



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

(1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity, and two important decisions on the scope of the inherent jurisdiction at the border of the MCA 2005;

(2) In the Property and Affairs Report: appointing a charitable trust corporation as a deputy and donating/tax-planning in PVS;

(3) In the Practice and Procedure Report: procedure in medical treatment cases; disclosure from proceedings to the police; and an update from relevant associations

(4) In the Wider Context Report: guidance on advance decisions and covert medication; alcohol, capacity and vulnerability; the FCA and vulnerable customers;

(5) In the Scotland Report: the Scott Review terms of reference; guardianship and (the failure of?) legal representation; and the apparent downgrading of the Mental Health Tribunal for Scotland.

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

## Contents

Donating and tax-planning in PVS..... 2

The limits of interim declarations and out of hours applications..... **Error! Bookmark not defined.**

Disclosure from proceedings to the police ..... **Error! Bookmark not defined.**

Associations update..... **Error! Bookmark not defined.**

### Donating and tax-planning in PVS

*Re MJL* [2019] EWCOP 31 (DJ Sarah Ellington)

*Best interests – property and affairs*

#### Summary

In 2007, when P was 54, he suffered a cardiac arrest and fell into PVS. He had an estate of over £17 million and no dependents, and was cared for in hospital funded by the NHS.

He was a supporter of the Labour Party and other left leaning organisations and, prior to the onset of PVS had made modest annual donations to such causes. He had also made substantial charitable donations.

The court had previously authorised the making of a statutory will that benefited his, independently wealthy, siblings and charities. The deputy had continued the payments to the Labour Party and left leaning causes.

The Deputy applied for retrospective authorisation of the political donations and for tax planning donations to the siblings and charities that benefitted under the will.

The Official Solicitor supported the former but not the whole of the latter, arguing that any large

donations should only be made from excess income and not capital.

The court performed the usual checklist balancing exercise making it clear that there was no default position from which the court would start and that, in relation to tax planning, affordability was only a necessary condition not a sufficient one.

In the end, the court had no difficulty authorising the past and future modest donations to political causes, there was ample evidence of P’s pre incapacity desire to benefit those causes.

As regards tax planning, evidence of a desire so to do was absent and, ultimately, the court decided that it was only in P’s best interests to make donations out of surplus income (both accrued and for the future).

#### Comment

This case illustrates that the availability of capital is a necessary condition for tax planning donations but not sufficient. What will be sufficient will depend on each case but an inclination pre incapacity of the desire so to do will go a long way.

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### Short Note: charities as deputies

In *Re TWAH [2019] EWCOP 36* the court considered an application by a trust corporation which was a registered charity (Allied Services Trust), a company limited by guarantee, to be appointed the deputy for property and affairs of an incapacitated person.

The court approved the application after satisfying itself that adequate insurance arrangements were in place and considering whether or not regulation by the Charity Commission was a sufficient safeguard (and deciding it was).

The court went on to set out the procedure to be followed in such cases (similar to [trust corporations linked to legal practices](#)). They include declarations/undertakings (to be filed as an additional page to the COP4 filed with the application) that:

- a. The proposed deputy (the trust corporation) is a trust corporation within the meaning of s.64(1) Mental Capacity Act 2005 and can lawfully act as such; and the trust corporation will notify the Public Guardian if that ceases to be the case.
- b. The trust corporation will comply with the Public Guardian's published standards for professional deputies.
- c. The trust corporation is regulated by the Charity Commission; and will notify the Public Guardian immediately if that ceases to be the case. The trust corporation undertakes to maintain insurance cover that:

- (i) includes indemnity in respect of all work undertaken by the trust corporation, including discharging the functions of deputyship; and
- (ii) provides a sum insured for any one claim (exclusive of defence costs) no less than £3 million.

- d. The trust corporation will lodge a copy of the insurance policy with the Public Guardian on appointment and will notify the Public Guardian immediately if there is any reduction in the terms or level of the insurance cover.

Some additional documents should also be filed with the application:

- a. copy of the authorisation by the Lord Chancellor to act as a trust corporation; and
- b. confirmation of its charitable registration.

(A copy of the insurance policy need not be filed with the application, but must be lodged with the Public Guardian on application.)

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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 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](#).

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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. 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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## Conferences

### Conferences at which editors/contributors are speaking

#### Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. The conference is also be held on 5 December in Manchester. For more information and to book, see [here](#).

#### Clinically Assisted Nutrition and Hydration Supporting Decision Making: Ensuring Best Practice

Alex is speaking at a conference about this, focusing on the application of the BMA/RCP guidance, in London on 14 October. For more information and to book, see [here](#).

#### Taking Stock

Neil is giving the keynote speech at the annual national conference on 15 November jointly promoted by the Approved Mental Health Professionals Association (North West England and North Wales) and the University of Manchester. 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.

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Our next edition will be out in October. 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).

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