MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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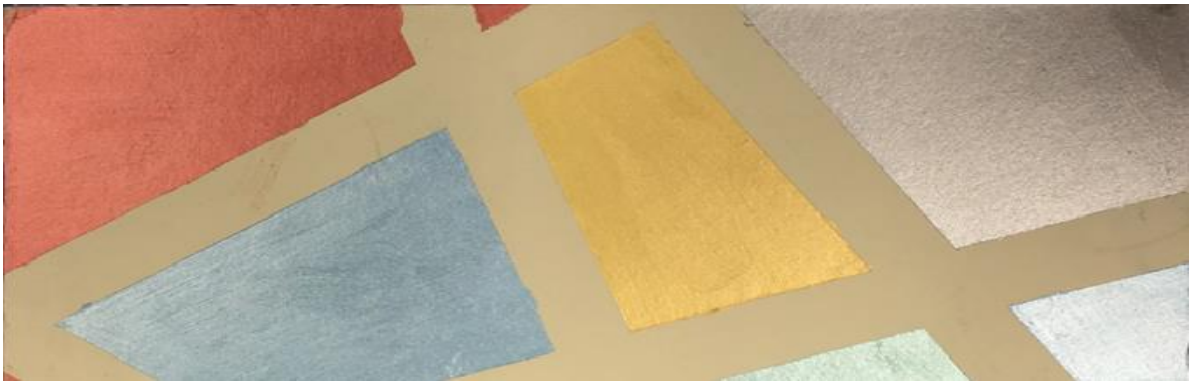

Welcome to the June 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Vaccine judgments; deprivation of liberty of 16- and 17-year-olds; and brain stem death.

(2) In the Property and Affairs Report: Capacity to make an LPA; and remuneration for non-professional deputies.

(3) In the Practice and Procedure Report: A dispatch from the World Congress on Capacity; and updates on the National Deprivation of Liberty Court for children.

(4) In the Wider Context Report: Draft Mental Health Act Bill is published; Mental capacity and PI awards; values in the Court of Protection; and helpful and interesting videos.

(5) In the Scotland Report: Dispatches from the World Congress.

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 autistic man. We are very grateful to him and his family for permission to use his artwork.

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Capacity to make an LPA

The Public Guardian v RI and others [2022] EWCOP 22 (7 June 22) (Poole J)

Lasting Powers of Attorney - Capacity

Summary

In *The Public Guardian v RI & Ors* [2022] EWCOP 22, Poole J had to decide whether the donor of an LPA executed in 2009 had had capacity to execute it. As he noted, whilst it is not uncommon for courts to determine this question, there is a dearth of reported judgments, with the exception of the extract of a judgment of former Senior Judge Lush in *Re Collis*.

The application was brought by the Public Guardian, who appeared by Counsel, and with the respondents (the three attorneys and the wife of one of them) being unrepresented. The donor himself was neither a party not represented.

At paragraph 16, Poole J directed himself that the relevant information in relation to the execution of an LPA is:

> a. The effect of the LPA.
>
> b. Who the attorneys are.
>
> c. The scope of the attorneys' powers and that the MCA 2005 restricts the exercise of their powers.
>
> d. When the attorneys can exercise those powers, including the need for the LPA to be executed before it is effective.
>
> e. The scope of the assets the attorneys can deal with under the LPA.
>
> f. The power of the donor to revoke the LPA when he has capacity to do so.
>
> g. The pros and cons of executing the particular LPA and of not doing so.

On the facts of the case, Poole J found that the donor had not had capacity to execute the LPA in 2009, as required by s.9(2)(c) MCA 2005, such that, applying s.22(2)(a) MCA 2005, one of the requirements for the creation of an LPA had not been met. He therefore directed the Public Guardian to cancel the registration of the LPA. However, as there was no suggestion that any of the attorneys knew that the donor had lacked capacity, or otherwise acted improperly, Poole J was clear that the protection under s.14 MCA 2005 applied to them.

Poole J also identified at paragraph 27 that:

> *Ideally, where there is a dispute about past capacity which the court is required to determine, it would be helpful to have evidence as to,*
>
> > *a. The certificate provider's experience - in particular in making a sufficient assessment of the capacity of a prospective donor who is known to have a learning disability or other impairment which might affect*

> *their capacity to execute an LPA – their usual practice or their specific recollections of the making of the LPA;*
>
> *b. Evidence from carers and family members relevant to P's capacity to execute an LPA at the relevant time and to any changes in P's condition, relevant to capacity, over time.*
>
> *c. Medical evidence, capacity assessments, assessments for benefits, records from carers or activity centres, or other professional evidence roughly contemporaneous with the relevant date when the LPA was executed.*
>
> *d. An assessment by a suitably qualified and experienced person of P's current capacity and reasoned opinion as to their capacity to execute the LPA at the relevant time, such opinion being informed by review of relevant medical records, contemporaneous assessments, and the evidence from carers and family members.*

Comment

On the face of it, this is a useful confirmation of the component parts of capacity to execute an LPA, as well as the evidence required in the event that the court is to be asked to determine whether the donor had the capacity at the material time. It does not resolve the question of whether it is possible to have capacity to execute an LPA even without having capacity to make all the decisions that might be encompassed within the scope of the power granted by the attorney, but it is entirely consistent with such an approach.

It is not entirely clear from the judgment quite how forceful the respondents actually were in seeking to uphold the validity of the power or whether (as is, in reality, more often their concern) they were seeking to make clear that they had done nothing wrong. In any event, they are not recorded as having advanced any legal arguments, and it would appear that Poole J largely took his lead from the submissions of Counsel for the Public Guardian (see paragraph 16).

In the circumstances, therefore, it is perhaps important to note three assumptions in the judgment of Poole J which require unpacking – not least because most or all of them we anticipate are so deep-rooted as never to be subject of question.

The first is the assumption that the MCA principles applied in retrospect: see paragraph 12, where Poole J recorded this, although he noted (at paragraph 12) that the court would "*have regard to all the evidence relevant to capacity at the material time, including evidence of matters that have come to light subsequent to the making of the decision in question*."

The second, linked, is the assumption that the burden of proof lay on the Public Guardian, "*who allege*[d] *that RD did not have capacity to execute the LPA in 2009*" (paragraph 27), although, in deciding whether or not to seek more evidence as to the donor's capacity in 2009, Poole J also noted that the approach of the Court of Protection was "*more inquisitorial* […] *than adversarial*" (paragraph 18).

The third was that the certifier (in the instant case, a legal executive) had assessed and considered the donor's capacity at the point of certification.

As to the first of the assumptions, this is in line with the decision of then Senior Judge in *Re Collis*, although it is not clear whether Senior Judge Lush had received any submissions upon the application of the principles contained in s.1 MCA 2005.[1] However, the assumption does not sit easily with the plain language of the Act itself. Section 1(2) is framed in the present tense: "[a] person must be assumed to have capacity unless it is established that he lacks capacity" (emphasis added). Similarly, the "support principle" in s.1(3) is framed in the present tense: "[a] person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success." Given the framing of these principles – both using the present tense – they must either both apply in retrospect or only to a current assessment of capacity. In this regard, it is therefore relevant to observe that applying the support principle in retrospect seems to be an impossible task. The time for giving such support must logically have passed, as the person has made the 'decision' in question; the real issue is whether, in fact, the person had capacity to make the decision at the time.

As to the second of these assumptions (as to the burden of proof), there are four points to note:

a. Insofar as a statutory burden of proof can be identified, it can only flow from the wording of s.1(2). However, as noted above, this is framed in the present tense. The statutory burden undoubtedly applies when the court is making a declaration of capacity for purposes of s.15(1)(a) MCA 2005, this is also a provision framed in the present tense, i.e. whether a person "has or lacks" capacity to make the decision specified in the declaration;

b. By contrast, a court making a determination under s.22(1)(a) MCA 2005 is undertaking a different task.[2] Section 22(1)(a) contains no statutory burden, but simply empowers the court to determine "any question relating to […] whether one or more of the requirements for the creation of a lasting power of attorney have been met." Then-Senior Judge Lush in *Re Collis* proceeded on the basis that the burden that remained on the person asserting incapacity, citing the pre-MCA case of *Re W (Enduring Power of Attorney)* [2001] 1 FLR 832. However, on a proper analysis, that earlier decision turned on the statutory wording of the Enduring Powers of Attorney Act 1985. The 1985 Act did contain a statutory (legal) burden, in the context of a situation where the power to register powers of attorney was vested in the (old) Court of Protection. The situation is now different,

[1] Interestingly, in his 2003 memorandum of evidence to the Joint Committee on the Draft Mental Incapacity Bill, then Master Lush seemed to take the view that the principles operated in retrospect, and that this could cause problems.

> *9. Similarly, clause 3 restates the common-law principle that "a person must be assumed to have capacity unless it is established that he lacks capacity," but it over-simplifies the matter, and potentially favours abusers by not allowing the burden of proof to shift in appropriate cases.*
>
> *10. For example, if an 85 year old woman with vascular dementia gives a door-to-door salesman, whom she has never met before, a cheque for £5,000, the onus should shift to him to prove that she had the capacity to understand the nature and effect of her actions when making a gift of that size, rather than there be an automatic presumption that she was capable of making the gift.*

[2] A point identified of his own motion, it appears, by Poole J in *RI*: see para. 11 "[u]*pon any finding that RD lacked capacity to execute the LPA the court should record its determination and must then direct the Public Guardian to cancel the registration of the LPA. I am not persuaded that a declaration as to capacity under s.15 of the MCA 2005 is also required – what is required is a determination of past capacity to execute the LPA*."

not least because registration now lies with the Public Guardian. When an application has been registered the plain language of s.22(2)(a) empowers the court to determine any question relating to whether one or more requirements for the creation of an LPA have been met. There is no reference in s.22(2(a) (as there was in relation to the EPA provisions considered in *Re W*, or in relation to the registration requirements in Sch.1 to the MCA 2005) to any person or body being satisfied of any matter;

c. If that is the case, therefore, and the MCA in fact lays down no statutory or evidentiary burden in relation to the past capacity to execute an LPA, what approach should be adopted? This is not a question which appears to have been addressed in any of the material relating to the pre-history of the MCA 2005, nor in any reported case determined under the MCA 2005. Should the situation be seen as being akin to contract, where the burden is conventionally understood to lie on the person asserting (and hence relying upon) incapacity? Or is it akin to wills, lifetime gifts and (as Alex has suggested here), advance decisions to refuse treatment? In relation to these situations, the starting point is that the person is to be presumed to have had capacity. However, if proper doubts have been raised that the person lacked the relevant capacity, then the evidential burden shifts to those person(s) seeking to establish that the relevant capacity was present. Although there is case-law suggesting that the contractual approach to incapacity applies to agency arrangements, there is no definitive case on the question, and the (limited) case-law that there is does not point in all one direction.[3] Further, just as the approach to capacity set down under the MCA 2005 only applies for purposes of the Act (see s.2(1) MCA 2005), it is equally the case that common law approaches do not automatically govern the approach of the Court of Protection, a creature of statute;

d. Whilst in very many cases, the court is likely to be much more concerned with the current conduct of the attorney(s) than with whether the donor had capacity to execute the power, it may be that there will be a case in future in which the assumption made by Poole J will be tested.

The last assumption made by Poole J relates to the task of the certificate provider: the judgment gives the impression that he understood that the provider's task is to assess and certify the donor's capacity: see e.g. paras 27 and 32. The assumption is widespread, but the Ministry of Justice has recently made clear that this is both wrong, and something that they do not intend to change. In its response to the 2021 consultation on modernising LPAs, the Ministry of Justice noted as follows:

> *77. Turning back to the responses that said that the role of the certificate provider is to assess the donor's mental capacity; this is incorrect as mental capacity should be assumed under the MCA unless there is evidence to indicate otherwise.*
>
> *78. A number of responses made reference to this with the response from the Law Society, in particular, stating this position "is wrong and should be corrected". Their view was that the role of the certificate provider should be clarified to say that it is an assessment of capacity, with a requirement for the certificate provider to declare that they understand their role and that they may be called before the Court of Protection.*

[3] For a discussion, see Eliza Varney, '*Agency contracts and the scope of the incapacity defence in English contract law: a topic too hot to handle?*' 2020 Journal of Business Law 5, pp. 382-402.

79. The role of the certificate provider under the MCA is to confirm three things at the time of execution that mean the LPA can be created: 1. That the donor understands the LPA 2. That there is no fraud or undue pressure on them to make the LPA 3. That there is no other reason the LPA cannot be executed

80. Importantly, the first requirement is not that the donor has mental capacity to execute the LPA but that the donor understands the LPA. It is correct that a donor cannot execute an LPA if they do not have mental capacity. It is also the case that mental capacity should be assumed without evidence to the contrary and that the ability to understand information forms part of the capacity assessment.

81. This means the certificate provider should have a conversation with the donor about their LPA to determine the donor's understanding of the document they are creating at, or as close to, the time of execution as possible. If the certificate provider believes the donor does not understand the document, they should not sign the certificate. While a lack of understanding could indicate a lack of mental capacity, the belief that the donor does not understand the document is enough on its own that the certificate provider should not sign the certificate to confirm the LPA can proceed. A capacity assessment is not needed for a certificate provider to refuse to sign the LPA.

82. In their response, the Law Society suggested determining a position on the donor's understanding "requires some positive step to be taken, such as asking relevant questions. It is not possible to comply with this requirement by simply relying on the presumption of mental capacity, without asking questions which might rebut that presumption". The government agrees with this. It is for this reason we are considering the use of example or set questions for the certificate provider, as well as the ability for the certificate provider to record and provide their assessment to OPG, particularly where they have concerns. This idea has featured in both our ongoing workshops with our stakeholder working group and the workshops that accompanied the consultation.

83. Providing additional support and guidance to certificate providers on their role to both protect the donor and facilitate their rights is an important part of the reforms we want to take forward. However, it does not require changes to legislation to make this happen and so was not featured heavily in the consultation.

The government will provide greater clarity around the role of the certificate provider in assessing the donor's understanding of the LPA and protecting against fraud, abuse and undue pressure. It intends to do this by giving additional guidance and support to those carrying out this role and providing a way to raise concerns directly with OPG.

It may be that the Government, by seeking to maintain the current position of certification of understanding only is trying to maintain a very low 'capacity' threshold for the formal requirements of execution of an LPA. That is undoubtedly a laudable goal. However, if there is, in fact, no contemporaneous evidence of the person's capacity to execute it, it might be thought that it is simply continuing to store up trouble of the kind that arose in the case before Poole J. It would also mean that the Public Guardian continues to be required to 'gate-keep' as regards registration – which requires that, substantively, that the donor has the capacity to execute the power – on the basis of a certificate

which does not actually address this question in terms. Indeed, a certificate provider could (for instance) properly assert that the donor had capacity to understand the LPA, in circumstances where donor could not use and weigh the consequences of making one, and therefore did not, in fact, have capacity to execute it.

As discussed here, a Private Members Bill on LPAs is to be introduced by Stuart Metcalfe MP. It is unclear at the time of writing whether this Bill may, in fact, be a vehicle supported by the Government, by which some or all of the proposals advanced by the Ministry of Justice are to be taken forward. In any event, it might be thought that the Bill could provide an opportunity for the question of what, precisely, the certifier should be doing to be revisited.

Remuneration for non-professional deputies

Riddle v Parker Rhodes Hickmott Solicitors [2022] EWCOP 18 (3 May 2022)(Hayden J)

Deputies – Financial and property and affairs

Summary

In *Riddle v Parker Rhodes Hickmott Solicitors* 2022 [EWCOP] 18, Hayden J refused permission to appeal an order refusing to reconsider an order appointing a deputy in so far as it related to his remuneration.

The original order had provided for remuneration by way of fixed costs, namely those set out in PD19B at the lower local authority rates. The deputy contended he should have his costs assessed alleging that the estate was complex to administer.

The judgment helpfully sets out the statutory and case law framework both for remuneration and reconsideration of orders. Hayden J considered that when reconsidering the order, HHJ Hilder had fully taken into account the deputy's arguments as to complexity and saw no reason to give permission to appeal.

Comment

This case sets no precedent but is useful not only for its reminder of the relevant law and procedure but of the necessity of deputies wanting higher rates to secure them on appointment and, perhaps also, the reluctance of the courts to allow non-professional deputies more than local authority rates.

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Conferences and Seminars

Forthcoming Training Courses

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

14 July 2022	BIA/DoLS legal update (full-day)
15 July 2022	Necessity and Proportionality Training (9:30-12:30)
15 July 2022	Necessity and Proportionality Training (13:30-16:30)
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.

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 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.

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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in 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 Report in the future please contact: marketing@39essex.com.

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