Judge, is to enable the court to determine whether the case can be resolved and avoid unnecessary litigation, and to that end the content of the hearing is not to be disclosed and everything said therein is not admissible (save in relation to a trial for contempt). The court is expressly required to give its view as to the likely outcome of the proceedings as part of the DRH. The aim is for the court to be able to endorse a consent order at the end of the DRH; if not, the court will list for directions of the management of the hearing and a Final Hearing.

The last stage – the Final Hearing – will take place in accordance with directions made at the DRH (there being no Final Management Hearing as with the welfare pathway).

As with the welfare pathway, there is no fixed timeframe for the determination of the application. Nor, in this instance, is there a specific timeframe for listing of the first attended hearing – the DRH. This recognises that there is merit to flexibility because there will be some cases in which allowing longer for a DRH is more likely to bring about a quicker resolution overall; conversely, in some cases, the sooner that judicial banging of heads takes place the better.

Mixed welfare pathway

If an application comprises elements of both welfare and property and affairs, prospective parties are directed at the pre-issue stage to identify which pathway is most effective and to comply with the requirements of that pathway so far as possible. At point of issue, they must file a list of issues to allow the court to identify which pathway or mixture of elements is most appropriate.

The court will then, on the papers, either allocate the case to one of the two pathways set out above, or give directions as to the elements of each pathway are to apply and the particular procedure the case will follows.

Urgent applications

In all cases there is express provision for urgent applications, requiring the parties in particular to specify why the matter is urgent and any particular deadline by which the issue(s) need to be resolved as well, as well as directing compliance (insofar as possible) with any necessary pre-issue steps.

Expert evidence

An important change that is introduced by the Case Management Pilot is a revised Part 15 on expert evidence. Crucially, the test for permission has been revised in COPR Pr121 to make it more stringent. The court's duty is now to restrict expert evidence to that which is necessary to assist the court to resolve the issues in the proceedings, and by COPR Pr 121(2) the court may only give permission to file or adduce expert evidence if it is satisfied that it is both necessary and cannot otherwise be provided. Further, the court must now in deciding whether to give permission to file or adduce expert evidence have specific regard by COPR Pr123(2A) to (a) the issues to which the expert evidence would relate; (b) the questions which the expert would answer; (c) the impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings; (d) any failure to comply with any direction of the court about expert evidence; and (e) the cost of the expert evidence. Additionally, by para 4.5(m), the Case Management Pilot Practice Direction provides that for cases on the welfare pathway, the court must at the case management hearing actively consider whether a section 49 report (or a report from a Rule 3A/PR r1.2 representative) could achieve a better result than the use of an expert.

Section 49 pilot

The s.49 Pilot also starts on 1 September, to run until 31 August 2017. The Practice Direction applies both to orders made under s.49 MCA by the COP of its own motion and – more importantly – to orders sought by parties. The Practice Direction is accompanied by a draft order. It recognises, in essence, that s.49 reports are an extremely important part of the COP's armoury when it comes to information gathering, but that they must be deployed:

(1) Carefully, so as to ensure that they are targeted to public bodies actually able to provide useful information;

(2) With suitable thought and preparation on the basis that, to be effective, they are best approached as if they were expert reports.

An important innovation is the requirement, where possible, for a party seeking a s.49 report from a NHS body or local authority to have made contact prior to the application being heard by the court to identify an appropriate person ("a senior officer") able to receive the order, and to have discussed with the body the reasonableness and time scales for providing the report. Although it does not prescribe when a court will and will not order one, the Practice Direction set out (at paragraph 3) common factors that the court may consider when deciding whether to order a s.49 report, including:

- where P objects to the substantive application or wishes to be heard by the court and does not qualify for legal aid;

- where it has not been possible to appoint a litigation friend or [under the new

numbering] rule 1.2 representative, including where the court has made a direction under rule 1.2(5);

- where a party is a litigant in person and does not qualify for legal aid;
- where the public body has recent knowledge of P; or it is reasonably expected that they have recent knowledge of P; or should have knowledge due to their statutory responsibilities under housing, social and/or health care legislation;
- the role of the public body is likely to be relevant to the decisions which the court will be asked to make;
- the application relates to an attorney or deputy and involves the exercise of the functions of the Public Guardian; and
- evidence before the court does not adequately confirm the position regarding P's capacity or where it is borderline; or if information is required to inform any best interests decision to be made in relation to P by the court.

An unofficial version of the template s.49 order in Word form is to be found here.

Transparency Pilot extended and model order varied

The Transparency Pilot has been extended to run until 31 August 2017. We hope in due course that a formal report as to the reasoning will be published, but for present purposes practitioners – and indeed the judiciary – should note the following changes to the Pilot Order (which is available here, including in unofficial Word form):

- An addition to paragraph 5A (i.e. those bound by the order) to make express that it binds "all persons who are provided with or by any means obtain documents and information arising from this application;"
- An addition to paragraph 6 (concerning anonymisation of the transcript of hearings/judgments/orders), making clear that a confidential schedule should be provided with the necessary identification (and a copy of the order) to any person who needs to know the identity of P and/or others anonymised, for instance for purposes of complying with an order for disclosure of documents/information relating to P;
- A considerable simplification of the requirements relating to anonymisation of documents. Because – so far – very few hearings have been attended by anyone other than the parties, the initially cautious approach, which required all core documents to be anonymised, has been relaxed. There is now no requirement that this is to be done; rather the court, by new paragraph 7, may at any time give such directions as it thinks fit (including directions relating to anonymisation, payment, use, copying, return and the means by which a copy of a document or information may be provided) concerning the provision of information or copies of documents put before the court and the terms on which they are to be provided to any person who attends an attended hearing (and who is not already allowed to

be given a copy of a document under PD13A – i.e. for such purposes as receiving advice or making complaints to relevant bodies).

Tor had previously prepared an unofficial easy read version of the Pilot Order, and we understand that an updated version to reflect the provisions of the amended Order will be forthcoming.

It should be noted, finally, that the PD extending the Transparency Pilot did so in such a fashion that it is now easier to update the Pilot Order, and practitioners should therefore make sure to ensure that they are using the current version, which will always be found here.

Shameless plug: LAG Court of Protection Handbook 2nd edition

All the above, and much more, will be covered in detail in the second edition of the LAG Court of Protection Handbook upon which Alex is beavering away at the moment with his co-authors with a view to publication in October. For more details and to pre-order, see here.

Habitual residence, integration and deprivation of liberty

Re DB; Re EC [2016] EWCOP 30 (Baker J)

International jurisdiction of the Court of Protection – Other

Summary [2]

This decision concerns the habitual residence of two people placed by Scottish authorities in hospital in England. For a Scottish perspective on the judgment, see the article by Adrian Ward in the August 2016 Scotland Newsletter.

DB and EC both had significant learning disabilities and required intensive care packages which engaged Article 5. Both had been born and raised in Scotland, initially placed in a specialist hospital in England and detained under s.3 MHA 1983 but subsequently made subject to a standard authorisation under Schedule A1 MCA 2005. Both applied under s.21A MCA 2005 to challenge their detention in the hospital. The parties did not dispute that the court had jurisdiction to determine a s.21A challenge regardless of whether the subject of the proceedings was habitually resident in England or Wales. The issue for the court was whether it could determine the best interests of the men as regards their care and residence if they were habitually resident in Scotland. The English and Scottish authorities agreed that both men had acquired habitual residence in England. The Official Solicitor for both men argued that they were habitually resident in Scotland. The judge, Baker J, noted that the meaning of habitual residence under the MCA 2005 was the same as under family law statutes and instruments, and that applying the guidance provided by the courts in those areas, both men were habitually resident in England for the following reasons:

- They had been present in England for a substantial period of time (7.5 years in one case and 6 in the other);
- Although ultimately the plan was for both men to return to Scotland, their placement in England was understood to

[2] Alex now being instructed in this case, he has not contributed to this note.

be indefinite, and would last until they were ready to return and a suitable placement was available;

- Although the men's lives had not been characterised by the degree of social or family integration enjoyed by most people, neither was able to integrate in a family or social environment anywhere in a conventional way as a result of their disabilities, and they had in fact achieved a degree of integration at the hospital.

Comment

This decision is a useful illustration of the application of the established principles in family law to habitual residence disputes involving adults. Of particular significant is the court's conclusion that a person with significant learning disabilities could achieve a degree of integration in a hospital setting, having regard to the difficulties such a person would have in social integration in any setting, whether or not of an institutional nature.

Another interesting aspect of the case is the agreement by the parties concerned that the Court of Protection had jurisdiction to determine a s.21A application even if the person subject to the standard authorisation was not habitually resident in England or Wales. The authors are aware of previous unreported cases in which it has been asserted that by virtue of paragraph 7 of Schedule 3 to the MCA 2005, the court does not have such jurisdiction. In this case, the need to determine the habitual residence of DC and EB arose because, as part of the s.21A challenges, the court would be invited to determine substantive issues of capacity and best interests and make orders under ss.15 and 16 MCA 2005, and the court and the parties proceeded on the basis that such orders could only be made in respect of a person habitually resident in England or Wales by virtue of para 7 of Schedule 3.

The judgment does not examine whether there is an inconsistency between the court having jurisdiction under s.21A in respect of all people subject to standard authorisations, whether or not they are habitually resident in England and Wales, but its jurisdiction otherwise being limited by habitual residence. It remains the case therefore that there is no judicial explanation as to whether DOLS authorisations can in fact be granted in respect of people who are not habitually resident in England and Wales, and if so, why Schedule 3 does not prevent authorisations in respect of such people being challenged under s.21A.

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Conferences at which editors/contributors are speaking

4th World Congress on Adult Guardianship

Adrian will be giving a keynote speech at this conference in Erkner, Germany, from 14 to 17 September. For more details, see here.

Autism-Europe International Conference

Alex will be taking part in a panel discussion on deprivation of liberty at Autism-Europe's 11th international congress in Edinburgh on 16-18 September. 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 third (free) seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Deprivation of Liberty in the Community

Alex will be doing a day-long seminar on deprivation of liberty in the community in central London for Edge Training on 7 October. For more details, and to book, see here.

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.

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.

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.

Other conferences of interest

Financially Safe and Secure?

Action on Elder Abuse (AEA) Northern Ireland is delivering its first national conference on 30 September, supported by the Commissioner for Older People for Northern Ireland (COPNI) and sponsored by Ulster Bank, to explore the nature and extent of financial abuse of older people and focus on working collaboratively to address what has been described as the 'crime of the 21st Century'. For full details and to book see here.

Chambers Details

Our next Newsletter will be out in early October. 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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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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 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.

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.