



Welcome to the March 2018 Mental Capacity Report. A combination of the January report coming out late in the month, the shortness of February, and the diversion of most of the editors to the Supreme Court in the Y case, means that we have had no February report, but are now firmly back on track. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, constructing a best interests decision in practice and the JCHR inquiry into DOLS reform;

(2) In the Property and Affairs Report: *Banks v Goodfellow* resurgens, trust corporations and appointees under the microscope;

(2) In the Practice and Procedure Report: Baker J on Charles J and Sir James Munby, children, confinement and judicial authorisation and the problems of litigants in persons;

(3) In the Wider Context Report: the MCA Action day, immigration detention and access to court for those with impaired capacity and international developments of relevance to capacity law reform;

(4) In the Scotland Report: the Scottish Government consultation on the Adults with Incapacity Act, and a round-up of recent relevant case-law;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

### Editors

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Nicola Kohn  
Katie Scott  
Simon Edwards (P&A)

### Scottish Contributors

Adrian Ward  
Jill Stavert

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.

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### *PP*: erratum and further comment

A glazing over of the editorial eye at proof-reading stage meant that we gave a duff reference for the *PP* cases we covered in the January report. The correct references (as correctly given in the summary on our database) are [\[2015\] EWCOP 93](#); [\[2016\] EWCOP 65](#) and [\[2017\] EWCOP 29](#).

We also had interesting follow-up comments from both John Howard at the Official Solicitor's office and Alexander Drapkin (instructed by the Official Solicitor for *PP*) as to the basis upon which DJ Batten made the order bringing the gift into hotchpot. They helpfully clarified that the attorney was willing to repay the money had the court not ratified the gift, so the difficult jurisdictional question that we posed did not, in fact, arise.

### Trust corporations as deputies

*Re Various Incapacitated Persons and the Appointment of Trust Corporations as Deputies* [\[2018\] EWCOP 3](#) (Senior Judge Hilder)

*Practice and procedure (Court of Protection) - Other*

### Summary

In this case Senior Judge Hilder considered and gave guidance in relation to applications on behalf of trust corporations to become property and affairs deputies.

The trust corporations in question were all associated with solicitors' legal practices so the order formulated only relates to such corporations. The judgment does, however, give some consideration to trust corporations associated with banks and charities and, to a lesser degree, trust corporations that have no connection with any regulated entity.

The court's concerns centered on the effectiveness of regulation by a regulatory body (in the cases before the court, the SRA) and the adequacy of indemnity insurance.

After receiving information from the SRA, bond security providers and the OPG, the court set out in the second schedule to the order the information and undertakings it would require from 2 of the 3 types of trust corporation making applications in this case.

Those were trust corporations regulated directly by the SRA and corporations not so regulated but which had no employees save a company secretary, whose directors were all solicitors,

who retained the associated legal practice to carry out all the practical work in managing P's affairs and which were covered by that practice's professional indemnity policy.

In essence the court considered that the protection to P afforded in those cases was equivalent to the protection afforded to P if the deputy was an individual solicitor. Indeed, the court recognized that in some respects P's position was better because of the continuity afforded by a trust corporation and the benefits of corporate governance.

The court at paragraphs 65-68 of the judgment set out various factors that it would need to consider in relation to other types of trust corporations, for example those associated with banks or charities. As regards corporations that are not subject to any regulation, the court made it clear that applications from such bodies would be treated on their merits but "*with caution*", see paragraph 66.

### Comment

There are other applications in the pipeline that will, no doubt, result in rulings concerning other types of trust corporations so, watch this space.

### *Banks v Goodfellow* resurgens (for now?)

*James v James & Ors* [2018] EWHC 43 (Ch) (Chancery Division (HHJ Paul Matthews sitting as a Judge of the High Court))

### Summary

In this case the court had to rule on the validity of a will where the capacity of the testator was in issue. The parties initially, in their skeleton arguments, agreed that the common law rule for

the assessment of testamentary capacity when a will is contested applied namely that propounded by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565. (See paragraph 71 of the judgment).

In closing submissions, however, the claimant (who was contesting the will) argued that the test ought to be the same as that in s.3 MCA 2005. The court, therefore, had to decide the issue.

The court from paragraph 72 to 82 reviewed the first instance authorities noting that there were a number that had considered the point *obiter* and two that had made rulings on the point (both decisions of deputy High Court Judges).

The latter of the two was reached after full consideration of the former so the judge considered that he was bound by it in accordance with the rule of judicial precedent that holds that a court of co-ordinate jurisdiction should follow such a later decision in preference to the earlier one, see paragraph 83.

In addition, however, the court went on to hold that the later decision was right and that the common law test still prevailed, see paragraphs 84-87. The court then considered the facts and upheld the will.

### Comment

Subject to the views of the Court of Appeal and Supreme Court, this issue must now be taken to be settled. In practice the difference may rarely result in a different result, although the judge did point out that the common law test is less stringent in some respects although the burden of proof at common law is on the propounder of the will whereas under the MCA the presumption

of capacity applies throughout, see paragraph 77.

The difference could, in theory, lead to a ruling by the Court of Protection to the effect that, pursuant to the MCA test, P lacks capacity to make a will and authorising the making of a statutory will on P's behalf with P, not impressed with that ruling, thereafter making a will that on his death is upheld on the common law test and revokes the statutory will. The matter is currently being considered by the Law Commission, who have provisionally proposed replacing the common law test with the MCA test.

### Appointeeship under scrutiny

*DB (as executor of the estate of OE) v SSWP and Birmingham CC* [2018] UKUT 46 (AAC) Upper Tribunal (Administrative Appeals Chamber)(UTJ Mitchell)

### Summary

In *DB (as executor of the estate of OE) v SSWP and Birmingham CC (SPC)*, Upper Tribunal Judge Mitchell took the opportunity to express some views on the process by which the Department of Work and Pension made Birmingham City Council a woman's social security appointee at a time when her nephew held an enduring power of attorney. After she died, the nephew brought an appeal as executor of her estate against a number of decisions of the Secretary of State for Work and Pension relating to benefits decisions. These succeeded for reasons that are not of relevance here, but the nephew's main grievance was that he had been made his aunt's appointee.

As UTJ Mitchell noted, appointment decisions do not attract a right of appeal to the First-tier Tribunal, and hence neither that Tribunal nor the Upper Tribunal, had jurisdiction to entertain an 'appeal' against an appointment decision. However, he had concerns about the way in which the application was handled, and he decided to express views to "*to provide some assistance to the DWP and local authorities in their efforts to operate the appointee system effectively and properly.*"

The observations of wider relevance are contained at paragraph 3 of the judgment, thus:

- (a) *the Social Security (Claims and Payments) Regulations 1987 do not contain an express prohibition on making an appointment despite some other person holding an enduring or lasting power of attorney, in respect of the claimant, that extends to welfare benefits matters. However, the Secretary of State has a power to make an appointment, not a duty. It may be difficult to identify a justification for exercising the power of appointment in the face of opposition from a person with a lasting or enduring power of attorney that extends to welfare benefits matters. This would involve disrespecting the wishes of a claimant given at a time when the claimant had mental capacity to select a person to deal with his or her affairs;*
- (b) *the Secretary of State has power to revoke an appointment. It may be difficult to identify a good reason for the DWP not revoking an appointment at the request of a person who holds a lasting or enduring power of*

*attorney that extends to welfare benefits matters;*

*(c) an appointment has significant consequences for the claimant. Applications for appointment need to be scrutinised with care [UTJ Mitchell noted a number of problematic features in relation to the specific application in question, including that it was unsupported by medical evidence, was unsigned and appeared to reveal that the local authority was unaware that the nephew held an EPA in his aunt's favour, all of which had not been investigated by the DWP]*

*(d) for most benefits, appointments are made under the 1987 Regulations. But they are not where the benefit is one to which the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 apply. In contrast to the 1987 Regulations, the 2013 Regulations prevent an appointment where someone has a lasting or enduring power of attorney in respect of the claimant. The reason for the different approaches is not obvious and none has been given by the DWP in these proceedings.*

It is also of note that, in the instant case, the DWP's response to evidence that Mr B held an enduring power of attorney was not to revoke the council's appointment but (a) to assert that Mr B had no right to any information about Miss E's benefits because he was 'no longer' her

authorised representative, and (b) to argue that, as Miss E's attorney, Mr B had been under a duty to notify the DWP of her admission to a care home. As UTJ Mitchell rather – but justifiably – tartly put it “*I would hope the DWP reflect on whether these actions were appropriate.*”

### Comment

We have had a long-standing concern as to appointeeship, which is an uncomfortable relic of an older age, not least because (as the MCA Code of Practice makes clear, at para 8.36), appointees are not covered by the MCA 2005 or its governing principles. Appointeeship may be administratively convenient, but, as this judgment points out, it has very significant consequences for the claimant, and the protections for the claimant and their interests appear to be rudimentary at best. Readers will recall that the UK entered a reservation against Article 12 CRPD because “*the existing social security benefit appointee system lacked appropriate safeguards in the arrangements to enable the appointment of a person to collect and claim benefits on behalf of someone else.*”<sup>1</sup> The Government withdrew the reservation following “*the development and piloting of a proportionate system of review to address this issue, which involved disabled people, a review system was introduced in October 2011 and is being rolled out to cover all appointees. We believe that this meets the requirements of Article 12.4.*” This judgment (in relation to an appointeeship made on 27 June 2012) should undoubtedly give pause to consider whether this really can be the case.

<sup>1</sup> [UK Initial Report On the UN Convention on the Rights of Persons with Disabilities](#): para 41.

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## Editors and Contributors

**Alex Ruck Keene:** [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)

Alex is recommended as a 'star junior' in Chambers & Partners 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, including as Wellcome Research Fellow at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). 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 has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click [here](#).

**Nicola Kohn:** [nicola.kohn@39essex.com](mailto:nicola.kohn@39essex.com)

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).



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## Editors and Contributors

**Katie Scott:** [katie.scott@39essex.com](mailto:katie.scott@39essex.com)

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. 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](#).

**Adrian Ward:** [adw@tcyoung.co.uk](mailto:adw@tcyoung.co.uk)

Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. 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; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

**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 Capacity Law 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](#).

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## Conferences

### Conferences at which editors/contributors are speaking

#### Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see [here](#).

#### Central Law Training Elder Client Conference

Adrian is speaking at this conference in Glasgow on 20 March. For details, and to book see [here](#).

#### Royal Faculty of Procurators in Glasgow Private Client Conference

Adrian is speaking at this half-day conference on 21 March. For details, and to book, see [here](#).

#### Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see [here](#).

### Other conferences of interest

#### UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers see [here](#).

### 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 report will be out in early April. 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](mailto:marketing@39essex.com).

**Michael Kaplan**

Senior Clerk

[michael.kaplan@39essex.com](mailto:michael.kaplan@39essex.com)**Sheraton Doyle**

Senior Practice Manager

[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)**Peter Campbell**

Senior Practice Manager

[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)

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[clerks@39essex.com](mailto:clerks@39essex.com) • DX: London/Chancery Lane 298 • [39essex.com](http://39essex.com)

**LONDON**

81 Chancery Lane,  
London WC2A 1DD  
Tel: +44 (0)20 7832 1111  
Fax: +44 (0)20 7353 3978

**MANCHESTER**

82 King Street,  
Manchester M2 4WQ  
Tel: +44 (0)16 1870 0333  
Fax: +44 (0)20 7353 3978

**SINGAPORE**

Maxwell Chambers,  
#02-16 32, Maxwell Road  
Singapore 069115  
Tel: +(65) 6634 1336

**KUALA LUMPUR**

#02-9, Bangunan Sulaiman,  
Jalan Sultan Hishamuddin  
50000 Kuala Lumpur,  
Malaysia: +(60)32 271 1085

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