

Court of Protection: Property and Affairs

Introduction

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

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: 'baby Bournemouth?', an update on the long-awaited Guidance on Deprivation of Liberty, deprivation of liberty at home, the 7th IMCA report and an important ECtHR ruling on the acid test;
- (2) In the Property and Affairs Newsletter: an important decision on the interaction between the CICA and the COP, anonymisation of judgments and changes to LPA forms;
- (3) In the Practice and Procedure Newsletter: details of the first stage of reform of the COP rules, the new Practice Direction on contempt of court, vulnerable witnesses, and funding questions;
- (4) In the Capacity outside the COP Newsletter: an editorial comment on the Care Act and capacity, the House of Lords debates the Select Committee report, recruitment for the chair of the National Mental Capacity Forum, an extremely important decision of the Supreme Court on informed consent, and the publication of the first work on the international protection of adults edited (inter alia) by Alex and Adrian;
- (5) In the Scotland Newsletter: a bumper selection of important material, including news of a new project to consider compatibility of both Scots and NI legislation with the CRPD, the potential for the introduction of designated specialist sheriffs for adult incapacity work, and commentary on recent case-law of relevance to practitioners in the area.

We are also delighted to announce that, as of this month, Beverley Taylor, until recently the Deputy Official Solicitor, will be providing regular guest contributions.

Editors

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

Guest contributor

Beverley Taylor

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

The CICA and the COP

Newcastle City Council v PV and Criminal Injuries Compensation Authority [2015] EWCOP 22
(Senior Judge Lush)

COP jurisdiction and powers – interface with personal injury proceedings

Summary

In this case, Senior Judge Lush had to decide various issues arising out of a large (just over £2.8 million) CICA award decided under the 1990 scheme as a result of an application made in March 1996.

Senior Judge Lush ruled that, as the result of the fact that there is no equivalent to CPR Part 21 in the rules governing applications to the CICA, an application to the CICA by an adult who lacks mental capacity should be made by the holder of a property and affairs EPA or LPA or a deputy or person specifically authorized so to do by the Court of Protection (see paragraph 28).

He ruled, in line with civil claims, that the Court of Protection's approval is not necessary for awards to be accepted on P's behalf, whether as to quantum or conditions (see paragraphs 30 and 32).

He further ruled that where the CICA makes it a condition of an award that there is a trust, then the Court of Protection, where the applicant lacks capacity so to do, should set up the trust and an application must be made to the Court of Protection for an order under section 18(1)(h) of the MCA (see paragraphs 38 – 41, differing here from the position of the Official Solicitor, who had invited him to find that it was the CICA/the

Tribunal to establish the settlement and execute any relevant instruments).

Senior Judge Lush ruled that, although the terms of the trust were in the Court of Protection's discretion, he doubted whether the court could do other than approve the terms stipulated by the CICA or the Tribunal and he could not envisage a situation in which the court would not approve terms which, for policy reasons, were so fundamental as to be non-negotiable (see paragraphs 43 and 44). He ruled that a deputyship might not be necessary where there was a trust, (see paragraphs 45 – 48). He further ruled that the deputy could also be a trustee but that the trust should contain a power for P, and hence the Court of Protection, to remove and replace trustees, (see paragraph 59).

Finally, Senior Judge Lush ruled that a *Peters* (*Peters v East Midland Strategic Health Authority* [2010] QB 48) undertaking was appropriate (see paragraph 67) or, if the deputyship order is discharged, there should be a suitable restriction of the trustees powers, (see paragraph 72).

Comment

Senior Judge Lush's decision is of importance for outlining (for the first time) the respective tasks of the CICA and the Court of Protection in relation to recipients of CICA awards who are unable to manage their property and affairs. His pragmatic approach (e.g. to the question of whether and how applications were to be made in the absence of rules providing for litigation friends before the CICA) is unsurprising.

Senior Judge Lush's approach to the question of *Peters* undertakings is unlikely to be of much future relevance in relation to CICA awards given the current £500,000 cap on CICA awards. It is, however, of interest in relation to personal injury

awards (although Senior Judge Lush has previously expressed some scepticism about the role of the Court of Protection in seeking to ensure that double-recovery does not take place: see his earlier decision in [Re Reeves](#)).

Short Note: Anonymity in judgments

The only other judgment of Senior Judge Lush from March that merits specific mention is that in *Re AW (DB v DW)* [\[2015\] EWCOP 16](#).

In this case Senior Judge Lush was faced with competing claims to be appointed P's deputy. One applicant was P's nephew, the other the brother in law of P's former companion. The Senior Judge referred to paragraph 20(iii) of the practice guidance which says that *"anonymity in the judgment as published should not normally extend beyond protecting the privacy of adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so."* He then referred to Article 6 of the European Convention on Human Rights which requires that a fair balance should be struck between the opportunities afforded to the parties involved in litigation and *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 2013 where, at paragraph 33, the European Court of Human Rights stated that *"in litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."* He ruled that in those circumstances, he would direct anonymity for both parties.

Amendment of LPA forms from July 2015

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2015 (SI 2015/899) come into effect on 1 July 2015, to introduce new prescribed forms for both health and welfare and property and affairs LPAs; to remove the requirement for two certificate providers in cases where the donor does not want anyone to be notified of an application for registration; and to revise the application to register form. They also replace the term "named persons" with the more logical "person [or "people"] "to notify."

The new prescribed forms will have to be used from 1 July, but transitional provision is made to permit the continued use of the existing version of the prescribed forms provided that execution of the form occurs before 1 January 2016.

A useful practical guide to the changes to the forms introduced by the Regulations prepared by Caroline Bielanska can be found [here](#).

Conferences at which editors/contributors are speaking

Socio-Legal Studies Association

Alex is presenting a paper on “(Re)presenting P before the Court of Protection” and Jill a paper on “Addressing the *Bournewood* gap in Scotland” at the SLSA 2015 Annual Conference at the University of Warwick 1-2 April.

Commonwealth Legal Education Association

Jill will be presenting (with Rebecca McGregor) a paper on “Access to equal recognition before the law for persons with mental disabilities through supported decision making in Scotland” at the Commonwealth Legal Education Association 2015 conference in Glasgow 9-10 April.

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](#).

Medical Issues and the Mental Capacity Act 2005

Tor will be speaking at a conference arranged by Clarke Willmott on 24 April, her topic being “The Court of Protection and medical treatment disputes: avoiding court and what happens if you can't.” Full details of the conference are available [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](#).

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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.

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.

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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, 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
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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.**



Neil Allen
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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.**



Annabel Lee
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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
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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.**



Adrian Ward
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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.**