

## Court of Protection: Property and Affairs

### Introduction

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

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: some light shed on undoing advance decisions to refuse medical treatment;
- (2) In the Property and Affairs Newsletter: Senior Judge's last judgment (on dispensing with service) and the latest LPA/deputy statistics;
- (3) In the Practice and Procedure Newsletter: different aspects of (and consequences of) reporting restrictions;
- (4) In the Capacity outside the COP Newsletter: guidance on s.20 Children Act 1989 'consents' and capacity, powers of attorney and managing telephone subscriber accounts;
- (5) In the Scotland Newsletter: an update on practice before the Glasgow Sheriff court, a round-up of relevant case-law, and the review of the Council of Europe's Recommendation CM/Rec(2009)11 *on principles concerning continuing powers of attorney and advance directives for incapacity*.

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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## Dispensing with service

*I v D* (by his litigation friend the Official Solicitor)  
[\[2016\] EWCOP 35](#) (Senior Judge Lush)

*Practice and procedure – other*

### Summary

In this case, his last reported decision, Senior Judge Lush was dealing with an application to dispense with service of an application to make a statutory will on a person who was entitled to a half share in P's estate and would be disinherited by the proposed statutory will.

The matter came before the Senior Judge by way of an appeal but the procedural history is not relevant for the purposes of the decision. So far as the facts and the result are concerned they, too, are not of general interest.

P had received a substantial personal injury award and his mother had been appointed receiver (in the days before professional deputies) and was subsequently appointed deputy. P's mother applied for a statutory will. She also applied for service on P's father to be dispensed with on the ground that P's father had had no contact with him and his whereabouts were unknown. The Senior Judge refused the application to dispense with service as there was no urgency, P's father had the right to be heard and he was not impressed with the efforts made thus far to locate him.

Of general interest, the Official Solicitor asked the Senior Judge to give guidance on the principles to be applied when the court to dispense with the service required by paragraph 9 of PD9F.

The latter provides:

*The applicant must name as a respondent:*

- (a) any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application;
- (b) any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and
- (c) any prospective beneficiary under P's intestacy where P has no existing will.

The guidance suggested is at paragraph 40 of the judgment and the Senior Judge approved it at paragraph 44. It is as follows.

*The Official Solicitor submits that, where the court is faced with an application to dispense with service on a materially affected party the following matters should be considered by the court:*

- (1) *A decision by the court to dispense with the service of an application on a person who would otherwise be entitled to it is not "an act done, or decision made, under [the Mental Capacity Act 2005] for or on behalf of P" within the meaning of section 1(5). It is therefore not a decision which is to be determined only by reference to an assessment of P's best interests.*
- (2) *The court's decisions on procedural matters should be considered with regard to the obligation to give effect to the overriding objective set out at rule 3 of the Court of Protection Rules 2007. This makes clear that dealing with a case justly includes:*
  - (a) *ensuring that it is dealt with expeditiously and fairly*
  - (b) *ensuring that P's interests and position are properly considered. Although P's best*

- interest may be relevant to the court's decision to dispense with service, unlike a decision which is being taken for or on behalf of P, they are not determinative;*
- (c) dealing with the case in ways that are proportionate to the nature, importance and complexity of the issues;*
  - (d) ensuring that the parties are on an equal footing;*
  - (e) saving expense; and*
  - (f) allotting it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases.*
- (3) The court should recognise that a decision to dispense with service on an individual otherwise entitled to it may engage that individual's rights under the European Convention on Human Rights, especially articles 6 and 8. In any event, P's own Convention rights are certainly engaged. More broadly, even if Convention rights are not engaged, issues of procedural fairness arise.*
- (4) A decision to dispense with service on an affected party will mean that the court may have to decide the substantive application without all the relevant material before it.*
- (5) Any decision to dispense with service on an individual will be taken by the court on the basis of untested evidence. The apparent merits of the substantive application should not be used to justify dispensing with service.*
- (6) Fears about the consequences to P or the applicant of service on the individual in question can in many ways be ameliorated*

*by the use of the court's powers under rule 19 to redact relevant details, such as addresses.*

- (7) The consequences of the application succeeding to the individual who is not to be served should also be considered.*
- (8) Before a decision is taken to dispense with service because of practical difficulties, consideration should be given to the possibility of effecting service by means of an alternative route under rule 34.*
- (9) Matters of procedural fairness should be given a high regard, and it is submitted that cases where it is appropriate to dispense with service on an individual who is directly and adversely affected by an application are likely to be exceptional.*
- (10) Different factors may apply in cases where the application is to dispense with service on P or where there is genuine urgency and there is a need to balance the prejudice of proceeding in the absence of an affected party against the prejudice to P or another party of not proceeding at all.*

## Comment

It is quite clear from the decision in this case, the guidance set out above and previous authority, that service in accordance with paragraph 9 PD9F will rarely be dispensed with outside cases of genuine urgency. The decision also, separately, marks the end of an era with the retirement of Senior Judge Lush, who was the subject of an [appreciation](#) by Penny Letts in our last issue, and whom we wish very well in his well-earned retirement. The Court of Protection will be much the poorer for the loss of his knowledge, experience and wisdom.

## Lasting Powers of Attorney/ deputyship statistics

The Court of Protection/OPG statistics for January to March 2016 are now [out](#). They show that there were 141,667 Lasting Powers of Attorney (LPAs) received in January to March 2016, the highest quarterly figure so far and up 18% on the same quarter for 2015. The MOJ (plausibly) puts the recent increases down largely to increased publicity and new online forms which have been introduced to make it simpler and faster to apply for LPAs. There were 3,511 EPAs registered in January to March 2016, down 14% on January to March 2015. There were 3,127 Deputyships appointed in January to March 2016, a decrease of 21% on the equivalent quarter in 2015.

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## Conferences at which editors/contributors are speaking

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### 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](#).

### 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<sup>th</sup> October. 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](#).

### 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](#).

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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 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).

### 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

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## 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.**

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**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.**