

Court of Protection: Property and Affairs

Introduction

Welcome to the March 2015 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: a case rivalling *Neary* in its importance, a case at the outer limit of the COP's powers and an update on *Re X*;
- (2) In the Property and Affairs Newsletter: recent decisions of Senior Judge Lush, including a rare refusal of an application by the OPG for revocation of a power of attorney including an interesting assessment of the place of P's wishes and feelings;
- (3) In the Practice and Procedure Newsletter: the significant case of *Bostridge* on nominal damages, extreme product champions, veracity experts and the place of morality;
- (4) In the Capacity outside the COP Newsletter: two extremely important decisions of Charles J in relation to the MHT and patients who may lack capacity, an extremely significant Strasbourg decision on Article 5; anonymisation, the capacity to drive; and a new SCIE directory of MCA resources;
- (5) In the Scotland Newsletter: an appreciation of Sheriff John Baird, an update on deprivation of liberty in the context of the SLC report, new guidance from the MWC about managing the finances of those lacking the material capacity; an update on incapacity matters addressed (or not) in proposals for court reform and the further Devolution Command paper, and an update on the Assisted Suicide Bill.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#).

Editors

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

Scottish contributors

Adrian Ward
Jill Stavert

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For all our mental capacity resources, click here . Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk .	

Short Notes of recent decisions by Senior Judge Lush

Senior Judge Lush has loyally been following the guidance of the President as to the publication of judgments, and we note here four recent decisions with implications going beyond the facts of the individual cases.

Re GW [\[2015\] EWCOP 9](#)

In the course of ordering the revocation of a LPA, the Senior Judge remarked on the unerring monotony of cases where attorneys do not pay care home fees and personal allowances to a patient with the result that the Public Guardian has to intervene.

Clearly, the message is not getting through.

Re SB [\[2015\] EWCOP 7](#)

Again whilst revoking a LPA, the Senior Judge considered whether simply to appoint one of P's close friends as sole deputy or as joint deputy with a panel deputy. He did the latter because of the need for an impartial third party to help deal with potential family conflict even though he noted that many panel deputies are reluctant to take such joint deputyships because of extra cost and professional indemnity issues (the panel deputy in this case had, after discussion with her partners, agreed to this course).

Re EG [\[2015\] EWCOP 6](#)

In revoking a LPA because of unauthorised gifts (more messages not getting through), the Senior Judge remarked that had an application for authority been made, it would have been received sympathetically in relation to one of the attorneys because she had given up her job to

look after P. He also stated that such an allowance ordered by COP would be treated by HMRC as voluntary and therefore not subject to tax, see HM Revenue & Customs Employment Status Manual, [ESM4016](#)

Re DT [\[2015\] EWCOP 10](#)

Unusually, the Senior Judge dismissed the Public Guardian's application for the revocation of a EPA. The application had been brought because of a failure to pay care home fees and a failure to account when required so to do.

The application was dismissed, however, principally because P was adjudged to retain capacity to revoke the EPA and vigorously expressed his desire not to do so, He wanted his sons to continue to act as his attorneys. The Senior Judge remarked on the fact that the former factor would have prevented him revoking a LPA.

He found that the revocation would cause P significant distress and could not be in P's best interests. Further, P's house had just been sold and after payment of care home arrears, P's assets would be very limited and a panel deputy's fees would soon reduce them to nothing so that such an appointment would be disproportionate even if necessary (which it was not).

This last decision is also of some interest for Senior Judge Lush's (very deliberate) invocation of the remarks of Her Honour Judge Hazel Marshall QC in *Re S and S (Protected Persons)* [2008] COPLR Con Vol 1074, where she held that, if P expresses a view that is not irrational, impracticable or irresponsible, "*then that situation carries great weight and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential*

sufficiently detrimental effect for P of doing so which outweighs this.” These remarks were held by Lewison J in *Re P (Statutory Will)* [\[2009\] EWHC 163 \(Ch\)](#) [2009] COPLR Con Vol 906 to have gone too far in terms of prioritising P’s wishes and feelings (see paragraph 41). They are, though, absolutely in line with the subsequent construction of the best interests test given by the Supreme Court in [Aintree v James](#) at paragraph 45, and, we would further suggest, represent the only construction of the MCA 2005 compatible with Article 8 ECHR, let alone Article 12 of the CRPD. It will be interesting to see whether these arguments are given a hearing by the European Court of Human Rights in the application made by RB discussed in the Health, Welfare and Deprivation of Liberty Newsletter.

Conferences at which editors/contributors are speaking

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available [here](#).

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available [here](#).

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see [here](#).

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see [here](#).

Editors

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

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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 April. 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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Editors

Alex Ruck Keene
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Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

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Alex Ruck Keene
alex.ruckkeene@39essex.com

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, 2015, 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.**



Annabel Lee
annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. **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 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.**