

## Court of Protection: Property and Affairs

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

## Table of Contents

Statutory wills and charitable gifting	2
Professional deputy costs	3
Conferences at which editors/contributors are speaking	4
For all our mental capacity resources, click <a href="#">here</a> .	

## Statutory wills and charitable gifting

*K v LM* [2015] EWCOP 91 (District Judge Mort)

### Statutory wills

#### Summary

In this case P was seriously assaulted by her birth mother when very young. She eventually received a large CICA award. Her care needs were met by the income from that award and NHS continuing health care payments. P's remaining capital exceeded £2m and was not being eroded. P's adoptive parents, it seems, were much involved in P's care. Her other family was a sibling who had 2 daughters.

P's deputy made an application for a statutory will proposing 25% each to her parents, 25% to her sibling and 25% to the 2 children of her sibling with an accrual clause to prevent anyone else benefitting.

The Official Solicitor was appointed P's litigation friend. P's family did not attend the hearing but made written representations.

Everyone agreed that there should be a statutory will. The issue was as regards any charitable gift.

The Official Solicitor proposed 20% to charity on the grounds that the funds were from the community and in those circumstances P would have wanted some part to go back to the community.

P's family accepted that a charitable gift was appropriate but suggested 5%. P's deputy, the applicant, supported that, pointing out that IHT

would return a substantial amount to the community anyway.

In an email, P's adoptive mother stated that she had felt "*massively insulted*". P's wishes as to charitable giving were impossible to ascertain, and her adoptive mother declined to suggest any charities that P might wish to name, commenting in the same email that "*the only way of getting this kind of information from her will be to plant the idea in her mind – thus it will not be 'her' choice/wishes.*"

In the result, the District Judge decided that the Official Solicitor's approach was right, directing a gift of 20% to charities principally a charity of the local NHS trust.

#### Comment

There is little in the judgment (which was published at the request of the Official Solicitor) that tells us why the judge decided that 20% was more in P's best interests than 5%. A Court of Protection Visitor had tried to ascertain P's views but with limited success. The judge clearly had section 4(7)(b) MCA in mind (requiring the court to take account of the views of those engaged in caring for P). The judge must have had in mind the fact that one of those carers had felt "massively insulted" but still found it in P's best interest to prefer the views of the Official Solicitor rather than that carer.

We must confess to a degree of unease as to why such an outcome could be said to be in P's best interests. For those who want to reflect further upon when and whether it is really right to apply a best interests criterion in the making of statutory will applications where (as here) it appears to be impossible to discern the person's

wishes and feelings, we commend the article by Rosie Harding entitled "[The Rise of Statutory Wills and the Limits of Best Interests Decision-Making in Inheritance](#)" (2015) Modern Law Review 78: 945–970.

## Professional deputy costs

The Office of the Public Guardian and the Senior Courts Costs Office have issued [good practice guidance](#) in relation to the new costs supervision and assessment regime. It is essential reading for all professional deputies.

Highlights are reminders that professional deputies will be required to submit estimates for their costs for the following year when submitting their annual breakdown of costs; that costs must be reasonable and proportionate to the value of the estate with work being done by the appropriate level of fee earner; that a professional deputy has an obligation to consider if it is P's best interests for them to continue in the role rather than ask a family member to take over; being open and transparent with family members with costs information and, whilst respecting P's confidentiality, considering whether it is in P's best interest for family members to have information about their charges.

The guidance has a section which gives an overview of the SCCO's approach regarding the assessment of general management costs.

### Conferences at which editors/contributors are speaking

---

#### 4<sup>th</sup> 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 11<sup>th</sup> 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](#).

#### 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

---

#### 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](#).

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](mailto:marketing@39essex.com).

**David Barnes**

Chief Executive and Director of Clerking  
[david.barnes@39essex.com](mailto:david.barnes@39essex.com)

**Alastair Davidson**

Senior Clerk  
[alastair.davidson@39essex.com](mailto:alastair.davidson@39essex.com)

**Sheraton Doyle**

Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

**Peter Campbell**

Practice Manager  
[peter.campbell@39essex.com](mailto: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

For all our services: visit [www.39essex.com](http://www.39essex.com)

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with Thirty Nine Essex Street provides any legal services. Thirty Nine Essex Street (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

### Editors

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

### Scottish contributors

Adrian Ward  
Jill Stavert

### CoP Cases Online



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





**Alex Ruck Keene:** [alex.ruckkeene@39essex.com](mailto: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](http://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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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.**