



Court of Protection: Property and Affairs

Introduction

Welcome to the October issue of the Mental Capacity Law Newsletter family. We hit our half-century this month in terms of numbers of issues in the newsletter format, although Tor and Alex can remember even earlier days! We remain very grateful to all of our readers for their continued support which allows us to continue with our mission of trying to spread the capacity law love.

Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: news of the process for judicial authorisations of deprivations of liberty, capacity and deprivation of liberty, and a new and depressing 'Neary'-type saga;
- (2) In the Property and Affairs Newsletter: cases on the duties of attorneys vis-à-vis care expenditure, testamentary capacity and the MCA 2005 and new guidance on assessing capacity to manage property and affairs;
- (3) In the Practice and Procedure Newsletter: two extremely important cases on when (and how) to go to court in medical treatment cases;
- (4) In the Capacity outside the COP newsletter: an update on the compatibility of the MCA 2005 and the CRPD, developments with LPAs, and two important Strasbourg cases;
- (5) In the Scotland Newsletter: breaking news as regards plugging the Bournemouth 'gap' in Scotland and further news in the developing saga relating to validity of powers of attorney.

As ever, we welcome your contributions and comments – and promise to publish those which pass our test of being useful to the wider community!

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards

Scottish contributors

Adrian Ward
Jill Stavert

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Short Note: Local authority deputies – pros (and a con)

In *EU (Appointment of Deputy)* [2014] EWCOP 21, Senior Judge Lush commented further upon the considerations going to the appointment of a family member as deputy (in this case for property and financial affairs).

At paragraphs 34 ff, he commented thus:

“34. In continental countries where the legal systems are based partly on Roman law, family members traditionally had a public duty to act as a curator (their equivalent of a 'deputy') for someone who lacked the capacity to manage their property and financial affairs. No one could refuse to act as a curator, though not everyone had the time or the inclination, or the ability or the energy to take on a responsibility of this kind, and numerous grounds for exemption, known as 'excuses', developed whereby a family member could avoid being appointed as a curator.

35. In England and Wales there has never been a public duty for family members to act as a deputy or its antecedents but, equally, family members have never had an automatic right to be appointed.

36. The Court of Protection has a discretion as to whom it appoints and has generally preferred to appoint a relative or friend as deputy (as long as it is satisfied that it is in P's best interests to do so), rather than a complete stranger.

37. The main reason for preferring family members to strangers, as a starting point, has been respect for their relationship, which is now reflected in Article 8 of the European Convention on Human Rights, but there are other, practical reasons for choosing a family member.

38. A relative will usually be familiar with P's affairs, and aware of their wishes and feelings. Someone with a close personal knowledge of P is also likely to be in a better position to meet the obligation of a deputy to consult with P, and to permit and encourage them to participate, or to improve their ability to participate, as fully as possible in any act or decision affecting them. And, because professionals charge for their services, the appointment of a relative or friend is preferred for reasons of economy.

*39. There are, of course, circumstances in which the court would never contemplate appointing a family member as deputy. I gave some examples in *Re GW*, London Borough of Haringey v CM [2014] EWCOP B23, at paragraphs 28 and 29.*

Senior Judge Lush also endorsed the submission made on behalf of the local authority applying to be appointed EU's deputy:

“43. I also accept Carol Richards' submission that there can be distinct advantages in having a local authority act as deputy. These include:

- (a) considerable hands-on experience in dealing with the property and financial affairs of adults who lack capacity to manage their own affairs;*
- (b) more rigorous checks and balances against financial misconduct and other forms of abuse than are possible in cases where a lay deputy is appointed;*
- (c) membership of a professional association, the Association of Public Authority Deputies ('APAD'), which provides guidance on professional ethics and best practice; and*

- (d) a greater awareness of:
- (i) the provisions of the Mental Capacity Act 2005;
 - (ii) the application of the principles in section 1 of the Act;
 - (iii) the requirement, where necessary, to assess the person's capacity to make a particular decision at a particular time;
 - (iv) the criteria and procedure for making a best interests decision;
 - (v) the contents of the Mental Capacity Act Code of Practice, particularly relating to the duties of a deputy; and
 - (vi) the ongoing case law emanating from judgments such as this."

Whilst not disagreeing that the propositions set out above are accurate as a general rule, we would also note one potential disadvantage – unlike other deputies, a local authority deputy is not, as a general rule, required to provide security by way of a bond. If, contrary to all expectations, a local authority behaves in a fashion that is contrary to the Act and the Code and causes P financial loss, that loss cannot be made immediately good by calling in a bond and recovery of any loss will therefore be a more complex and (therefore) inevitably more costly process.

Short Note: Attorneys and care expenditure

In *EU (Appointment of Deputy) The Public Guardian v AW and DH* [2014] EWCOP 28, Senior Judge Lush revoked an LPA as the donee had

used a substantial part of P's estate on improvements to the donee's house (where P lived) and payments for the donee's care of P without having sought the court's authority, without obtaining the agreement of the co-donee and without recording or protecting P's interest in the property. She had also severely restricted contact between P and the co-donee and her family. (The donees were sisters and P their mother).

Senior Judge Lush at paragraphs 30-32 held that the proper course would have been an application for authorisation under section 23(2)(b) MCA 2005. At paragraph 32, he referred to the pre Act practice of approving care expenditure and capital expenditure on accommodation in personal injury cases, stating that significant expenditure on improvements to a house where P was living should be protected by a declaration of trust and an entry on the Land Register.

Testamentary capacity and the MCA 2005 (again)

Bray v Pearce and Smith (unreported, 6 March 2014) (Chancery Division) (Mr M H Rosen QC, sitting as a Deputy High Court Judge)

Mental capacity – finance

Summary

With thanks to Martyn Frost for bringing this to our attention (and Constance McDonnell for confirming certain points), we note this further case relating (inter alia) to the question of whether the MCA 2005 applies to the determination of testamentary capacity outside the Court of Protection.

In this case the deceased died on 1 September 2008 when 98 years old. She had made wills on 14 November 2005, 23 November 2007 and 7 December 2007. Each of those wills made Mr Pearce, the deceased's window cleaner, the principal beneficiary and the last will her only beneficiary. Previous wills, the last dated 7 August 2003, made the deceased's nephew her main beneficiary with gifts to various Jewish and animal charities.

The last will was proved in common form by the named (solicitor) executor on 18 November 2008. The nephew brought a claim for the revocation of that grant, declarations against the validity of the 2005 and November 2007 wills and proof in solemn form of the August 2003 will.

The nephew claimed the 2005 and 2007 wills were invalid on various grounds, but the one that concerns us is that of capacity. He also made a claim that he was entitled to a constructive trust interest in the deceased's main asset.

Mr Pearce appeared at the trial but was not represented. He (because of a failure to serve any witness statements or give disclosure) did not give evidence or call witnesses. He was allowed to cross examine the claimant's witnesses and make submissions. The executor appeared by counsel and took a neutral position.

As to the deceased's capacity, there was the written evidence of Professor Jacoby, an eminent old age psychiatrist, together with witnesses of fact as to her condition.

The result of the trial was that the judge (M Rosen QC sitting as a deputy judge of the Chancery Division) declared against the 2005 and 2007 wills and in favour of the 2003 will on the ground that the deceased lacked capacity to make those wills. He would also have found in

favour of the claimant's constructive trust claim, had that been necessary.

As to the test for capacity, he set out the *Banks v Goodfellow* common law test. He then considered whether, in relation to the 2007 wills, the capacity test in the MCA 2005 applied (this issue being dealt with, after the trial, by email correspondence with the judge).

At paragraph 90 Murray Rosen QC stated his view that "*if left to his own devices*" he would hold the Act applied to testamentary capacity at least by analogy. He then, however, at paragraph 91 (and 74) stated that incapacity may be established under section 1(2) of the Act if a real doubt is raised by the evidence from which it is possible to infer incapacity and the defendant does not rebut that inference in evidence.

In this case, the defendant had not been able to call any evidence and at paragraphs 82-84, the judge followed the pre Act cases that held that where a real doubt as to capacity of a testator is raised, the evidential burden to prove capacity shifts to the proponent of the will in question.

The question of the burden of proof was in the end academic as at paragraph 92 the judge held that that the evidence (essentially that the deceased had become delusional) would have satisfied him that the deceased lacked testamentary capacity even if the burden of proof had remained on the claimant throughout.

Comment

The precise effect of the MCA 2005 on the issue of testamentary capacity has yet authoritatively to be determined. There are two questions, one whether the Act's test applies and the other whether the presumption of capacity in the Act means that the burden of proving incapacity

remains on the person asserting it throughout. These questions were recently discussed in an article by Simon Edwards available [here](#).

Assessment of capacity to manage property and affairs

The excellent [Empowerment Matters](#) has just published (free) guidance on assessing, supporting and empowering specific decision-making in the context of financial matters. It is available for free from their [website](#), and contains a wealth of practical tips to assist in the practical application of the MCA 2005 in this vital area.

Conferences at which editors/contributors are speaking

Implementing the Mental Capacity Act and the Deprivation of Liberty Safeguards

Alex and Tor are speaking at this conference arranged by Community Care in London on 8 October 2014, a re-run (with variations) of the sold-out and high octane conference held in March – on the day of the Supreme Court decision in Cheshire West. Full details are available [here](#).

The Mental Capacity Act 2005: Annual Review 16 October 2014

Neil and Tor are speaking at Switalski's multi-disciplinary conference looking at the workings of the Mental Capacity Act 2005 in York on 16 October, alongside speakers including Mr Justice Baker and Fenella Morris QC. Full details are available [here](#).

'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available [here](#).

Court of Protection Practice and Procedure 2014

Alex and Tor are speaking at Jordan's annual Court of Protection Practice in London on 21 October, alongside Mr Justice Charles, Vice-President of the Court of Protection, the Public Guardian, Alan Eccles, District Judge Marin and David Rees. For further details, see [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 Perth on 9 October, Aberdeen on 20 November and Wigtown on 10 December.

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

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.

Our next Newsletter will be out in early 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 Newsletter in the future please contact marketing@39essex.com.

David Barnes

Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson

Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle

Practice Manager
sheraton.doyle@39essex.com

Peter Campbell

Practice Manager
peter.campbell@39essex.com

London 39 Essex Street, London WC2R 3AT
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

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Jill Stavert

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Contributors: England and Wales



Alex Ruck Keene
alex.ruckkeene@39essex.com

Alex 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. **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. 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.**



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.**



Anna Bicarregui
anna.bicarregui@39essex.com

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.**



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.**

Contributors: Scotland



Adrian Ward
adw@tcyoung.co.uk

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.**



Jill Stavert
J.Stavert@napier.ac.uk

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.**