

Court of Protection: Property and Affairs

Introduction

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

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: Neil Allen comments on the Law Commission's interim statement, Charles J on deputies and Article 5, and an updated Guidance Note on judicial authorisation of deprivation of liberty;
- (2) In the Property and Affairs Newsletter: Senior Judge Lush on the difference between property and affairs and welfare deputies and new OPG guidance;
- (3) In the Practice and Procedure Newsletter: an appreciation of Senior Judge Lush by Penny Letts OBE ahead of his retirement in July;
- (4) In the Capacity outside the COP Newsletter: a major report on the compliance with article 12 CRPD of the three jurisdictions of the United Kingdom and a guest article by Roy McClelland OBE on the new Mental Capacity (Northern Ireland) Act 2016;

In large part because its editors have been all but entirely subsumed with work on the report on CRPD compliance, there is no Scotland newsletter this month.

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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Table of Contents

Introduction	Erro
Attorneys and attorneys	2
New OPG Guidance on Family Care Payments	2
New OPG guide for lay attorneys and deputies on the making of gifts	3
Conferences at which editors/contributors are speaking	5
For all our mental capacity resources, click here .	

Attorneys and attorneys

The Public Guardian v PM &SH [\[2016\] EWCOP 25](#)
(Senior Judge Lush)

Lasting powers of attorney – revocation

Summary

In this case the Senior Judge was dealing with an application for the partial revocation of a property and affairs LPA and the revocation of a welfare LPA.

P's daughter was the welfare attorney and was also, jointly and severally with her brother, the property and affairs attorney.

The application centred on the daughter's behaviour. As regards the property and affairs LPA, the Senior Judge reminded himself of the ruling in *Re F* [2004] 3 AER 277 where Patten J had said;

"It seems to me that to remove an attorney because of hostility from a sibling or other relative, in the absence of any effective challenge to his competence or integrity, should require clear evidence either that the continuing hostility will impede the proper administration of the estate or will cause significant distress to the donor which would be avoided by the appointment of a receiver."

In the end, the Senior Judge concluded that there was such hostility and the proper administration of the estate had been impeded so the LPA for property and affairs was partially revoked and P's son became the sole attorney.

As regards the welfare LPA, the Senior Judge held that rather different considerations applied (see paragraphs 47 and 48). In particular, he noted, a

welfare attorney can only take decisions which P lacks capacity to take and there is protection for P where, as here, the attorney had suffered a temporary lapse in her ability to perform her duties, in that s.5 MCA has the effect that the vast majority of welfare decisions are taken in collaboration, informally, with a range of agencies. In those circumstances there is a safety net for P.

In the end, therefore, the Senior Judge refused to discharge the welfare LPA.

Comment

This decision – one of the last that Senior Judge Lush will give prior to his retirement (see further the appreciation by Penny Letts elsewhere in this Newsletter) provides a useful reminder of the clear conceptual, and in turn practical, differences between the two forms of powers of attorney that can be granted under the MCA.

New OPG Guidance on Family Care Payments

The OPG has published a very welcome [practice note](#) on the circumstances in which deputies can make payments to people other than professional third party providers who provide P with care. The practice note is also aimed at attorneys whose power allows them to make such payments.

The practice note starts by considering what is "family care." It covers relatively informal arrangements where a family member or friend is providing care with the motivation of natural love and affection rather than reward. It does not cover formal arrangements where a person works set hours, with set duties and an expectation of reward. That would be more

correctly categorised as a contract, possibly of employment.

The question of payment for such care must be judged in P's best interests and it is important that the deputy must consider whether the decision to pay for the care puts him in a position where his interest conflict with P's.

The practice note refers to three recent cases: (1) [Re HC](#) [2015] EWCOP 29; (2) [Re A](#) [2015] EWCOP 46; and (3) [Re HNL](#) [2015] EWCOP 77 (all of which can be found in our case summaries database by clicking on the relevant hyperlinks).

Re HC is particularly helpful as, in that case, the Senior Judge valued such care in the same way as is done in personal injury cases, taking a commercial rate and deducting 20% for the fact that the care is given gratuitously and not subject to tax (though 25% is the usual deduction in the Queen's Bench).

So far as COP approval is concerned, the practice note states that in general, a professional deputy does not need to seek it. This will be a relief for such deputies as the OPG had previously suggested the reverse. The practice note suggests seeking approval where such payment may prove controversial.

So far as non-professional deputies are concerned, approval is always required to make a payment to the deputy and the practice note states that the Public Guardian may require such approval where the payment is to someone closely connected to the deputy. The latter seems to suggest that before going to court for approval, the deputy should seek the views of the Public Guardian.

The practice note then goes on to make practical recommendations about working out the amount

of the payment, reminds us that such payments are treated by HMRC as gratuitous and, therefore, tax free, suggests that there could be some form of indexation and stresses the need for a record of the decision making process as well as the payments themselves (which should be kept under review).

New OPG guide for lay attorneys and deputies on the making of gifts

The OPG has published a [guide](#) (to accompany its more detailed [practice note](#)) for non-professional attorneys and deputies on the making of gifts. The guide contains a useful summary of the rules and restrictions relating to gifts. It emphasises that an interest free loan would amount to a gift. It also emphasises the importance of involving P if at all possible in the decision making process.

It states unequivocally that deputies and attorneys cannot make gifts with the aim of avoiding P having to make a contribution to care home etc fees.

It reminds deputies and attorneys that if they exceed their authority they may face sanctions and that if a gift is proposed that is in excess of authority an application to COP for approval is necessary

The guidance contains a short checklist as follows:

If you can answer 'yes' to all three questions below, you don't need permission from the Court of Protection to give a gift:

- 1) *Is the gift to someone related to, or connected with, the person – or to a charity they might normally have given to?*

- 2) *If the gift is to a person, is it being made on a customary occasion?*
- 3) *Is the gift of reasonable value, given the size of the person's estate and their expected future needs?*

Conferences at which editors/contributors are speaking

The Use of Physical Intervention and Restraint: Helpful or Harmful?

Tor will be speaking at this free afternoon seminar jointly arranged by 39 Essex Chambers and Leigh Day on 13 June. Other confirmed speakers include Bernard Allen, Expert Witness and Principal Tutor for 'Team-Teach,' two parents / carers and Dr Theresa Joyce, Consultant Clinical Psychologist and National Professional Advisor on Learning Disabilities on the CQC. For more details, and to book, 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](#).

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 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 7th 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, which this year 'The five guiding principles of the Mental Health Act.' For more details, and to book, 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 July. 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.**



Jill Stavert: J.Stavert@napier.ac.uk

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.**