

Court of Protection: Property and Affairs

Introduction

Welcome to the September 2015 Newsletters: Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on the *Re X* saga, clarification over DoLS and conditional discharges, scrutiny of DoLS scrutinisers, an important decision on withdrawal of treatment, and a guest article by Dr Gareth Owen and capacity and brain injury;
- (2) In the Property and Affairs Newsletter: an important decisions on P's use of funds for school fees in the context of mutual dependency, successive deputies, adverse costs orders and interest free loans, bad LPA behaviour, and family members as deputies;
- (3) In the Practice and Procedure Newsletter: clarification over the (lack of) funding of s49 court reports, the importance of participation in proceedings, and habitual residence;
- (4) In the Capacity outside the COP Newsletter: CRPD Committee's guidelines on article 14, assisted suicide, and litigation capacity in other proceedings;
- (5) In the Scotland Newsletter: questionable policies and article 8 ECHR, the Education (Scotland) Bill, new guidance and ordinary residence, and new DOL guidance.

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

Editors

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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.

School Fees and Mutual Dependency

David Ross v A [\[2015\] EWCOP 46](#) (Senior Judge Lush)

Summary and comment

In this case P's professional deputy made an application to authorise the payment of P's brother's school fees from P's clinical negligence award. The Official Solicitor acting as P's litigation friend opposed the application and submitted that the deputy ought to reimburse P's fund in relation to school fees that had already been paid.

The Senior Judge allowed the application, making it clear at the end of his judgment that this case was decided (as all such cases are) on its own facts and should not be taken as any precedent for the payment of siblings' school fees from damages awards.

Notwithstanding that warning, there are some aspects of the case that deserve further mention. The first is that at paragraph 30 the Senior Judge castigated the Official Solicitor's approach as unnecessarily intrusive and hostile. The Senior Judge considered that the Official Solicitor had failed to understand the natural and inevitable mutual dependence of P and P's family in cases such as this, as had been described by the Court of Appeal in *Re B (deceased)* [2000] 1 All ER 665.

The second is the way in which the Senior Judge considered that it would be appropriate to review decisions that the professional deputy had already taken, in this case to pay the fees without first having the court's authorisation.

At paragraph 40, he noted section 4 (7) (d) MCA (which requires the court to take into account the

views of any deputy) and held that where a professional deputy had carefully gone through the checklist of matters to be taken into account when making a best interests decision, the court should be reluctant to interfere unless the decision was plainly wrong. In the end, he held that the deputy's decision had not only not been plainly wrong, it had been right.

Finally, at paragraph 36, the Senior Judge again emphasised the reasons why the court will normally appoint a professional deputy to administer damages awards on behalf of protected beneficiaries. This is to avoid the potential for conflicts of interest or hidden agendas that might otherwise arise.

Successive Deputies

Re H, on the application of F and M [\[2015\] EWCOP 52](#) (Senior Judge Lush)

Summary

In this case P's parents applied to be appointed as P's deputies for welfare and property and affairs. They also applied for the appointment of successive deputies pursuant to section 19(5) MCA.

The Senior Judge remarked at paragraph 7 that such appointments were very rare. In the circumstances, therefore, he ordered a report from the Public Guardian pursuant to section 49 MCA into the appointment of successive deputies both in the instant case and generally.

P was 26 at the date of the hearing and lived with her parents. She had suffered severe injuries at birth but there was no damages award. She was severely autistic.

The report highlighted the difficulties that those suffering from autism encountered in communicating with others and the need that they have for someone familiar who can interpret how they feel.

The Senior Judge also sought and considered representations from a representative from the Building Societies Association as to the practicalities of successive deputies in terms of their recognising the successor deputy.

On what appears to be a fine balance from the checklist the Senior Judge approved the successive appointments principally because it would give P's parents peace of mind having arranged matters properly for the long term, that the successive deputies would be more likely to take part in P's life and this would filter through to P.

Again the Senior Judge referred to the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD'), which the United Kingdom ratified on 7 August 2009 which stipulates in article 12.4 that:

"States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial

authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."

He made the point that that would point towards limiting (in time) the terms of appointment of deputies and away from successive appointments. He held, however, that in this case P's best interests were served by such appointments. He noted that in any event limited appointments would be unpopular and administratively inconvenient.

Adverse costs and interest free loans

DC TT and ST v MA and PB [\[2015\] EWCOP 49](#)
(Senior Judge Lush)

Summary

In this case the applicants (three of P's children) sought a reconsideration of the appointment of the respondents (two of P's children) as attorneys pursuant to a LPA.

The application was dismissed but the Senior Judge ordered the applicants to pay the respondents' costs because they had made a weak application, failed to answer the evidence the respondents filed and did not turn up to the hearing.

Of note is the form of order. The Senior Judge made each applicant liable for an equal share of the costs. He also authorised the attorneys to make an interest free loan to each applicant to pay the costs, such loan to be repaid from the applicant's share of P's estate on his death. This novel form of order meant that he could make an

order reflecting the outcome of the case and his disapproval of the applicants' conduct notwithstanding the fact that they contended that they were unable to pay them.

LPA revocation for bad behaviour

The Public Guardian v DA, YS and ES [2015] EWCOP 41 (Senior Judge Lush)

Summary

In this case the Public Guardian applied for the revocation of a LPA on the ground that the donees had failed to keep accounts and had used their position to advance their own interests by using the proceeds of sale of P's property for their own purposes and obtaining large shares for themselves in the property bought with the proceeds.

The application was granted and a panel deputy appointed with the Senior Judge predicting litigation in the Chancery Division to restore P's assets. As regards costs, the Senior Judge departed from the general rule and made no order costs.

The attorney's behaviour in this case was particularly poor. It might have been a case where they ought to have paid the Public Guardian's costs.

Familial Deputies

Re PAW [2015] EWCOP 57 (Senior Judge Lush)

Husband (ARW) and wife (PAW) both had Alzheimer's dementia. He applied with other family members to become her deputy for

property and financial affairs. One of their sons objected.

The Senior Judge reiterated the court's general preference to appoint a relative or friend as deputy rather than a stranger if it was in P's best interests. Such a starting point accorded with Article 8 and had practical reasons:

"25. 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."

The court went on to outline some examples of when a family member would not be appointed:

- (a) *the proposed deputy has physically, emotionally or financially abused P;*
- (b) *there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;*
- (c) *there is an actual conflict of interests, rather than simply a potential conflict;*
- (d) *the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs;*
- (e) *there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs; and*
- (f) *there is a need to ensure that P is free from undue influence, particularly the*

influence exerted by the person who is seeking to be appointed as deputy.

On the facts, the husband was not appointed because of his health issues and he would probably prefer to be relieved of the worry. Instead, the sister and brother of her first cousins (who were originally proposed with ARW) would instead be appointed jointly.

Conferences at which editors/contributors are speaking

The Mental Capacity Act 2005 – Ten Years On

Alex will be delivering his paper, '(Re)presenting P', and Neil will be delivering, 'The (not so?) great confinement' at this major conference hosted by the University of Liverpool on 9 and 10 September 2015. For further details and to book, see [here](#).

Court of Protection Practitioners' Association National Conference

Alex will be speaking at COPPA's national conference on 24 September 2015. For further details, and to book, see [here](#).

Queen Mary University

Jill will be a discussant at the Rethinking Deprivation of Liberty in a Health and Social Care Context Conference at Queen Mary University of London on 30 September 2015.

Bromley Safeguarding Adults Board 2015 Conference

Annabel is speaking at this conference on 6 October 2015 about the role of the Court of Protection.

Jordan's Court of Protection Conference

Alex will be delivering, 'More Presumptions Please? Wishes, feelings and best interests decision-making' at Jordan's Annual Court of Protection Conference on 13 October 2015. For further details, and to book, see [here](#).

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Seventh Annual Review of the Mental Capacity Act 2005

Neil and Alex will both be speaking (along with Fenella Morris QC) at this annual fixture in York on 15 October 2015, under the auspices of Switalskis solicitors. For further details, and to book, see [here](#).

Click [here](#) for all our mental capacity resources

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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.

Taking Stock

Neil will be speaking on 16 October 2015 at this annual fixture, arranged by Cardiff Law School and the University of Manchester, at the Royal Northern College of Music. For further details, and to book, see [here](#).

Community Care Live

Annabel is presenting a legal masterclass on the Mental Capacity Act 2005 and Alex will be on a panel discussion on deprivation of liberty at Community Care Live 2015 in London on 3-4 November 2015. For further details, and to register for this event, see <http://www.communitycare.co.uk/live/>

Other conferences and training events of interest

Our friends Empowerment Matters are hosting an IMCA conference on 12 November at the Smart Aston Court Hotel in Derby, entitled 'Interesting Times – developments for IMCAs in practice and law.' For more details and to book, see [here](#).

The charity, Living Well Dying Well, is holding its first annual national conference, 'Doing Death Differently' in London on 7 November 2015. For more details and to book, see [here](#).

Peter Edwards Law have released details of their autumn training courses on matters MCA and Care Act related. The full details of (very well received) courses can be found [here](#).

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

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Use this QR code to take you directly to the CoP Cases Online section of our website





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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, 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.**



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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. 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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Annabel appears frequently in the Court of Protection and is instructed on behalf of the Official Solicitor, individuals, local authorities, care homes and health authorities. Her COP practice covers the full range of issues in health and welfare, property and affairs, and medical treatment cases, with particular expertise in international cross-border matters. Annabel also practices in the related fields of human rights and community care. **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.**



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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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Jill Stavert is Professor of 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.**