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## Court of Protection: Property and Affairs

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### Introduction

Welcome to the November Mental Capacity Law Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on judicial authorisations of deprivation of liberty and two difficult cases, one involving the MHA and the MCA, and the other capacity to consent and to contact;
- (2) In the Property and Affairs Newsletter (this month edited by [Kelly Stricklin-Coutinho](#)): the first revocation of a digital LPA and an update on necessities;
- (3) In the Practice and Procedure Newsletter: fact-finding against the odds, the limits of the inherent jurisdiction, an escalation of the legal aid debate and the launch of Alex's guidance on litigation friends in the Court of Protection;
- (4) In the Capacity outside the COP newsletter: an important case on capacity and s.117 MHA 1983, an update on the new approach adopted by CQC to the MCA 2005 and a round-up of recent guidance on the MCA 2005, as well as call for best practice documentation, new guidance on DNACPR notices, and the Committee on the Rights of Persons with Disabilities' statement on Article 14.
- (5) In the Scotland Newsletter: the hotly anticipated Scottish Law Commission report on plugging the *Bournemouth* gap, updates on the position relating to powers of attorney, an important case on testamentary capacity and undue influence, and updates on recent reports from the Mental Welfare Commission.

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk).

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## Necessaries revisited

*Aster Healthcare Limited v The Estate of Mr Mohamed Shafi* [2014] EWCA Civ 1350 (Court of Appeal (Master of the Rolls, Beatson and Briggs LJ))

### *Mental Capacity - Finance*

We have previously [reported](#) upon the first instance judgment in this case [2014] EWHC 77 (QB)) was reported on in the edition of our newsletter. In this appeal against the High Court's order overturning summary judgment for the claimant, the Court of Appeal unanimously dismissed the appeal.

The Claimant owned six care homes registered under the Care Standards Act 2000. In one of those care homes, Raj Nursing Home ('the Home'), the majority of the referrals were made by Brent Council. Mr Shafi resided at the home from 29 January 2010 until his death on 28 March 2012. Fees of £62,199.94 accrued for his care and accommodation. The Claimant sought recovery of the fees from the estate of Mr Shafi. HH Judge Million granted the Claimant summary judgment for the fees, but this was overturned by Andrews J in the High Court. Permission to appeal to the Court of appeal was granted in limited circumstances.

Mr Shafi was admitted to Park Royal Centre for Mental Health ('the Hospital') on 13 November 2009 for an assessment under s.2 MHA 1983. The Hospital decided that he lacked capacity to make decisions as to his future care and a social worker employed by Brent Council contacted the Home for an admissions assessment. He was assessed as suitable and the admission sheet, completed by the manager of the Home, showed the duration of his assessment as long term and Brent Council as the "funding source." The

Claimant wrote to Brent Council in 2010 as to outstanding fees and Brent Council responded as follows:

*"Mr Shafi had a financial assessment completed and it indicated that he had in line with fairer charging criteria enough money readily available in bank accounts to pay for his care. Mr Shafi is thus considered to be a self funder and as such should be charged for his care accordingly.*

*Should access to Mr Shafi's accounts be frustrated as it appears is the case a member of his family, or indeed on certain occasions a care home can apply to the Office of Public Guardian in respect of an apointeeship (sic). As such management of Mr Shafi's finances can be taken over."*

After this, Andrews J had held in the High Court, the Claimant had tried to get Mrs Shafi to sign an agreement, which she refused to sign, but someone else did, for Mr Shafi. The judge had held that the agreement was obviously backdated and that Mr Shafi lacked capacity on the date of the agreement.

For a reminder of the judgment of Andrews J in the High Court, please see our earlier [report](#).

On appeal, Counsel for the Claimant conceded that Mr Shafi's estate had an arguable defence to the claim for fees up to the period when Brent Council notified the Claimant that Mr Shafi should pay the fees rather than Brent Council, but he argued that there was no defence to the claim for fees after that date, or after a reasonable period from that date. There were two grounds of appeal. The first was that Brent Council placed Mr Shafi at the home either:

1. on a temporary basis under s.47(5) of the National Health Service and Community Act

1990 (which allows for a local authority to temporarily provide or arrange the provision of community care services without a prior assessment of needs if the person's condition requires urgent services), or

2. under ss.21 and 26(2) of the National Assistance Act 1948 under which a local authority may make arrangements to provide residential accommodation for certain people in need of care otherwise not available to them, and those arrangements may be made with a registered care home.

The second ground of appeal was that the judge had incorrectly proceeded on the basis that the claimant could not rely on s.7 MCA 2005, which provides that:

*"(1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.*

*(2) 'Necessary' means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied."*

The Claimant's argument was that s.7 MHA 1983 would assist it unless it were held that the services were provided as a gift, which it considered unlikely.

In respect of the first ground of appeal, the Court of Appeal held that there was clear evidence that the contract between Brent Council and the Claimant was a long term contract and there was no evidence that there was a temporary contract. As a matter of contract law, Brent Council's letter amounted at most to a repudiatory breach of the contract, but there was no evidence as to the acceptance of that repudiation or the end of the contract. In terms of statutory provisions, the

Court of Appeal held, Brent was at least arguably always under a duty to provide assistance to Mr Shafi, whatever his resources, because he lacked capacity, no one had been appointed as his Deputy and accommodation was not otherwise available to him within the meaning of the National Assistance Act. The Circular LAC98 and paragraph 1.022 of CRAG supported this reading. It was therefore at least arguable that had Brent Council terminated its contract in its letter, it would have been in breach of its statutory obligations. Brent Council therefore remained at least arguably liable for the Claimant's fees after the date of its letter. The Court of Appeal therefore dismissed this ground of appeal.

In respect of the second ground of appeal, the Claimant was refused permission to appeal on the basis that the question is not whether the services were provided as a gift but rather whether it provided services to Mr Shafi on terms that he was not to pay for them. This was a question of fact, and the Court of Appeal held that it could not improve upon Andrew J's reasoning in concluding that this could not be determined in advance of a trial. The Court of Appeal also confirmed that Andrews J had been correct to hold that s.7 MCA 2005 mirrored the common law rule on "necessaries," and (as under the common law) it did not come into play where it was not intended by the supplier that the recipient should pay for the goods and services.

### Comment

The Court of Appeal's decision is unsurprising, and useful in upholding the reasoning of Andrews J as to the operation of s.7 MCA 2005. It follows that where P has no Deputy or LPA and is accommodated by a Local Authority in residential care under the 1948 Act, the Local Authority is under a statutory obligation to pay the care home fees. It can, of course, seek to reclaim against P's

estate but the important point to note is that the debt would lie between the Local Authority and P, and not between the care home and P.

## Short Note: Digital Misconduct

In *JL (Revocation of Lasting Power of Attorney) [2014] EWCOP 36*, Senior Judge Lush considered an application by the Public Guardian to revoke and cancel the registration of a digital LPA for property and financial affairs. He noted that this seemed to him to be the first occasion on which the court has considered a digital LPA in the context of an application to revoke the appointment of an attorney.

A digital LPA had been executed by the donor (JL) such that her daughter (AS) would be her sole attorney. JL did not receive independent advice about the creation of the LPA, although AS claimed she had fully explained the document to JL prior to it being executed and a friend of the family witnessed the signature and acted as the certificate provider. Senior Judge Lush noted that:

*“10. ....The function of the certificate provider is to certify that:*

- (a) the donor understands the purpose of the LPA and the scope of the authority conferred under it;*
- (b) no fraud or undue pressure is being used to induce the donor to create the LPA; and*
- (c) there is nothing else which would prevent the LPA from being created by the completion of the prescribed form.”*

In making his decision, Senior Judge Lush held that in order to revoke the LPA he had to be satisfied that AS had behaved in a way that contravened her authority or was not in JL's best

interests and that JL lacked the capacity to revoke the LPA herself.

Senior Judge Lush considered the particular circumstances arising as to the making of the digital LPA:

*“23. I shall consider these reasons in a little more detail. First, AS admits that she failed to keep proper records and accounts. At the hearing she said she did not know she had to keep accounts and that she had not read the declaration in Part C of the prescribed form of LPA, which she had signed. It says:*

*‘I understand my role and responsibilities under this lasting power of attorney, in particular:*

*...*

*...*

*I have a duty to keep accounts and financial records and produce them to the Office of the Public Guardian and/or to the Court of Protection on request.’*

*This admission is damning enough, but it gives rise to additional concern about the circumstances in which the LPA was created. If AS failed to read Part C, it makes it hard to believe her assertion that she had carefully read and explained to her mother the contents of Part A of the LPA – the part that the donor is required to complete.”*

Senior Judge Lush considered the evidence before him as to JL's living conditions, the application of her funds, and the pressure exerted on her by AS and went on to hold that in addition to AS acting in a way that contravened her authority and was not in JL's best interests, JL also lacked the capacity to revoke the LPA herself.

## **Short Note: departing from the general costs rule in property and affairs cases**

A further example of departure from the rule in property and affairs cases can be found in *BIM & Ors v MD* [\[2014\] EWCOP 39](#). The brother and sister-in-law of P's husband sought in the context of a major "row" to be substituted as property and affairs deputies in place of P's husband. They persisted in the face of indications that their application was hopeless. They were therefore ordered by Senior Judge Lush to pay their own costs of the proceedings.

## Conferences at which editors/contributors are speaking

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### Edge AMHP Conference

Neil will be speaking at Edge Training's Annual AMHP conference on 28 November. Full details are available [here](#).

### Talks to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Aberdeen on 20 November and Wigtown on 10 December.

### Borderline Personality Disorder and Self Harm

Jill is chairing a jointly hosted seminar (the Centre for Mental Health and Incapacity Law, Rights and Policy NHS Tayside and Perth and Kinross Council) on "Borderline Personality Disorder and Self Harm" in Perth on 25 November

### LSA Annual Conference

Jill is speaking about the Mental Health (Scotland) Bill 2014 at the Legal Service Agency's Annual Conference in Glasgow on 27 November. For details, see [here](#).

### Intensive Care Society State of the Art Meeting

Alex will be speaking on deprivation of liberty safeguarding at the Intensive Care Society's State of the Art Meeting on 10 December 2014. Details are available [here](#).

### Editors

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### 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 Mind 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 Newsletter will be out in early December. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact [marketing@39essex.com](mailto:marketing@39essex.com).

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Alex has been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website [www.mentalcapacitylawandpolicy.org.uk](http://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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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.**



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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.**



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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. **To view full CV click here.**



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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 practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: “*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*” he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. **To view full CV click here.**



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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**