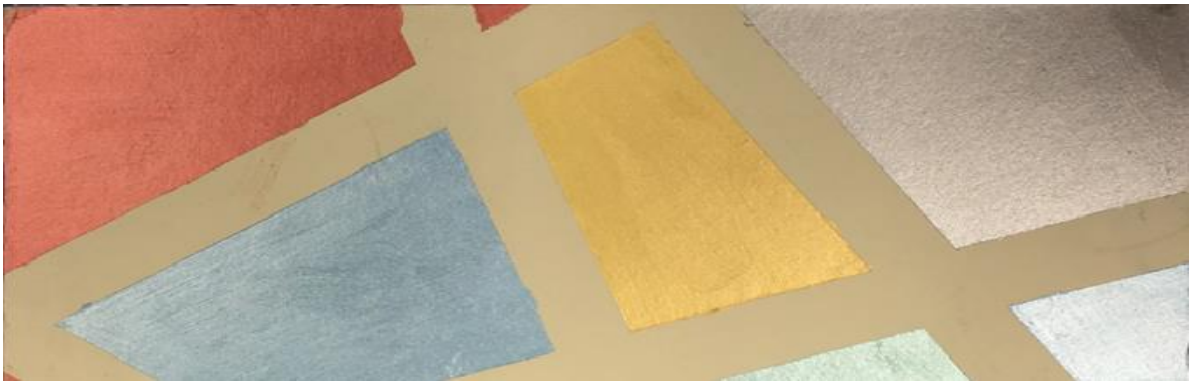
MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

April 2022 | Issue 121



Welcome to the April 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Draft MCA and LPS Code published; capacity to terminate a pregnancy; the (limited) role of the Inherent Jurisdiction; and is an application needed in all vaccine disputes?

(2) In the Property and Affairs Report: the Court of Appeal weighs in on testamentary capacity, and the evidence used to prove it; and an invitation to the pilot for digital submission of property and affairs cases

(3) In the Practice and Procedure Report: reporting restrictions; the role of COP in MHA discharge planning; costs; and notable conferences on capacity;

(4) In the Wider Context Report: the impact of s.49 reports on mental health professionals; Article 2 and 3 damages claim; the *M'Naghten* test considered; and is having a deputy an Article 14 'status'?

(5) In the Scotland Report: Guardians' remuneration; open justice or anonymisation; and still time to contribute to the Scott Review or sign up to the World Congress on Adult Capacity in Edinburgh;

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Important guidance from the Court of Appeal on testamentary capacity and assessments

Hughes v Pritchard, Hughes and Hughes [2022] EWCA Civ 386 (24 March 2022)(Moylan LJ, Asplin LJ, Elisabeth Laing LJ)

Mental capacity – Testamentary capacity

In *Hughes v Pritchard and Ors* [2022] EWCA Civ 386, the Court of Appeal allowed the appeal of the Claimant in a probate action, whose claim to prove the Will of his late father had been dismissed on the grounds that the testator lacked mental capacity at the date he made the Will. The appeal was from the decision of His Honour Judge Jarman QC, sitting as a judge of the Chancery Division [2021] EWHC 1580 (Ch), which case was noted in the September 2021 issue of *The Mental Capacity Report*.

The Claimant was one of the Testator's three children and one of two who survived him. The First Defendant was his sister, the Second Defendant was the Deceased's son's widow and the Third Defendant was one of their children. The Testator had been a director and shareholder in a building company, but a few years before his death the company had ceased trading by virtue of want of business and, shortly before he died and at the time he made the contested Will, the company was in the process of being dissolved.

In addition, the Testator had been a farmer, owning and renting various plots of land. At the time of his death, he owned the bungalow where he lived, 79 acres of farmland known as "*Buchanan*", another 58 acres of farmland three miles from that, "*Yr Efail*", a cottage and livestock, and had a bank balance of about £290,000. The dispute, in effect, turned on the disposition of the land known as *Yr Efail*.

The Testator made a Will in 2005, after his divorce from his second wife, and whilst all his children were alive. At that time, the son who later died was working the land and the provisions of the 2005 Will were that the shares in the building company were left between the Claimant and the First Defendant equally, and the farmland went to the son (who subsequently died) who worked it. The bungalow and personal effects were left to the Second Defendant daughter and the residuary estate divided equally between the three children.

The son who had worked the land, and was the beneficiary of the 2005 Will in relation thereto, died by suicide in September 2015. By that time, the building company had ceased to trade and, therefore, had little value. By that time also, the Testator was beginning to suffer from memory problems. He granted a Lasting Power of Attorney in March 2015 and, in December 2015, he had been assessed as scoring 47 out of 100 on the Addenbrooke's Test, indicating a moderately severe degree of mental impairment.

Nevertheless, the Testator determined that he needed to change his Will in the light of the circumstances which had occurred since 2005. The solicitor who he instructed had not met him before and did not have a copy of the 2005 Will. She took instructions for the new Will. The main difference was that *Yr Efail* was to be left to the Claimant, with the remainder of the farmland held on Trust for the Second Defendant for life and then to her three sons equally. The First Defendant, as well as receiving a gift of the bungalow, received a gift of the cottage and all other property was in residue and divided equally amongst the Testator's grandchildren.

The solicitor made a detailed attendance note of the meeting on 11 March 2016, and produced an initial draft Will on 22 March 2016. She then met the Testator again, with the attendance note showing that the Testator had made enquiries about title deeds of various properties, realising the importance of correctly describing the properties in his Will. There was also discussion about the company shares.

At that meeting, the solicitor suggested that it would be prudent to obtain a medical certificate for the Testator to avoid issues in respect of contesting the Will. In that respect, the solicitor contacted the Testator's GP, asking him to carry out an assessment with full instructions. The GP visited the Testator on 14 June 2016, taking a draft of the Will with him. The GP went through the Will and clearly established that the Testator had a full understanding of the nature of the Will, understood the process, had a full understanding of the extent of his property and that changes to the Will were due to circumstances within the family, and stated his conclusion that he had no issues regarding the Testator's capacity and would be happy to witness the Will at a convenient time.

That was on 7 July 2016 and the GP duly attended to witness the Will. The Will was read over clause-by-clause to the Testator, who confirmed that he agreed with it. The attendance note of the meeting recorded the fact that it took 55 minutes and was detailed and lengthy.

The Testator died on 7 March 2017. The Claimant sought to prove the Will and it was contested on various grounds, including want of knowledge and approval, and undue influence. The Judge dismissed those defences and there was no appeal from those decisions.

At the trial, the court heard from a significant number of witnesses, including a joint medical expert, a consultant old age psychiatrist. His conclusion was that it was more likely than not that the Testator had testamentary capacity when he gave instructions for and then executed the 2016 Will.

Notwithstanding that, the first instance judge found against the Will on the grounds of want of mental capacity. At paragraph 86 in the Court of Appeal, Asplin LJ, with whom the other judges agreed, summarised the issue as follows:

> "*It seems to me, therefore, that the real question in this appeal, is not whether the judge should have merely accepted Ms Roberts'* [the solicitor] *evidence together with that of Dr Pritchard* [the GP] *as if it were a 'touchstone' as to the validity of the 2016 Will, as some of the grounds of appeal might suggest. The relevant questions are whether: the judge was right to place less reliance on Ms Roberts' evidence because of her reliance upon Dr Pritchard and because she did not ask the Deceased about the change in the bequest of* Yr Efail*; the fact that she had no medical qualifications and was not told about his medical background; whether he was right to conclude that Dr Pritchard's failure to ask the Deceased about the changes in his testamentary intentions at* Yr Efail *and his reason for the change impacted significantly upon the weight to be given to Dr Pritchard's evidence; and ultimately, when evaluating the evidence as a whole he was right to place greater weight on evidence, other than that of Ms Roberts and Dr Pritchard, relating to the Deceased's conduct in conversations before and after the 2016 Will was executed.*"

At paragraph 87, Asplin LJ reminded herself that the question was whether no reasonable jury could have reached the conclusion the judge did, or that, giving appropriate weight to the evidence of Ms Roberts and Dr Pritchard, was the judge entitled to find as he did on the basis of the evidence as a whole?

The court, of course, reminded itself of the basis upon which courts approach testamentary capacity, namely the test set out in *Banks v Goodfellow* [1869-70] LR 5 QB 549 as follows:

> "*It is essential… that a testator shall understand the nature of the act and its effects; shall understand the extent of the*

> *property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his senses of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*"

The Claimant/Appellant also relied on the proposition that a Will that had been drafted by an experienced independent lawyer should only be set aside on the clearest evidence of lack of mental capacity, see *Halles v Burgess* [2013] EWCA Civ 74.

The court also reminded itself of the "*Golden Rule*" (which had been followed in this case), which is to the effect that, as a matter of practice, where a solicitor is instructed in relation to a Will of an aged testator or a testator who has suffered a serious illness, it should be witnessed and approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his findings, see *Kenward v Adams*, Times Law Reports, 29 November 1975.

The principal attack on the judge's findings related to the way in which the fact that neither the solicitor nor the GP had asked the Testator about why he was changing his Will undermined (fatally, as it turned out) their assessment of his capacity. At paragraph 94, Asplin LJ said this:

> "*It seems to me, however, that they* [the solicitor and GP] *should not have been downgraded for those reasons in this case. Although it may be prudent for a solicitor and, for that matter, for a medical practitioner whose attention has been drawn to significant changes in testamentary intentions, to ask the testator about these changes, there is no rule to that effect. It seems to me that all Templeman J meant in Re Simpson was that reference to the terms of a previous Will may be a helpful safeguard when seeking to confirm that the testator is aware of those who have a call upon his or her bounty. … In any event, it seems to me that it is no more than that. It is a helpful tool when seeking to confirm that the Banks v Goodfellow test and its third limb, in particular, is satisfied. Reference to changes from provisions of a previous Will, although a prudent step, should not be elevated into a requirement either for the drafting solicitor or the medical practitioner before their evidence in relation to capacity can be accepted.*"

At paragraph 98, Asplin LJ reaffirmed the point made by Lewison LJ in *Simon v Byford* [2014] EWCA Civ 280, that the question of capacity is concerned with the potential to understand. It is not a test of memory or a requirement for actual recollection. At paragraph 99, she went on to state that testamentary capacity does not require a testator to recall the terms of a past Will they have made, or the reasons why it provided as it did, as long as they are capable of accessing the information if needed and of understanding it once reminded of it.

At paragraph 102, Asplin LJ then held that, applying that test, the mere fact that the 2005 Will and the change in the disposition of *Yr Efail* was not discussed did not undermine the evidence of the GP, the solicitor or the Joint Expert.

Further elucidation of that was given in paragraph 106 and 107 of her judgment, where she criticised the first instance judge for, in effect, giving no weight to the solicitor's and the GP's evidence at all, and considered that the focus of the judge's conclusions was too much in relation to *Yr Efail* and fairness, which strayed from a proper application of the *Banks v Goodfellow* test (see paragraphs 108 and 109).

On that basis, the Court of Appeal allowed the appeal and upheld the 2016 Will. That, however, was not the end of the matter because in the same judgment the first instance judge had held that a proprietary estoppel had arisen in favour of the Testator's son in relation to *Yr Efail* and, therefore, in effect, it lay outside the estate. There was a

cross-appeal in relation to that which was allowed only to the extent that the judge had not properly determined detriment and remedy. With considerable reluctance, the Court of Appeal directed the remission of the matter to the High Court for consideration of detriment and remedy.

Invitation to the pilot for digital submission of property and affairs applications

HMCTS continues to extend an invitation to the pilot for the digital submission of Property and Affairs cases, which was introduced in Autumn 2021 to a small number of professional users. It has now been further developed to test a new upfront notification process for the applications coming through the London office at First Avenue House. There are 69 professional court users currently onboard.

HMCTS encourages court users to sign up to join the pilot to further expand its testing and use. A reserve list may be created if necessary to onboard in waves with an aim to add everyone who requests participation as soon as possible.

To join the Pilot for upfront notification, please send your name and preferred email details to: COP_EAPPS@justice.gov.uk.

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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 contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 The world is coming to Edinburgh – for this live, in-person, event. A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on "Programme": including scrolling down from "Programme" to click on "Plenary Sessions" to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at "Registration". An early bird price is available until 11th April 2022.

The Judging Values and Participation in Mental Capacity Law Conference
The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the British Academy (10-11 Carlton House Terrace, London SW1Y 5AH), on **Monday 20th June 2022 between 9.00am-5.30pm**. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King's College London). The conference fee is £25 (including lunch and a reception). If you would like to attend please register on our events page here by 1 June 2022. If you have any queries please contact the Project Lead, Dr Camillia Kong.

Forthcoming Training Courses
Neil Allen will be running the following series of training courses:

22 April 2022	DoLS refresher for mental health assessors (half-day)
28 April 2022	The Mental Health and Capacity Act Interface (full-day)
6 May 2022	Necessity and Proportionality training (half-day)
13 May 2022	BIA/DoLS legal update (full-day)
16 May 2022	AMHP legal update (full-day)
17 June 2022	DoLS refresher for mental health assessors (half-day)
14 July 2022	BIA/DoLS legal update (full-day)
16 September 2022	BIA/DoLS legal update (full-day)

To book for an organisation or individual, further details are available here or you can email Neil.

Pregnancy, Childbirth and the Mental Capacity Act: 4 May 2022
Ian Brownhill will be offering a course through Edge Training to assist delegates to navigate the challenging landscape of mental capacity law in the field of obstetrics. Delegates will cover the basics of the Mental Capacity Act and how the law should be applied in relation to specific decisions such as caesarean sections and birth plans. Related areas will also be covered such as contraception and termination of pregnancies. There will be particular consideration of those detained under the Mental Health Act and guidance on when to apply to the Court of Protection. To register, click here.

Conferences (continued)

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Essex Autonomy Project Summer School 2022

Early Registration for the 2022 Autonomy Summer School (*Social Care and Human Rights*), to be held between 27 and 29 July 2022, closes on 20 April. To register, visit the Summer School page on the Autonomy Project website and follow the registration link.

Programme Update:

The programme for the Summer School is now beginning to come together. As well as three distinguished keynote speakers (Michael BACH, Peter BERESFORD and Victoria JOFFE), Wayne Martin and his team will be be joined by a number of friends of the Autonomy Project who are directly involved in developing and delivering policy to advance human rights in care settings. These include (affiliations for identification purposes only):

> Arun CHOPRA, Medical Director, Mental Welfare Commission for Scotland

> Karen CHUMBLEY, Clinical Lead for End-of-Life Care, Suffolk and North-East Essex NHS Integrated Care System

> Caoimhe GLEESON, Programme Manager, National Office for Human Rights and Equality Policy, Health Service Executive, Republic of Ireland

> Patricia RICKARD-CLARKE, Chair of Safeguarding Ireland, Deputy Chair of Sage Advocacy

Planned Summer School Sessions Include:

> Speech and Language Therapy as a Human Rights Mechanism

> Complex Communication: Barriers, Facilitators and Ethical Considerations in Autism, Stroke and TBI

> Respect for Human Rights in End-of-Life Care Planning

> Enabling the Dignity of Risk in Everyday Practice

> Care, Consent and the Limits of Co-Production in Involuntary Settings

The 2022 Summer School will be held once again in person only, on the grounds of the Wivenhoe House Hotel and Conference Centre. The programme is designed to allow ample time for discussion and debate, and for the kind of interdisciplinary collaboration that has been the hallmark of past Autonomy Summer Schools. Questions should be addressed to: autonomy@essex.ac.uk.

Our next edition will be out in May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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