



Welcome to the November 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal considers parental consent to confinement, CANH withdrawal and the courts, and the latest DOLS figures;

(2) In the Property and Affairs Report: personal injury payouts and s.117 MHA 1983, calling in bonds and court approval of compromises through a human rights lens;

(2) In the Practice and Procedure Report: the Court of Protection Rules 2017 and what we can learn from the new Family Procedure Rules and PD concerning vulnerable witnesses;

(3) In the Wider Context Report: re-framing *Gillick* competence through MCA eyes, MHA changes coming into force, and CRPD developments and resources;

(4) In the Scotland Report: critical comments on practice rules, counter-proposals for guardians and parental consent to confinement from a Scottish perspective;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#). On our website, you can also find updated versions of our [capacity](#) and [best interests](#) guide, and new [guide](#) to without notice applications before the Court of Protection.

His fellow editors also take this opportunity to congratulate Neil on his very well-deserved [nomination](#) for the Bar Pro Bono award 2017.

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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The Court of Protection Rules 2017 (and associated Practice Directions)

As of 1 December 2017, the *look* of the Court of Protection Rules is to be dramatically changed with the coming into force of the Court of Protection Rules 2017 ('the 2017 Rules'), which will recast all of the Rules into the same format as the Civil Procedure and Family Procedure Rules. The new-look Court of Protection Rules will also incorporate those rules relating to case management which have, since September 2016, been implemented by way of the Case Management Pilot. The accompanying Practice Directions are amended where necessary to reflect the renumbering of the Rules, and will also cement into the practice of the Court the Transparency Pilot and the Section 49 Report Pilot.

This note ¹ sets out the background to the changes and highlights some key features for practitioners to be aware of under the new regime.

Background

It is now ten years since the MCA came into

force and the 'new' Court of Protection opened its doors for business. After an abortive start in 2010, a rolling programme of incremental reform has been undertaken since 2014 by the ad hoc Rules Committee to respond to a range of challenges. These include, most notably, participation of 'P,' concerns that welfare cases in particular were not being managed as effectively as they should, and the concerns as to whether the public interest mandated a greater degree of transparency about the court process. The Court of Protection (Amendment) Rules 2015 began the process in earnest, in particular with the introduction of Rule 3A, requiring the court to consider a menu of options at the outset of each case as to how P is to participate (these changes and the others were described in Alex's article "The next stage of the journey – the Court of Protection (Amendment) Rules 2015" [2015] Eld LJ 150). Much of the work since then has been done by way of pilots, in particular the Case Management Pilot introduced with effect from 1 September 2016, providing for the introduction of three distinct pathways for COP proceedings: 1) a Property and Affairs pathway, 2) a Health and Welfare pathway, and 3) a hybrid pathway for cases that

¹ A version of which will appear in the next issue of the Family Law Journal. It would have appeared in the Elder Law Journal but for the sad – and unwarranted –

demise of that important publication at the hands of LexisNexis.

have elements of both. A Transparency Pilot introduced on the same date provided, in essence, for all hearings to be held in public subject to reporting restrictions (the Pilot was amended earlier this year to merge the approach under this Pilot and that traditionally adopted in serious medical treatment cases, which had, similarly, been held in public with reporting restrictions). Finally, a Pilot also introduced on 1 September 2016 sought to address problems that had been encountered with securing reports from NHS bodies and local authorities under the provisions of s.49 MCA. A limited number of amendments to the Rules were subsequently introduced earlier this year to add provisions relating to civil restraint orders and rules for cross-border cases arising under Schedule 3 to the MCA.

During the course of the incremental reform process, it became increasingly clear that it was unhelpful that the Court of Protection Rules were numbered in sequential fashion, and that it would be more appropriate for them to be recast into the same format as the governing rules of Family, Civil and Criminal courts. The Case Management Pilot introduced recast rules for those cases falling within the Pilot; the 2017 Rules adopts the re-cast structure and reformats the entirety of the remainder of the Rules in the same fashion.

Changes brought about the 2017 rules

There have been only minimal changes implemented by the 2017 Rules as they are predominantly consolidating provisions. There will be an inevitable learning curve while practitioners find their way around COPR 2017: to ease the pain, an unofficial destination table can be found at the end of this note. In this

regard, it should also be noted that “Rule 3A representatives,” often called on in deprivation of liberty proceedings, are now “Rule 1.2 representatives.”

The only new rules are contained in the new Part 21. These are modelled on provisions in the CPR and FPR and contain comprehensive freestanding provision for proceedings in relation to contempt of court, replacing the much more limited provisions in Part 21 of the 2007 Rules. It should perhaps be noted that Case Management Pilot approach to expert evidence has been implemented in Part 15 of the 2017 Rules confirming that the Court of Protection is now in alignment with the restrictive approach to such evidence taken in family proceedings.

Changes brought about by the Practice Directions

Accompanying the 2017 Rules are a new suite of Practice Directions. For the most part these roll forward the relevant Practice Directions accompanying the 2007 Rules with relevant renumbering. The pilots set out above have all been incorporated into the practice of the court (through PD3B, Case Management; 4C, Transparency; and 14E, Section 49 reports respectively).

One important point to note is in relation to serious medical treatment cases. Practice Direction 9E to the 2007 Rules, concerning serious medical treatment, will not be replaced in the new suite of practice directions, and it is not clear at this point whether a further practice direction will be promulgated in due course concerning this issue. What is now PD3A (on allocation) has also been amended to remove any reference to serious medical treatment,

which had always to be allocated to High Court judges. It now provides that “*where an application is made to the court in relation to an ethical dilemma in an untested area, the proceedings must be conducted by a Tier 3 judge [i.e. High Court] judge.*” Pending any decision of the Supreme Court in the Y case, we are in somewhat uncharted waters at the moment as to the question of precisely what medical treatment cases need to come to court; the removal of PD9E and the amendment of (now) PD3A means that we are also in uncharted waters as to what should happen to them when they reach the court.

Transitional provisions

Practitioners need to be aware of the strict PD24C, providing for transitional provisions, as these could easily trip up the unwary. They provide that applications under the previous rules or pilot PDs received on or after 1 December will be returned, albeit that an application made using the old forms will be accepted until close of business on 12 January 2018 or such later date as the Senior Judge may direct. Where proceedings are ongoing as at 1 December, the general presumption will be that any step in proceedings which were started (i.e. the application form was issued by the court) before 1 December which is to be taken on or after that date is to be taken under the 2017 Rules, subject to any directions given by the court.

Destination table for Court of Protection Rules 2007 as now recast as Court of Protection Rules 2017

Notes:

1. The Court of Protection Case Management

Pilot introduced Pilot Parts 1–5 and 15, which had the same numbering as the COPR 2017.

2. Part 22 in the COPR 2007 (as amended), providing for transitional arrangements, has been deleted and replaced with a new Part 22 addressing Civil Restraint Orders. The contents of Parts 21-4 of the COPR 2007 (as amended) have also been moved around within the Parts of the COPR 2017; the destination table proceeds by reference to the organisation of the COPR 2007 as opposed to the organisation of the new COPR 2017.

COPR 2007 (as amended)	COPR 2017
Part 2: The overriding objective rr3–5	Part 1: The overriding objective rr1.1–1.6
Part 3: Interpretation and general provisions rr6–9A	Part 2: Interpretation and general provisions rr2.1–2.6
Part 4: Court documents rr10–24	Part 5: Court documents rr5.1–5.16
Part 5: General case management powers rr25–28	Part 3: Managing the case rr3.1–3.9
Part 6: Service of documents rr29–39H	Part 6: Service of documents rr6.1–6.19
Part 7: Notifying P rr40–49	Part 7: Notifying P rr7.1–7.11
Part 8: Permission rr50–60	Part 8: Permission rr8.1–8.6
Part 9: How to start proceedings rr61–76	Part 9: How to start and respond to proceedings, and parties to

	proceedings rr9.1–9.16
Part 10: Applications within proceedings rr77–82	Part 10: Applications within proceedings rr10.1–10.10
Part 10A: Deprivation of liberty r82A	Part 11: Deprivation of liberty r11.1
Part 11: Human rights r83	Part 12: Human rights r12.1
Part 12: Dealing with applications rr84–86	Part 3: Managing the case rr3.1–3.9
rr87–89	Part 13: Jurisdiction, withdrawal of proceedings, participation and reconsideration rr13.1–13.4
Part 13: Hearings rr90–93	Part 4: Hearings rr4.1–4.4
Part 14: Admissions, evidence and depositions rr94–118	Part 14: Admissions, evidence and depositions rr14.1–14.25
Part 15: Experts rr119–131	Part 15: Experts rr15.1–15.13
Part 16: Disclosure rr132–138	Part 16: Disclosure rr16.1–16.8
Part 17: Litigation friends and rule 3A representatives rr140–149	Part 17: Litigation friends and rule 1.2 representatives rr17.1–17.14
Part 18: Change of solicitor rr150–154	Part 18: Change of solicitor rr18.1–18.5

Part 19: Costs rr155–168	Part 19: Costs rr19.1–19.14
Part 20: Appeals rr169–182	Part 20: Appeals rr20.1–20.14
Part 21: Enforcement rr183–184	Part 21: Applications and proceedings in relation to contempt of court rr21.1–21.32
Part 21: Enforcement rr185–194	Part 24: Miscellaneous rr24.1–24.6
Part 22: Transitory and Transitional Provisions rr195–199	Deleted and not replaced
Part 23: Miscellaneous rr200–202	Part 24: Miscellaneous rr24.3–24.5
Part 23: Miscellaneous r203	Part 22: Civil restraint orders r22.1
Part 24: International Protection of Adults rr204–209	Part 23: International protection of adults rr23.1–23.6

The table above is reproduced with permission of the Legal Action Group, and is taken from the revised second edition of the Court of Protection Handbook which is to be published at the start of December, and which will include both hard copies of the Rules and an introductory overview of significant changes in the law in the past year.²

² A supplement containing the introductory overview and the new Rules will be available as a free eBook and PDF. A hard copy will be sent out automatically (for free) to people who bought the second edition directly from LAG but can be

requested (by email to lag@lag.org.uk) for free by those who bought from other outlets.

Accredited Legal Representatives

The first cohort of Accredited Legal Representatives have now been approved by the Law Society – congratulations to them all (the list can be found [here](#)).

We now await further progress from HMCTS and the judiciary to outline precisely when and how ALRs will be appointed as part of the initial consideration by the court of P's participation under (soon to be) Rule 1.2 of the COPR 2017. In the interim, however, we see no reason³ why proactive steps cannot be taken by an approved solicitor who has been approached by P, an RPR or an IMCA in an s.21A application. In such a case, the solicitor may consider filing a witness statement confirming their accreditation, describing their interaction with P and explaining why this could be a suitable case for P to participate through the appointment of an ALR rather than via a litigation friend.

The Law Society has also, importantly, published its *Practice Note on Accredited Legal Representatives in the Court of Protection*. This practice note, available [here](#),⁴ includes detailed advice on:

- the role of an Accredited Legal Representative
- communicating with and taking instructions from your client

The table also appears on the Handbook website, where the new Rules and Practice Directions can also all be [found](#).

³ See also in this regard Sophy Miles' [note](#) on the Court

- representing P and ensuring P's effective participation
- your duties of confidentiality and disclosure
- good practice in the Court of Protection
- funding of P's legal costs
- applications under s21A Mental Capacity Act 2005
- other issues e.g. breach of the HRA 1998.

New Family Procedure Rules on Participation of Vulnerable People: Enabling the Court of Protection to pick up the pace?

[We are very pleased to be able to include this guest article by Professor Penny Cooper on what we can draw from the new procedures introduced into the Family Courts with effect from the end of this month]

The Family Procedure (Amendment No. 3) Rules 2017 are in force from 27th November 2017. They are supplemented by Practice Direction 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence. The Ministry of Justice explanatory memo says these changes "were informed by a 2015 report of the *judicially-led Vulnerable Witnesses and Children Working Group*, established by the President of the

of Protection Handbook website, Sophy having been instrumental in the work leading to the establishment and approval of ALRs.

⁴ Although the Practice Note is free, it is – somewhat unhelpfully – at present behind a wall on the Law Society website which requires registration.

Family Division." It was a slow journey from the report of that group to the consultation and finally the rules. The aim is simple: To improve the participation of parties and witnesses in the family cases.

What follows is a quick overview of the new rules and Practice Direction; they contain some useful points of reference for Court of Protection practitioners.

There is a common-sense approach to the meaning of *participation*. The court's decision about whether a party or witness's participation is likely to be diminished by reason of vulnerability should take into account their ability to:

- a) understand the proceedings, and their role in them, when in court;*
- (b) put their views to the court;*
- (c) instruct their representative/s before, during and after the hearing; and*
- (d) attend the hearing without significant distress. (PD 3AA, 3.1)*

The new rules and the PD together result in a checklist for *vulnerability*. When considering the vulnerability of the party or witness the court must have regard to the matters set out in paragraphs (a) to (j) and (m) in rules 3A.7 (FPR 3A.3).

- (a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—*
 - (i) any other party or other witness to the proceedings or members*

of the family or associates of that other party or other witness; or

- (ii) any members of the family of the party or witness;*

(b) whether the party or witness—

- (i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;*

- (ii) has a physical disability or suffers from a physical disorder;*
or

- (iii) is undergoing medical treatment;*

(c) the nature and extent of the information before the court;

(d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;

(e) whether a matter is contentious;

(f) the age, maturity and understanding of the party or witness;

(g) the social and cultural background and ethnic origins of the party or witness;

(h) the domestic circumstances and religious beliefs of the party or witness;

(i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G (6) of the [Matrimonial and Family Proceedings] 1984 Act;

(j) any characteristic of the party or witness which is relevant to the participation direction which may be made;

(k) whether any measure is available to the court;

(l) the costs of any available measure; and

(m) any other matters set out in Practice Direction 3AA.' (FPR 3A.7).

The Practice Direction supplements this by adding that abuse includes concerns arising from:

- domestic abuse, within the meaning given in Practice Direction 12J;
- sexual abuse;
- physical and emotional abuse;
- racial and/or cultural abuse or discrimination;
- marriage or so called 'honour based violence';
- female genital or other physical mutilation;
- abuse or discrimination based on gender or sexual orientation;
- and human trafficking.

The rules represent progress on the definition of vulnerability. There is a significant nod to the criminal justice system (as the 2015 report had intended) but fortunately the rules do not copy the confusing, bifurcated 'vulnerable' or 'intimidated' definition that criminal courts sometimes struggle with. 'Special measures' have quite rightly become simply 'measures'. The family court must have regard to (a) to (m) when deciding whether to make a '*participation direction*' about '*measures*' (FPR 3A.8) such as

live link, an intermediary or 'anything else' in PD 3AA.

The rules are straightforward but implementing them will not always be so; nothing in the rules gives the court power to direct public funding must be made available for a measure (3A.8(4)). Moving locations if a measure is not available at one court (3A.8 (2)) is possible, but in some cases solving one issue (such as the need for a live link) could be at the expense of unsettling or making travel arrangements harder for a vulnerable person. However, it is encouraging to see that the Practice Direction (5.4) allows for the pre-recording of a witness's evidence.

Some people will remember that one of the tasks of the 2015 working group (of which I was a member) was to review the Family Justice Council's April 2010 *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872. Anyone hoping for some new pointers here will be disappointed; neither the new rule nor the PD addresses this topic.

Ground Rules Hearings were born in the criminal justice system as were 'toolkits' for advocates working with vulnerable people. The family court's new Practice Direction has a section on *Ground Rules Hearings* and also says that advocates (including litigants in person) should be familiar with The Advocate's Gateway toolkits (PD 3AA, 5.7).

Whatever the impact of these new provisions in family courts, one thing is for certain, the spotlight continues to fall on the topic of practitioner competence. In the Court of Appeal Criminal Division in August 2017, Lord Thomas CJ issued a mighty judgment dealing with, in

part, vulnerable defendants and advocates' duties:

*We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.*⁵

Developments about participation for vulnerable people in the criminal and family courts will no doubt continue to inform practice in the Court of Protection. Recently CoP guidance has been issued to "provide helpful suggestions as to how practitioners might consider enhancing participation of [the vulnerable person] in proceedings in the Court of Protection."⁶ This represents a very good start; however, I am reminded of the words of Lucy Series and colleagues:

Surprisingly given it is a jurisdiction wholly devoted to matters concerning people with mental disabilities, the CoP has until recently given no systematic consideration to the special measures and reasonable adjustments that would be needed to facilitate the participation of P. Recent (non-binding) guidance encourages judges and parties to consider these matters, but there is no provision in the [CoP Rules] or practice directions in relation to this matter, and

*questions remain as to how such measures would be funded.*⁷

The Court of Protection seems to be moving along a fairly well-trodden path which ought to mean the pace can pick up. Perhaps the ad hoc Rules Committee of the COP will take FPR 3A and PD 3AA as a starting point and see where re-using and up-cycling takes them, just as the family courts did with criminal justice practice.

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⁵ *R. v Grant–Murray & Henry; R. v McGill, Hewitt & Hewitt [2017] EWCA Crim 1228*, para. 226.

⁶ Charles, Mr. Justice. (2016). Facilitating participation of P and vulnerable persons in Court of Protection Proceedings.

⁷ Series, L., Fennell, P. & Doughty, J. (2017). The Participation of P in Welfare Cases in the Court of Protection. England: Cardiff University & The Nuffield Foundation. 15.

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Conferences

Conferences at which editors/contributors are speaking

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see [here](#).

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 8 December which looks both at the present and potential future state of the law in this area. For more details, see [here](#).

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 the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our last report of 2017 will be out in 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 Report in the future please contact: marketing@39essex.com.

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