



Welcome to the December 2022 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Collection of sperm where a person is on the edge of brain death; public protection and deprivations of liberty; and many newly-reported 'part 2' judgments tell us what happened next.
- (2) In the Property and Affairs Report: Lasting Powers of Attorney bill is published; and deprivations of assets.
- (3) In the Practice and Procedure Report: Cross-border placements; and amendments to the Court of Protection Rules.
- (4) In the Wider Context Report: 'A gloriously ordinary life'; *Crowter* in the Court of Appeal; consent to adoption and capacity; prolonged disorders of consciousness; and a Strasbourg update.
- (5) In the Scotland Report: A new checklist for cross-border placements; a decision to close day centres is reduced; and model laws for advance choices.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also subscribe to this Report, and where you can also find updated versions of both our capacity and best interests guides.

Editors

Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sullivan
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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

Contents

| | |
|--|----|
| Lasting Powers of Attorney Bill receives a second reading | 16 |
| When will the Court of Protection authorise the settlement of P's capital in a disabled person's trust? | 16 |
| Upfront notification process for property and affairs deputyship applications in the Court of Protection | 17 |

Lasting Powers of Attorney Bill receives a second reading

The Powers of Attorney Bill has been published and, on 9 December 2022, received its second reading in the House of Commons. Although technically a private members bill, the Bill has government support and it is very likely that it will become law more or less in its current form.

Though entitled Powers of Attorney Bill and having one (of its three) sections concerning Powers of Attorney generally (amending section 3 of the Powers of Attorney Act 1971 to add an additional authorised person as a certifier of powers of attorney), the main purpose of the Bill is to amend the Mental Capacity Act insofar as it relates to Lasting Powers of Attorney. This it does by the Schedule to the Bill which, broadly speaking, contains provisions amending Schedule 1 of the Mental Capacity Act 2005 concerning registration, notification provisions, identification requirements and objections to and evidence of registration.

The Bill proposes amendments which were the subject of consultation and the explanatory notes to the Bill explain that the main aim of the Bill is to modernise the process of making and registering Lasting Powers of Attorney. The notes say that the effect of the Bill will be that donors will find it easier to create their LPA whilst also being better protected from abuse. Another important aim is stated to be better protection from fraud.

One of the principal changes will be the introduction of a digital channel for making and registering an LPA. Thus, the Bill provides for regulations to provide for different ways to make an LPA, whether digitally, on paper or a mix of the two.

The Bill further provides that only a donor can apply to register an LPA. As a further check on abuse and fraud, the Bill provides for regulations to set out identity verification requirements that must be met for an application to register an LPA to be accepted.

The Bill will require the Office of the Public Guardian to notify the parties when an application to register an LPA is complete and the registration process is starting. The Office of the Public Guardian will also operate a triage system for certain types of objection.

The Bill will allow third parties not named in the LPA to make objection to the registration of an LPA and objections will be made to the Public Guardian, giving the Public Guardian power to register the LPA if satisfied that there is no evidence which reasonably supports the concern.

If, upon receiving an objection, the Public Guardian is satisfied that evidence reasonably supports the objection, then it is up to the donor or the attorney to apply to the Court of Protection for a direction to the Public Guardian to register the LPA.

Plainly, there is much to be awaited in respect of the major changes concerning the way in which

applications are made. That will depend on the regulations made under the new provisions. Certainly, however, those changes are in keeping with the modern approach to matters such as this, namely that they are dealt with principally digitally. The other changes are less drastic and are aimed, mainly, to tighten up on one or two avenues by which fraudulent LPAs can be registered. They do nothing, of course, to allay concerns about how genuine LPAs can be abused in practice.

When will the Court of Protection authorise the settlement of P's capital in a disabled person's trust?

F v R [2022] EWCOP 49 (17 November 2022)(Senior Judge Hilder)

By this application, the Court of Protection (Senior Judge Hilder) was asked to grant authority for the settlement of an inheritance P had been left in a will of a relative absolutely on terms that instead of being held by P absolutely, it should be held by trustees on a Disabled Person's Trust.

The value of the inheritance was between £400,000 and £600,000. P's income derived mostly from state benefits totalling £60,293.48 per year, of which £52,381.60 was means tested. P was represented in the proceedings by the Official Solicitor.

The Applicant argued that although there were known benefits to funds being held by deputies rather than behind a trust, those benefits were outweighed by the effect of an absolute gift as opposed to the effect of funds being in a trust, namely that the former is taken into account in the assessment of means tested benefits, whereas the latter is not.

Unfortunately, that benefit was, so the court held at paragraphs 46 to 49, very likely to be nullified by the Local Authority and the DWP taking the view that the intention behind the settlement was simply, as the court found, to deprive P of capital

that would otherwise be taken into account in a means tested benefit application.

The court also referred to the *Secretary of State for Justice v A Local Authority & Ors* [2021] EWCA Civ 1527, where both King LJ and Baker LJ, at paragraphs 70, 73 and 74 respectively, emphasised that the Court of Protection is part of a wider system of the administration of justice and the court could not endorse a proposal whose purpose was to preserve an eligibility for benefits which Parliament had decided does not exist. The court went on to hold at [51]:

At this point, it is the court's purpose that matters, and the only purpose of the application is to preserve R's means tested benefits, whether that is directly or indirectly by giving effect to the supposed intention of T.

This was, of course, an individual best interests decision, but it shows quite clearly that the Court of Protection is not likely to sanction any schemes of this sort where it is suggested that any of P's assets should be transferred to a trust in effect in order to preserve benefits.

Upfront notification process for property and affairs deputyship applications in the Court of Protection

HMCTS has recently released a statement on changes to applications for Property and Affairs deputyship orders:

From January 2023, the new upfront notification process will become the standard process for all Property and Affairs deputyship applications, following a successful pilot. A new Practice Direction and new [Court of Protection forms](#) will be available on GOV.UK.

Benefits of the new process include:

- *less paperwork to complete and faster processing times*
- *increased initial engagement reducing delays caused by objections*

- forms CoP20a and COP20b no longer need to be completed
- a new easy to use online service that supports better accuracy of applications

Changes from January 2023

New Property and Affairs Deputyship applications received by the court after 1 January 2023 must follow the new notification process using the new forms. We are phasing the release of the online service to ensure a smooth transition for our users.

This means:

- the online service will be available for solicitors/professional users to use from 2 January 2023.
- personal applicants will be able to pay and apply online from February 2023

From 1 February 2023, Property and Affairs Deputyship applications that do not follow the new upfront notification process will be returned to the applicant.

An introduction to the new process

Applicants should notify 3 people who know the person affected by the application, for example, relatives, a social worker or doctor. Applicants should gather the responses before submitting their application. Applicants should send responses and all recordings of notifications to the court with their application.

There are new forms to use for upfront notifications, the COP14PADep and COP15PADep. These forms are both notification and acknowledgement forms combined.

The forms should be returned to the applicant or agent within 14 days of notification where possible. The applicant should then send/upload all

acknowledgement forms whilst making the application to the court. After 14 days from notification, the court will assume agreement to the order being made if no acknowledgement form is returned to the applicant and no COP5 is filed by those notified.

If you would like further information, please contact the Civil & Family Business Support team (Civil_and_FamilyBusinessSupport@justice.gov.uk).

Editors and contributors

Victoria Butler-Cole KC: 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. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), 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 ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).



Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click [here](#).



Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click [here](#).



Arianna Kelly: arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click [here](#).



Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a 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](#).



Scotland editors

Adrian Ward: adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).



Conferences and Seminars

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

| | |
|------------------|---|
| 13 January 2023 | Court of Protection training |
| 26 January 2023 | MCA/MHA Interface for AMHPs |
| 1 February 2023 | DoLS Authoriser Training (9:00-13:00) |
| 2 February 2023 | Necessity and Proportionality Training (morning and afternoon sessions) |
| 16 February 2023 | BIA/DoLS update training (9:30-16:30) |
| 16 March 2023 | AMHP Legal Update (9:30-16:30) |
| 23 March 2023 | Court of Protection training (9:30-16:30) |
| 30 March 2023 | BIA/DoLS update training (9:30-16:30) |

To book for an organisation or individual, further details are available [here](#) or you can email [Neil](#).

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 next edition will be out in February. 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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com



Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set



The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • [DX: London/Chancery Lane 298](tel:+44207353298) • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

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

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.