MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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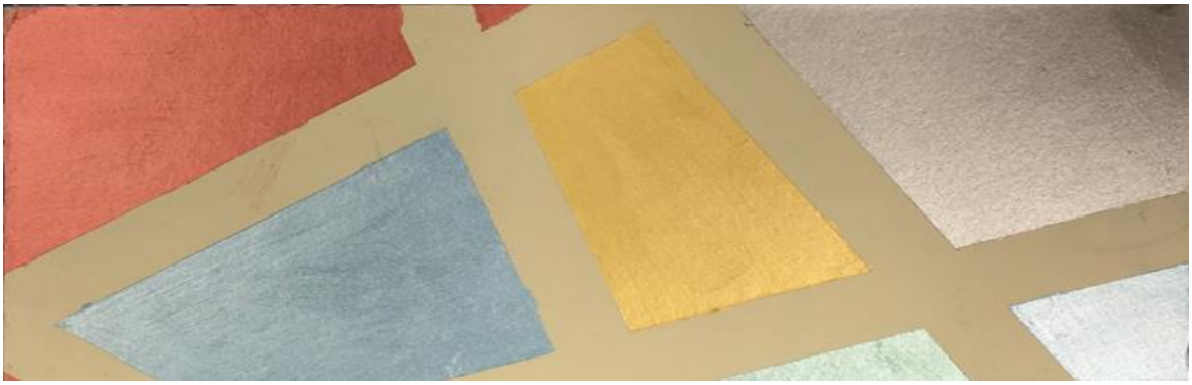

Welcome to the May 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; reproductive rights and the courts; capacity to consent to sexual relations; and one option in practice.

(2) In the Property and Affairs Report: an attorney as witness; barristers as deputies and a range of new guidance from the OPG;

(3) In the Practice and Procedure Report: the need to move with speed in international abduction cases; executive dysfunction and litigation capacity, and a guest article on meeting the judge;

(4) In the Wider Context Report: new capacity guidance; a fresh perspective on scamming the Irish *Cheshire West* and the CRPD and life-sustaining treatment;

(5) In the Scotland Report: two judgments in the same case relating to anonymity and the 'rule of physical presence' in the context of the Mental Health Tribunal.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our capacity assessment guide), and as promised, an updated version of our best interests guide is now out.

We trust we are also allowed to with some pride that no fewer than 5 of the editors have recently been appointed or reappointed to the Equality and Human Rights Commission panel of counsel, along with 3 other members of Chambers: see here.

Editors
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
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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Attorney as witness

OPG v PGO, MAB, MJD [2019] EWCOP 13, (SJ Hilder)

Lasting powers of attorney – revocation

Summary

P had executed 2 LPAs, one welfare, one property and affairs, but the signature of P was witnessed by one of the proposed attorneys.

The LPA was registered but the OPG did not notice the defect. By the time a financial institution did, P had lost capacity to make new LPAs.

The OPG, therefore, made an application for a declaration as to whether the requirements for the creation of an LPA had been met and a direction as to whether the registration of the LPAs should be cancelled.

Section 9(2)(b) MCA requires an LPA to have been made in accordance with the requirements of schedule 1 of the Act. Section 9(3) provides that if the LPA is not so made it confers no authority.

Schedule 1 requires regulations concerning execution to be satisfied. Regulation 9(8)(b) of the Lasting Power of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007 provides that a donee may not witness any signature required for the power apart from that of another donee.

It was clear, therefore, that as one of the donees had witnessed P's signatures, the regulations had not been satisfied. SJ Hilder held that the regulations were mandatory and, as a consequence, she had no choice but to direct the cancellation of the registration of the LPAs (paragraph 17 of the judgment).

SJ Hilder reached her conclusion with regret o the facts of the case before her. She noted that:

> *19. In the absence of attorneys to manage her property and affairs, the Court may appoint a deputy or deputies. In making such an appointment, the Court will take into account all that is known of BGO's wishes and feelings in respect of who she would like to assist her, as demonstrated by the attempt to grant LPAs and otherwise.*
>
> *20. In respect of health and welfare, the Court may also appoint a deputy or*

> *deputies if considered appropriate, although it does so much more rarely. However, pursuant to section 20(5) of the Mental Capacity Act 2005, a deputy cannot be given powers to refuse consent to the carrying out or continuation of life-sustaining treatment. In her welfare instrument, BGO had ticked the box to confirm that she wanted to give her attorneys this power. On the failure of her LPA, there is no means for the Court to give effect to her wishes in this respect.*

SJ Hilder was mindful of authorities (such as *Miles & Beattie v The Public* Guardian [2015] EWHC 2960, *Wye Valley NHS Trust v Mr B* [2015] EWHC 60, *Briggs v Briggs* [2016] EWCOP 53 and *The Public Guardian v DA & Others* [2018] EWCOP 26) which together emphasise the empowering intention of the Mental Capacity Act 2005 and the "*underlying principle that respect must be given wherever possible to the donor's autonomy*" (Baker LJ in *PG v DA* at paragraph 47), and that the mandatory nature of Schedule 1 paragraph 18, particularly where it had the consequences it did for P "*may appear to run in the opposite direction*." However, SJ Hilder concluded (at paragraph 21) that:

> *it should be borne in mind that Lasting Powers of Attorney are powerful documents and inevitably therefore there will be those who seek to obtain powers wrongfully. There is no suggestion of such wrongful intent in the matter currently before me but, in different circumstances, insistence on an independent witness to the Donor's signature is itself an important safeguard for the expression of genuinely autonomous decisions.*

Comment

It is, to put mildly, unfortunate that the OPG did not notice the fundamental defect in the powers of attorney at the point of registration, as the consequences for P were ultimately that she has been deprived the opportunity of empowering an attorney to act on her behalf in relation to decisions in relation to life-sustaining treatment, a matter about which she clearly felt sufficiently strongly to seek to give her attorney that power.

Barristers as deputies

NKR & Usha Sood v The Thomson Snell and Passmore Trust Corporation Limited [2019] EWCOP 15 (SJ Hilder)

Deputies – property and affairs

Summary

In this case P was a child with cerebral palsy with the consequence that he it was unlikely he would have capacity to manage his property and affairs when he reaches 18. He received a large award of damages arising out of negligence at his birth and a professional deputy was appointed.

There was a breakdown of relations between P's family and the deputy and so P's mother applied for the discharge of the current deputy's appointment and the appointment in its place of a barrister to act as professional deputy.

The court directed inquiries as to professional regulation and insurance. The Bar Council confirmed that the work of a deputy is not the provision of legal services so not directly regulated but that in the context of discharge of the functions of deputyship, regulatory powers extend to "*behaviour which diminishes trust and*

confidence in you or the profession (CD5) or insufficient cooperation with the BSB (CD9)…".

The latter satisfied the court that the behaviour of the proposed deputy, Ms Sood, would be the subject of some regulation in that one of the main risks is misappropriation and that would clearly be a breach of the quoted regulations. (Paragraph 24).

As to insurance, Ms Sood had obtained a quote (BMIF not covering these activities) but had not indicated whether she would charge this as an expense to P's estate or treat it as an overhead (as other professional deputies do).

The deputy had identified a suitable panel deputy who was willing to act. The court, partly because of the insurance position and partly because of the panel deputy's greater experience, decided that P's best interest were served by the appointment of the panel deputy. (Paragraphs 28-30).

Comment

SJ Hilder's decision confirms that barristers may in principle act as professional deputies (although it would appear that insurance would have to be treated as an overhead).

Capacity, pre-nuptial agreements and knowledge of your own assets

PBM v TGT & X Local Authority [2019] EWCOP 6 (Francis J)

Mental capacity – assessing capacity – finance – marriage

Summary

This case concerned the questions of capacity to marry, enter into a prenuptial agreement and also disclosure of the extent of assets managed by a property and affairs deputy. It concerned a man, PBM, who had an acquired brain injury as a result of a deliberate injection of insulin by his father when he was 12 months old. He received a significant compensation award from the Criminal Injuries Compensation Authority in respect of these injuries, although he had made a much greater recovery from his injuries than had been anticipated at the time when his award had been assessed. His compensation award was managed for him by his Property and Affairs Deputy. PBM was described as having coexisting mild/moderate learning difficulties; he had an autistic spectrum disorder (Asperger's) and epilepsy. He lived in a bungalow in Wales with the benefit of a care package run by a case manager.

Since about 2016, PBM had been in a relationship with his fiancée MVA. They had originally planned to marry in June 2018. However, on 24 May 2018, following an application by the Deputy, the court made an interim declaration that PBM lacked capacity to marry and consequent thereto a caveat has been entered by the Deputy under section 29(1) of the Marriage Act 1949. This had the consequence of preventing PBM from marrying, a step which understandably upset PBM, but which on the substantive determination of the Deputy's application Francis J held had been justified at the time.

By the time that the matter came to final determination, there was agreement between all (including the Official Solicitor as PBM's litigation friend) that PBM had capacity to marry

and also to enter into a prenuptial agreement, but lacked the capacity to manage his property and affairs (although that steps should be taken by the Deputy to assist him in developing the requisite skills).

Perhaps because of that agreement, Francis J did not spell out in detail the components for capacity to enter into a prenuptial agreement but noted that "*there can be no doubt that PBM understands the purpose of a prenuptial agreement and that, with the benefit of careful legal advice, he has the capacity to enter into such an agreement*." Francis J accepted the Official Solicitor's submission that "*there is nothing inconsistent in saying that PBM has capacity to make a decision about a prenuptial agreement but yet may lack capacity to manage his property and affairs generally on an ongoing basis. Understanding and negotiating (with advice) and entering in to a pre nuptial agreement is a one off event, albeit that the effect of the contract negotiated is always binding. Managing property and affairs is not a single event, but a continuum.*"

Francis J noted (at paragraph 33) that "*it is obviously desirable (from the prenuptial agreement perspective) that* [PBM] *should know* [the extent of his assets]. *I make it clear that this is not a reason for him to know or not since the test that I have to apply in relation to that issue is the test of capacity already set out above. However, it is hard to envisage how the disclosure consistent with a successful prenuptial agreement could take place without PBM knowing about the extent of his estate.*" Francis J further noted that it was "*axiomatic that it would not be appropriate to tell MVA and not PBM, about the extent of PBM's assets.*" Further "[i]*t is, in my judgement, inevitable that when MVA seeks legal advice, as she must, in respect of the prenuptial agreement, those advising her are going to want to know how much PBM is worth. Whilst I am not saying that would be impossible to have an effective prenuptial agreement without disclosure, it is clear, at least on the present state of the law, that full and frank financial disclosure is regarded as one of the key building blocks of a successful prenuptial agreement*."

The motivating factor behind the Deputy's concern (echoed by the case manager) in terms of disclosing to PBM the extent of his assets was his financial vulnerability. However, as Francis J noted, "*Dr Layton was keen to point out, however, the difference between lacking capacity and being vulnerable. Vulnerability is not enough to justify the withholding of the information*."

Francis J was invited not to follow the decision of Foskett J in *EXB v FDZ and others* [2018] EWHC 3456 (QB) (a conclusion that P should not be informed of the amount of a damages award).

> *43. Mr Rees submits that a decision as to whether a person should be told about the value of his assets is a wholly artificial one. A capacitous person, he submits, does not ask themselves whether they should be made aware of the extent of their assets. If they do not have the relevant knowledge to hand, they have a right to obtain that information should they wish to obtain it.*
>
> *44. Mr Rees asks me to go further still: he submits that where a person has capacity to take a decision and wishes to make that decision, that person must be entitled to any information belonging to them which they require to make that decision. I am not prepared to go so far as to say that Foskett J was wrong, nor*

> *am I prepared to say that I disagree with him. It is not necessary for me to do so for the purposes of this case. I do not accept that a valid prenuptial agreement cannot be made without knowledge of the value of one's assets. Accordingly, the premise of Mr Rees's submission falls away. I can readily envisage a situation where the judge could decide that somebody has the capacity to enter into a prenuptial agreement but does not have the capacity to know about the extent of their assets. I have already highlighted, above, the obvious disadvantages in this factual state of affairs which is, I suggest, one that we should strive to avoid if at all possible.*

Francis J concluded that:

> *46. In spite of the properly articulated argument on behalf of the Deputy, I have formed the clear conclusion, based on the evidence of Dr Layton as well as everything that I have read, that PBM does have the capacity to be informed about the extent of his assets. It is unnecessary for me to decide whether the test is whether PBM can decide whether he should ask about the extent of his assets or whether he should be told. To me this is bordering on a semantic absurdity. Plainly, the moment one is entitled to know about the extent of one's assets one is almost bound to make the enquiry. I do not think that the distinction is one which will burden people in the real world.*

Even if he were wrong about this "semantic issue," Francis J considered that it would be in PBM's best interests to be provided with the information, not least because disclosure would accord with the principles of the MCA and the CRPD. Further, "*PBM is already aware that he is worth a substantial amount. 'Substantial' is a word that means different things to different people, but, as I suggested in discussion in court, it is possible that PBM thinks that he is worth more, rather than less, than the sum that he is actually worth*." As Francis J observed, "[w]*hen PBM is informed of the extent of his assets it is important that he is supported emotionally, as well as assisted to build and develop life skills*."

The remainder of the judgment is of specific interest to those considering obligations under the Social Services and Well-Being (Wales) Act 2014, as it consisted of a review of the obligations imposed by that Act. In the instant case, the local authority's position (with which Francis J agreed) was that it needed to be more robust in ensuring the discharge of its safeguarding obligation under s.126 (akin to s.42 Care Act)), but in relation to discharge of its obligations to assess and meet PBM's substantive care and support needs:

> *66* [i] *had assessed PBM's needs, as required by s19(1). It has identified the outcomes that PBM wishes to achieve in day-to-day life, and has concluded that there is nothing additional that could be done to contribute to achieving those outcomes (principally control of his own finances, and the ability to take decisions that flow from that) or otherwise meet his needs. Put simply, the LA asserts that his needs are being met (indeed, possibly exceeded) by his current package.*"

Comment

This decision of particular interest for the careful way in which Francis J sought to navigate the line between capacity and vulnerability in the context of "substantial" assets being managed

on behalf of a person. It is of further interest for the way in which – no doubt because of what appears to have been a strong expert report – the court was able to reach conclusions as to capacity which undoubtedly upheld the principles of both the MCA and CRPD. However, and whilst it made no difference to the outcome to the case, it is perhaps not an entirely semantic question as to whether the test is that the person has capacity to ask for information about their assets or capacity to be informed about their assets. The latter sits oddly with the MCA. The MCA is not concerned with someone's capacity to have knowledge about something, but with their capacity to take specific decisions. If it is being framed as a decision, one would not normally think of "being informed of one's assets" as a decision that the person would take – the decision for the person (and to be taken on their behalf if they lack capacity to take it) is to ask for information about their assets, on the basis that if they have capacity and ask, they will receive it as of right (unless, of course, there is some other bar that would prevent disclosure of that information).

Capacity – guidance for banks and utilities

The guide, Office of the Public Guardian for England and Wales, in partnership with various regulators, as issued guidance advising the staff of financial services and utility companies how to deal with customers whose decisions are taken for them under a property and affairs LPA or by a court-appointed deputy. Amongst the other useful practical matters covered (including examples of what forms and relevant watermarks on official documents actually look like) is the reminder that:

> *there's nothing in law that says you must see the original LPA. Your choice to accept original documents might depend on the level of risk involved in letting an attorney manage someone's account. For utility companies, the risk might be relatively low. For banking services, where an attorney would be able to withdraw someone's life savings, the risk might be higher.*

Investment – new OPG guidance

The OPG has published new guidance for deputies and attorneys covering investment.

The advice is clear and helpful and emphasises the need to seek financial advice in many if not most cases.

Online LPAs

As part of its safeguarding strategy for 2019-2025, the OPG has reaffirmed its belief that the creation and registration of LPAs should go fully online so that a "wet" signature is no longer required. This is in keeping with its view that everyone should have an LPA. Further discussions will take place against the background of continuing concerns about the potential for fraud.

This STEP article helpfully sets out the issues.

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Editors and Contributors

Alex Ruck Keene: 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. To view full CV click here.

Victoria Butler-Cole QC: 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), 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 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. To view full CV click here.

Nicola Kohn: 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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Editors and Contributors

Katie Scott: 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. To view full CV click here.

Katherine Barnes: Katherine.barnes@39essex.com

Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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 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; 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

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. 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.

Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see here.

Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information and to book, 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 edition will be out in 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 Report in the future please contact: marketing@39essex.com.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 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