Essex CHAMBERS

MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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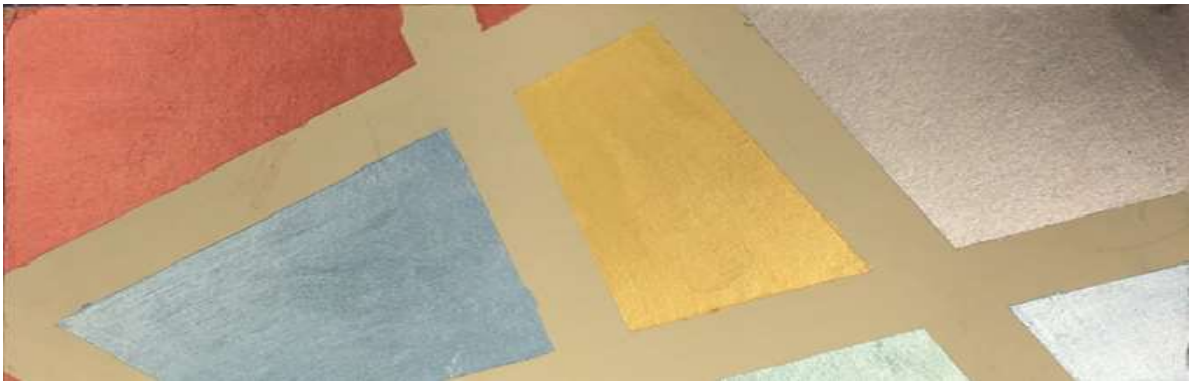

Welcome to the October 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, the CRPD in the Court of Protection and spotting the signs of abuse;

(2) In the Property and Affairs Report: two important cases about deputies and fixed costs and how to get financial deputyship applications right;

(3) In the Practice and Procedure Report: s.21A applications and interim declarations; the limits of the court's jurisdiction; contempt proceedings and when not to recognise a foreign order;

(4) In the Wider Context Report: new GMC consent guidance, Sir James Munby returns to the inherent jurisdiction, new CQC publications and relevant ECHR developments;

(5) In the Scotland Report: a new Chief Executive for the Mental Welfare Commission, MWC publications, and what COVID-19 has revealed about ageism and disability discrimination.

We thank Katherine Barnes for all her contributions to date, and wish her well as she steps down to focus her activities on other areas; we welcome Rachel Sullivan and Stephanie David as new contributors.

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. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

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Deputies, fixed costs, detailed assessment and net assets

Penntrust Ltd v West Berkshire District Council & Anor [2020] EWCOP 48 (Senior Judge Hilder)

Deputies – property and affairs – CoP jurisdiction and powers – costs

Summary

Senior Judge Hilder has returned to the vexed question of Practice Direction 19B and fixed costs in the Court of Protection. In its current iteration, PD19B provides that "*where the net assets of P are below £16,000*," the option for detailed assessment of costs of the estate "*will only arise if the court makes a specific order*."

The Applicant trust corporation was formerly appointed as property and affairs deputy for a woman called AH. At all times during the deputyship P's liquid assets were less than £16,000 but her total assets, including a property in which she lives, were substantially higher. The deputyship order includes authorisation to seek SCCO assessment but made no explicit reference to the size or nature of AH's estate. The Applicant contended that it was entitled to rely on the authorisation in its deputyship order to seek SCCO assessment of its costs. In the event that the court did not agree, the Applicant sought retrospective authority to obtain SCCO assessment. The Respondent local authority, which was now the property and affairs deputy, wanted to understand what debt AH had incurred; the Public Guardian sought no specific outcome, but to seek to assist the court.

Section 19(7) MCA provides that deputies are entitled (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and (b) if the court so directs when appointing him, to remuneration out of P's property for discharging them. As Charles J identified in *Re AR* [2018] EWCOP 8, a decision as to remuneration is a "best interests" decision, to be determined by reference to the individual facts of a particular case.

The range of options for remuneration is set out in Rule 19.13, and amplified by a Practice Direction, PD19B. There have been two versions (for present purposes): the old version which was effective between 1 February 2011 and 30 March 2017; and the version which has in effect since 1 April 2017. The old version had a footnote explaining that "*Net assets includes any land or property owned by P except where that land or property is occupied by P or one of P's dependents*;" the new version has no explanation. There has been no guidance or explanation for the removal of the

footnote. Neither the versions before 2011 nor the pre-Mental Capacity Act equivalent had the footnote in. Contrary to the arguments of the Public Guardian that the footnote definition should be carried over into the new version, Senior Judge Hilder held that the 2011-2017 version was an outlier, such that at (paragraph 72):

> *the definition from the 2011-17 version of Practice Direction 19B does not somehow "carry over" into the current version from which it is omitted. The term "net assets" in the version of PD19B effective from 1st April 2017 falls to be interpreted according to the ordinary meaning of the phrase, as "total assets minus total liabilities."*

On the facts of the case, and in light of this interpretation, Senior Judge Hilder held that the Applicant was always authorised by the deputyship order to obtain SCCO assessment of its costs.

Going forwards, Senior Judge Hilder (at paragraph 86) held that:

> *to avoid the necessity for proceedings such as these, where a deputy is appointed in respect of a net estate worth – at the time of appointment – less than £16 000 (within the meaning current at the time of appointment) but with authority to seek SCCO assessment, the decision-maker (either judge or Authorised Court Officer) should make explicit reference to the nature of the estate and paragraph 12 of PD19B in the wording of the order (as has been the practice at the central registry for some time.) Additionally, the deputy should check the terms of the costs authorisation carefully on first receipt of the order. If it includes the option of SCCO assessment but does not expressly confirm that such authorisation applies even where the net estate is worth less than £16 000 for the purposes of paragraph 12 of Practice Direction 19B, the deputy should make a speedy COP9 application pursuant to Rule 13.4 of the Court of Protection Rules 2017 for reconsideration. Such an approach would be of minimal cost to P and would avoid future argument.*

Comment

The judgment provides helpful clarification of an otherwise ambiguous position. However, more broadly, with a liquid estate of less than £16,000 and P's only other asset being the house in which she lives (the value of which the report does not divulge), the former deputy's claim for remuneration over 3 years amounting to some £70,000 might indicate that more control of the costs of deputyship in the case of small estates is needed not less and begs the question why the PD was changed. That is without considering the costs of the litigation which presumably also will fall on P's now much diminished estate.

Professional deputies, hourly rates, and the realities of 2020

PLK & Ors (Court of Protection: Costs) [2020] EWHC B28 (Senior Court Costs Office (Master Whalan))

Deputies – property and affairs – CoP jurisdiction and powers – costs

Summary

In an important decision, the Senior Court Costs Office has looked at the method of assessment

of the hourly rates claimed by Deputies and, in particular, at whether those rates need to reflect commercial realities in 2020. The SCCO consolidated the assessments in four cases that were chosen to represent the costs claimed by Deputies in different parts of England in the management of the affairs of protected parties who had sustained significant brain or birth injuries. The central submission of the deputies was that the court's current approach, which, broadly speaking, relied on the application of the Guidelines Hourly Rates ('GHR') approved by the Costs Committee of the Civil Justice Council was, by 2020, incorrect and unjust. Instead, they submitted, the assessment of COP work should be predicated on a more flexible exercise of the discretion conferred by CPR 44.3(3), whereby the GHR were utilised as merely a 'starting point' and not a 'starting and end point'.

Master Whalan did not accept the primary argument of the applicants that COP firms had experienced:

> *29.* […] *'a significant increase in hard and soft overheads' (SA, 45). The evidence, both in respect of time and expenditure, is inconsistent and, in my view, incomplete. Nor am I persuaded by the submission made in the oral hearing that 'it is clear that no other area of practice requires such a level of unrecoverable time'. So far as the datum is consistent and stable – and, as noted, the most reliable figures are probably those produced by Clarion – it suggests a comparatively modest incidence of time and expenditure. However reliable the figures produced may be, they do not, in my view, demonstrate that the burden is one that is exclusive to COP work or that it is atypically high in comparison with that experienced by practitioners in comparable areas of practice. Fee earners in personal injury, medical and professional negligence, for example, incur invariably time and expense that is irrecoverable, in marketing, accessing cases that are not proceeded with or, indeed, pursued and lost. These are burdens which do not apply to Deputy's sources of work (on a case by case basis) which is often consistent and predictable over many years.*

However, he continued at paragraph 31:

> *Three preliminary observations then inform my initial approach to the applicants' secondary argument. First, it should be emphasised from the outset that this court has no power to review or amend the GHR, either formally or informally, as this role is the exclusive preserve of the Civil Justice Council. This reality is recognised properly by Mr Wilcock in his written and oral submissions. Secondly, while the court has received submissions concerning the application of an inflationary uplift when applying the GHR, this is not just a 'blunt tool', but an approach which endorses the application of a practise which has been rejected explicitly since 2014, from which time the emphasis has been on a 'comprehensive, evidence based review'. Thirdly, however, it must be acknowledged that the GHR cannot be applied fairly as an index of reasonable remuneration unless these rates are subject to some form of periodic, upwards review. O'Farrell J. in Ohpen (ibid) observed that it 'is unsatisfactory that the guidelines are based on rates fixed in 2010' as these 'are not helpful in determining reasonable rates in 2019'. These observations were made in the context of an assessment of*

> *London City solicitor rates in an assessment where the court was not bound by the GHR. It seems clear to me that the failure to review the GHR since 2010 constitutes an omission which is not simply regrettable but seriously problematic where the GHR form the 'going rates' applied on assessment. I do not merely express some empathy for Deputies engaged in COP work, I recognise also the force in the submission that the failure to review the GHR since 2010 threatens the viability of work that is fundamental to the operation of the COP and the court system generally.*

Against this backdrop, Master Whalan concluded that

> *35. I am satisfied that in 2020 the GHR cannot be applied reasonably or equitably without some form of monetary uplift that recognises the erosive effect of inflation and, no doubt, other commercial pressures since the last formal review in 2010. I am conscious equally of the fact that I have no power to review or amend the GHR. Accordingly my finding and, in turn, my direction to Costs Officers conducting COP assessments is that they should exercise some broad, pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed. If the hourly rates claimed fall within approximately 120% of the 2010 GHR, then they should be regarded as being prima facie reasonable. Rates claimed above this level will be correspondingly unreasonable. To assist with the practical conduct of COP assessments, I produce a table below which demonstrates the effect of a 20% uplift of the 2010 GHR. I stress again that I do not purport to revise the GHR, as this court has no power to do so; instead this is a practical attempt to assist Costs Officers and avoid unnecessary delay (caused by individual re-calculation) in a busy department conducting over 8000 COP assessments per annum.*

	Guideline Hourly Rates			
Bands	A	B	C	D
London 1	£490	£355	£271	£165
London 2	£380	£290	£235	£151
London 3	£275-320	£206-275	£198	£145
National 1	£260	£230	£193	£142
National 2	£241	£212	£175	£133

Master Whalan indicated that

> *This approach can be adopted immediately and is applicable to all outstanding bills, regardless of whether the period is to 2018, 2019, 2020 or subsequently. It goes without saying that this approach is subject ultimately to the recommendations of Mr Justice Stewart and his Hourly Rates Working Group and the Civil Justice Council. Ultimately the recommendations of the Working Group must be adopted in preference to my findings.*

Subsequent to the decision, the Senior Costs Judge issued a Practice Note explaining some of the practical consequences.

Comment

The long gap between the last review of the SCCO Guideline Hourly Rates and the current one has caused problems and dissatisfaction both in the COP and generally. In that context, this decision and the Senior Cost Judge's subsequent practice direction are welcome interim measures. It is to be hoped that reviews

will henceforth happen more than once a decade.

Getting deputyship applications right

A helpful blog has been published on the Law Society's website, written by Caroline Bielanska, and setting out how to avoid common mistakes in making financial deputyship applications to the Court of Protection.

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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 Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a 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.

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

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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.

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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.

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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.

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Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. 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.

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

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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

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Jill Stavert's Centre for Mental Health and Capacity Law (Edinburgh Napier University)'s Autumn 2020/January 2021 webinar series will include contributions by Adrian Ward on 11 November at a webinar about Advance Care Planning: advance care and treatment planning, end of life, COVID-19, and by Alex on 2 December 2020 at a webinar about Psychiatric Advance Statements. Attendance is free but registration via Eventbrite is required. For more details, 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.

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