

## Court of Protection: Practice and Procedure

### Introduction

Welcome to the May 2016 Newsletters. Unusually this month – but proving that we do not simply generate material for the sake of it – we do not have any Health, Welfare and Deprivation of Liberty or Scotland Newsletters because there have been no developments of sufficient note to merit coverage. Note, though, that we are anticipating shortly the interim statement from the Law Commission on their Mental Capacity and Deprivation of Liberty project which we will be covering in our next Newsletter.

Highlights this month include:

- (1) In the Property and Affairs Newsletter: causing your own incapacity and the consequences for personal injury proceedings;
- (2) In the Practice and Procedure Newsletter: the transparent fall-out from the C case;
- (3) In the Capacity outside the COP Newsletter: two guest pieces: (1) an introduction to her role by the Amanda Solloway MP, the new Rapporteur on Mental Health for the Joint Committee on Human Rights; and (2) an article by Patricia Rickard-Clarke outlining the provisions of the Assisted Decision-Making (Ireland) Act 2015.

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  
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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## Transparently pulling in different directions

*V v Associated Newspapers & Ors* [\[2016\] EWCOP 20](#) (Charles J)

*Media – anonymity – private hearings*

### Summary

In the sequel to the decision in [C's](#) case, Charles J has considered afresh the Court of Protection's approach to reporting restrictions orders, not least in light of the transparency pilot currently underway.

For present purposes, the facts can be very shortly summarised. C's case came before the Court of Protection for determination as to her capacity to consent to renal dialysis. A reporting restrictions order was made at the outset of the proceedings (in standard terms for a serious medical treatment case) restricting reporting of information leading to the identification of C and her adult daughters. The order was expressed to have effect during C's lifetime. After a hearing at which it was determined that C had the capacity, such that the Court of Protection had no jurisdiction, C died. The case was the subject of considerable media interest, and both the tactics adopted by some reporters and the style of some reporting caused considerable distress to C's family. The adult daughters applied for a continuation of the reporting restriction order; by the time that the matter came finally to be determined by Charles J, the relevant media organisations did not contest that the order should be continued to the 18<sup>th</sup> birthday of C's teenage daughter, although raised an issue as to whether the order could be made by Charles J as a Court of Protection judge (as opposed to a High Court judge) Subsequent to the hearing, a

further application was made that the order be extended to cover C's inquest, which the media organisations did not resist, and which Charles J found to be justified on the particular facts of the case, especially given the prurient nature of the reporting that had taken place.

Much of Charles J's judgment, therefore, consisted of determination of general principles for future guidance, rather than the resolution of a contest as to how they should apply upon the facts of the instant case. In characteristic fashion, the judgment delves into matters in considerable detail, but for practitioners, the following conclusions he reached are key.

First: the Court of Protection has jurisdiction to make a post mortem reporting restrictions order (although in the instant case, and on a "belt and braces approach," Charles J also made the order as a High Court judge to avoid any future jurisdictional arguments). Further, reporting restrictions orders in serious medical treatment cases can extend beyond the death of the subject of those proceedings and there is no presumption or default position that such orders should end on P's death.

Second: the Court of Protection should generally address the following questions:

1. Are there good reasons for the hearing to be in public?
2. If there are, should that public hearing be ordered with or without reporting restrictions? As part of that determination, how effective are any such reporting restrictions likely to be in protecting and promoting the relevant Article 8 rights and how restrictive are they likely to be of the relevant Article 10 rights having regard to the

factors, propositions and public interests that underlie and promote those competing rights?

3. In light of the conclusions as to these questions, and applying the ultimate balancing test required by *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, should the hearing be in private or in public? If in private, what documents (with or without redactions and anonymisation) should be made public (and when and how this should be done)? If in public, what reporting restrictions order / anonymity order should be made?

Third, the answer to the first question is almost always going to be “yes” because of the benefits of open justice and so almost always the *Re S* exercise will be engaged by addressing the second and third questions.

Fourth, a distinction can be made between (a) cases where pursuant to the default or general position under the relevant Rules or Practice Directions the court is allowing access (or unrestricted access) to the media and the public, and (b) cases in which it is imposing restrictions and so where the court is turning the tap on rather than off. However, Charles J emphasised that this distinction only reflects the strength of the reasoning underlying those Rules and Practice Direction that in many, perhaps most, cases the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The distinction therefore provides weight to the general arguments for anonymity to promote the administration of justice by the court generally and in the given case. The distinction therefore does not undermine the general proposition that naming people has a valuable function of rendering news stories

personal and therefore effective as journalism (see *In re Guardian News and Media Ltd* [2010] UKSC 1). As Charles J reminded us, the CoP needs to remember it is not an editor.

Fifth, the weight to be given to the “naming proposition” and the conclusion as to what generally best promotes the administration of justice will vary from case to case, and may require specific consideration (and reasons) in specific cases. Charles J gave some useful examples of how these considerations might apply in different cases:

- (1) If the case involves a celebrity but otherwise is not out of the ordinary, the Court will be exercising a well-known decision making process, and the difficulty or impossibility of providing effective anonymisation may found a decision not to order a public hearing. The question for the trial judge will therefore be what (if any) document or judgment should be made public;
- (2) If the case involves a celebrity but raises new or unusual points and so is out of the ordinary this may found a decision for a public hearing with no (or unusual) reporting restrictions;
- (3) Where findings of serious mistreatment or malpractice are sought or when a member of a family wants (or has initiated) publicity that identifies P and family members issues will arise whether: (1) there should be a public hearing with no reporting restrictions (so the rival arguments and assertions are made public and linked to identified individuals); or (2) whether there should be a private hearing (with disclosure to relevant bodies or persons).

Charles J also used the opportunity to set out in a

schedule to the judgment a comparison between the Transparency Pilot and the approach to reporting restrictions orders in serious medical treatment cases. His analysis includes a useful – technical – explanation of the reasons why the two are different, a useful discussion of the purpose of notice, and also an invitation to the media and other interested persons to provide comments and contributions as to the practice relating to and the terms of Transparency Pilot Orders and PD13 Reporting Restriction Orders, not least so as to enable the ad hoc Rules Committee he chairs to consider whether separate practice directions and different standard orders should continue in respect of serious medical treatment cases and/or whether the existing practice/template order in such cases should be changed.

### Comment

In light of the sorry picture painted of the conduct of the relevant media organisations, it is hardly surprising that Charles J took the (very unusual) step of extending the RRO to cover C's inquest. Of wider significance and longer-term importance, however, are Charles J's observations as to the general approach to be taken and questions to be asked as the CoP continues to look – via the Transparency Pilot – for the best approach to enable it secure the correct balance between Articles 8 and 10 ECHR and thereby correctly promote the powerful (and often competing) public interests they engage and reflect.

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## Conferences at which editors/contributors are speaking

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### 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](#).

### 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](#).

### Professorial Lecture

Jill will be delivering her inaugural professorial lecture entitled "Paradigm Shift or Paradigm Paralysis: Law, rights and mental health" on 2 June at Edinburgh Napier University. For more details, and to book, see [here](#).

### 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. For more details, and to book, see [here](#).

### Mental Health Lawyers Association 3<sup>rd</sup> 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 June. 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).

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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](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 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.**