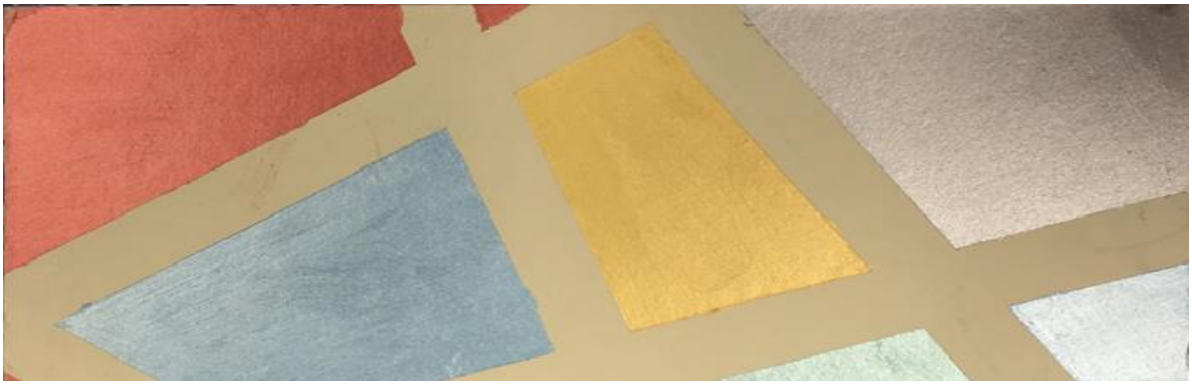
Essex CHAMBERS

MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

October 2018 | Issue 89



Welcome to the October 2018 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, a further appreciation of Alastair Pitblado and a report on a seminar on the new law at the end of life;

(2) In the Property and Affairs Report: deputies, costs and security bonds, and dealing with impermissible directives in powers of attorney;

(3) In the Practice and Procedure Report: two important decisions on costs and a seminar on improving participation in the Court of Protection;

(4) In the Wider Context Report: the new NICE guideline on decision-making and capacity, capacity and the Mental Health Tribunal, coverage of developments relating to learning disability and an CRPD update;

There is no Scotland report this month as our Scottish contributors are entirely tied up with projects both domestic and foreign, about which we hope to bring you news in the next Report.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

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.

Contents

Office holders as deputies

Re SH [2018] EWCOP 21 (Senior Judge Hilder)

Deputies – financial and property affairs

Senior Judge Hilder in this case reviewed the appointment of office holder deputies in the case of a company set up by a local authority to take over parts of its social work functions, including its deputyship role.

She considered 3 issues. One, the most important, was whether the appointment should be of the office holder for the time being rather than a named person holding such office, another was whether the company had the power to act as deputy and the last was as to its insurance cover.

At paragraph 24, she held that the court had the power to appoint an unnamed holder for the time being of an office (assisted by section 12 of the Interpretation Act 1978). At paragraph 27, she further held that to protect P, the person holding the office should be directed to inform the Public Guardian when they cease to hold the office so that the Public Guardian can review the position and bring the matter to court if concerned.

So far as powers were concerned, the judge held that COP was not the appropriate venue to decide matters of company law and was content to rely on the statement of truth to the effect that deputyship was within the company's powers and the Public Guardian's acceptance of that statement.

She was not, however, satisfied with the company's insurance arrangements so ordered £10,000 security, see paragraph 42.

Deputies, costs and security bonds

London Borough of Enfield v Matrix Deputies Limited, DW, OM and the Public Guardian [2018] EWCOP 22 (Senior Judge Hilder)

Deputies – financial and property affairs

Summary

Senior Judge Hilder in this case decided various further issues arising from the discharge of a large number of deputyships held by Matrix Deputies Limited and its former employees on various grounds, including excess fee charging, see *The Public Guardian v Matrix Deputies and the London Borough of Enfield and others* [2017] EWCOP 17.

The first issue to be decided was the proper procedure for calling in security bonds where the deputy disputed liability. At paragraph 11, she considered *Re Meek* [2014] EWCOP 1 where HHJ Hodge QC had held that the calling in of a bond

should be "*a matter of course*". At paragraph 14, she considered *Re M* [2017] EWCOP 24 where HHJ Purle QC held that calling in of a bond was inappropriate at the behest of a third party (a local authority owed care home fees) which the deputy had refused to pay.

The judge held that neither considered the position where the application was made against a former deputy who disputed liability (as Matrix did in this case). See paragraph 16.

At paragraph 20, she set out the procedure to be followed:

a. The person bringing the application (usually the new deputy but potentially the Public Guardian or the personal representatives of P's estate after P's death) should be required to provide a report identifying the alleged loss, with documentary evidence in support exhibited as appropriate. That report must be served on the deputy alleged to have caused the loss (but need not be served on the bond provider);

b. The allegedly defaulting deputy should have opportunity to consider that report and to file a written response;

c. The court will make a summary determination, with or without oral submissions as the court sees fit. The burden of establishing the loss is on the person bringing the application, on a balance of probabilities. The determination will 'summary,' not in the sense of 'summary judgment' but rather in the sense of 'summary assessment of costs' and as opposed to a full forensic examination;

d. The summary assessment must quantify the loss sufficiently for all parties and the bond provider to be clear about how much money is to be paid under the bond. If the loss is less than the full amount of the bond, then quantification should be in the form of a specific amount ("£x") or by reference to an ascertainable amount (eg "the new deputy's costs of the investigation and call-in proceedings as assessed by the SCCO.") If the assessment is that the loss exceeds the full amount of the bond, it will be sufficient to state that and provide for the bond to be called in for its full amount.

Finally, at paragraph 22, she held that the COP decision to call in the bond did not amount to a final determination of the former deputy's liability. The bond provider would have to pursue the former deputy in civil proceedings and establish liability in the usual way.

The next set of issues the judge dealt with concerned the rates Matrix could charge.

At paragraph 44 she held that where an order appointing a deputy who is not a solicitor simply authorises fixed costs, the starting point is the public authority rate.

At paragraph 59, she held that where an order authorises fixed costs but also authorises the non-solicitor deputy to seek a SCCO assessment, that order does not necessarily imply fixed costs at the higher rate.

At paragraph 66, she held that if a non-solicitor deputy holds multiple appointments some of which authorise remuneration at higher fixed

rates, there is no implication that all appointments carry those higher rates.

At paragraph 69, she held that where the appointment order does not authorise a SCCO assessment but one is obtained anyway, such an assessment gives no authority to charge the higher assessed amount.

Lastly, at paragraph 78, she held where a deputy has an order authorising a SCCO assessment but the value of the estate falls below the PD19B £16,000 threshold, the deputy must apply to COP for authority to seek the assessment.

Comment

The ruling on the procedure to be adopted concerning the calling in of bonds is useful as it underlines that the bond is an on demand bond, paid for by P so that it would be stripped of much of its utility if COP had to adjudicate on the former deputy's liability in every case where the former deputy disputed liability.

It remains to be seen, however, how this would work in a case where the former deputy is alleged to have negligently mishandled P's affairs, eg by poor investments.

It also remains to be seen what would happen if in the later bond holder proceedings against the former deputy, it was established that P had suffered no loss. It is, further, not altogether clear whether Senior Judge Hilder can have been correct to have held that an order calling in the bond does not amount to a final determination of civil liability on the part of the deputy, given that the terms of bonds entered into between deputy and bond provider are that the bond provider guarantees that it will pay the amount of any loss or losses as determined by the Court of Protection. In the circumstances, it may very well be that in the proceedings to enforce recovery in the civil courts that the bond provider can proceed on the basis that this is equivalent to a judgment debt which the bond holder cannot then challenge on the basis that some other sum is owing.

Euthanasia and other impermissible directions

The Public Guardian v DA and others [2018] EWCOP 26 (Baker LJ)

Lasting powers of attorney – registration

In this case Baker LJ considered a number of different issues that arise seemingly frequently concerning the registration of lasting powers of attorney.

Of general interest are those that concern the inclusion in a power of preferences or instructions that direct or encourage assisted suicide or euthanasia.

Schedule 1 of the MCA is concerned with the registration of LPAs. Paragraph 11 requires the Public Guardian to apply to the court for a determination under section 23(1) if it appears that the power contains a provision that would be ineffective as part of a lasting power of attorney.

Sub paragraph (4) and (5) of paragraph 11 enables the court to sever any provision that would be ineffective or would prevent the instrument acting as a valid LPA.

The LPAs in question either contained instructions or preferences to the effect that in certain circumstances the attorney is to take or encourage steps to be taken that would bring

about the donor's death. At paragraph 27, Baker LJ held:

> *I agree with the combined view of the Public Guardian and the Official Solicitor that an instruction or preference in an LPA directing or expressing a wish that an attorney takes steps to bring about the donor's death is instructing or encouraging someone to commit an unlawful act and therefore ineffective.*

Incidentally, at paragraph 28, the judge determined an issue of general relevance, namely how the court should interpret a preference set out in the instructions box on the form and vice versa. He held:

> *On the first issue between the parties, I prefer Mr Rees' argument. Applying Nugee J's approach requiring flexibility to ensure that the donor's autonomy is fully respected, I agree that an instruction is a direction in mandatory terms wherever it appears on the form. Thus, a stipulation in the "preferences" box that is clearly mandatory should be interpreted as an instruction. Equally, a provision in the "instructions" box may be couched in terms that make it clear that it is intended to be a preference.*

In some of the LPAs instructions or preferences had been given that would only come into effect if the law changed to make assisted suicide lawful. Baker LJ held at paragraph 29:

> *On the second point, however, I accept Mr Entwistle's submission that instructions and preferences predicated on a change in the law are ineffective. It seems to me that the ways in which the law could be changed in this field are so many and varied that permitting an LPA to be registered when containing an instruction or preference as to the attorney's actions should the law change would lead to uncertainty and confusion. Towards the end of oral submissions, Mr Rees suggested that a clause which stipulated that "if at any point it becomes permitted as a matter of English law for my attorney to make a decision that my life should be terminated in certain circumstances and those circumstances arise, then I express a wish for my attorney to make a decision that terminates my life" would meet the objections raised on behalf of the Public Guardian. But in the event that Parliament at some future point permits an attorney to take steps to terminate the donor's life, any change in the law is likely to be subject to detailed statutory provisions and guidance in a Code of Practice, the terms of which cannot at this stage be predicted. In those circumstances, for this court to give the green light to the inclusion in LPAs of any such provision at this stage would be likely to cause uncertainty and confusion. In those circumstances, the right course is to declare all such provisions, whether they be instructions or preferences, ineffective.*

In the result, all the provisions under review were held ineffective and severed, see paragraph 42.

The second batch of cases concerned more mundane matters.

Section 10(4) of the Act requires a power to appoint attorneys to act:

> *(a) jointly,*
>
> *(b) jointly and severally, or*

> *(c) jointly in respect of some matters and jointly and severally in respect of others.*

These are the only ways attorneys can be appointed and section 9 (3) provides that an instrument that does not comply with section 10 confers no authority.

In one set of cases, the power contained the following words:

> *If my spouse is capable of acting, my attorneys other than my spouse shall not act in any manner unless my spouse is unable to act on their own in that matter.*

The court held that these words were inconsistent with a joint and several power and should be severed, see paragraph 52.

In another case, these words occurred:

> *The Primary Power of Attorney is Mrs [JR] should she survive her husband and be of sound mind and will be the decision-maker. [The other two attorneys] are secondary PAs should Mrs [JR] not be of sound mind or deceased.*

Again, this was held inconsistent with a joint and several appointment and were severed (see paragraph 55). The appropriate result could have been achieved by the donor appointing his spouse as sole attorney and the others as replacement attorneys.

In the last case, the power required the consent of a third party before certain powers could be exercised. This was held to be unobjectionable, see paragraph 58.

It is worth mentioning that Baker LJ at paragraph 9 specifically approved of what District Judge Eldergill had said as follows:

> *In The Public Guardian's Severance Applications [2017] EWCOP 10 at paragraphs 45 to 47, District Judge Eldergill compared and contrasted the new terminology in the latest versions of the prescribed forms with the statutory language in s.9(4). He observed:*
>
> > *"45. It is always risky to depart from the statutory language when drafting forms and the adoption of the headings 'Preferences' and 'Instructions' in the forms introduced by the Amendment Regulations is potentially misleading.*
> >
> > *46. The term 'instructions' is not synonymous with 'conditions or restrictions'.*
> >
> > *47. Equally, the term 'preferences' is not synonymous with 'best interests' or a donee's duty when deciding what is in the donor's best interests to consider anything written in section 7 of the form concerning the donor's wishes, feelings, beliefs and values, and the other factors to be considered by their donee(s): see s.4(6) of the 2005 Act."*
>
> *I respectfully agree with the district judge's observations. It may be that those responsible for drafting forms will wish to reconsider these changes in the light of his comments.*

Lastly in paragraph 46 of the judgement, Baker J considered a dictum of DJ Eldergill in the above case. He said:

In The Public Guardian's Severance Application (supra), District Judge Eldergill suggested that there was nothing objectionable in an arrangement which provided that two of the attorneys must always agree on any decision jointly whereas the third could act independently and that it should not be necessary to create two instruments in order to achieve such an objective. Mr Rees acknowledges that the District Judge's view is consistent with the principle of flexibility but submits that it is contrary to the clear wording of the statute. Although I have not heard a full-contested argument on that point, it seems to me that Mr Rees' submission is well-founded.

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: 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

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. 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

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 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). 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, 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

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. 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

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.

Conferences

Conferences at which editors/contributors are speaking

Centre for Mental Health and Capacity Law CRPD events

Jill Stavert's Centre at Edinburgh Napier is holding three events around the CRPD in October and November: a workshop on CRPD, mental health and capacity: overcoming obstacles to implementation; a seminar by Dr Shih-Ning Then: *An Antipodean Perspective: Supported Decision-making in Law and Practice* and a lecture by Professor Penelope Weller on *Advance decision-making and the Convention on the Rights of Persons with Disabilities: a cross- jurisdictional discussion*. For details and to book, see here.

Taking Stock

Neil and Alex are speaking at the annual Approved Mental Health Professionals Association/University of Manchester taking stock conference on 16 November. For more details, and to book, see here.

Other events of interest

The London branch of the Court of Protection Practitioners Association is holding a seminar on care home fees on 8 November. For details, 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 November. 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

International Arbitration Chambers of the Year 2014 Legal 500

Environment & Planning Chambers of the Year 2015

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