



Welcome to the June 2025 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: the court is not a rubber stamp for clinicians and what does it mean to represent P's interests;
- (2) In the Property and Affairs Report: Professional Deputy Costs, and paying drug debts for P;
- (3) In the Practice and Procedure Report: capacity to conduct proceedings and the costs of inadequate disclosure;
- (4) In the Mental Health Matters Report: capacity to conduct Tribunal proceeding, and the independent investigation into the care and treatment of Valdo Calocane;
- (5) In the Children's Capacity Report: looking at other options before using the inherent jurisdiction to authorize a deprivation of liberty;
- (6) In the Wider Context Report: what happens if you never had litigation capacity and new books;
- (7) In the Scotland Report: AWI reform and the UK Protocol on Judicial Cooperation.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page [here](#).

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

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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.

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### Professional Deputy Costs

The Office of the Public Guardian and the Senior Courts Costs Office have published a good practice guidance, [Professional Deputy Costs](#). Its purpose is to ‘explain[] the approach the SCCO takes when assessing bills submitted by professional deputies. It covers good practice, OPG’s role, complaints, appeals and guidance on general management costs.

The guidance contains:

- reminders of what to consider when incurring GM costs against P’s estate
- advice on submitting bills of costs for assessment
- OPG’s reporting requirements

*It should be read in conjunction with the relevant Civil Procedure Rules (CPR), CoP Practice Direction PD19B, section 23 of the SCCO Guide (2023), the Mental Capacity Act 2005 Code of Practice (the Code) and OPG professional deputy standards...*

*It does not replace any of these documents.’*

The guidance emphasises the need for deputies to reflect on the level of costs they incur, particularly if P’s funds are depleting:

*This includes considering the amount of involvement they expect to have in P’s affairs in the next deputyship year and how much the professional deputy fees are likely to cost P’s estate. In addition, the deputy has a responsibility to make a professional assessment if it is in P’s best interests for them to continue in their role, resulting in a reduction of P’s estate. If P’s affairs are sufficiently well organised and unlikely to*

*undergo significant change, the professional deputy may consider if an application to the CoP for appointment of a willing member of P’s family or a friend would be appropriate.*

*Both OPG and the SCCO are clear that any professional deputy who does not follow the published guidance will be expected to explain the reason for their actions and in particular, demonstrate how their actions are in P’s best interests.*

The guidance also states that in submitting the OPG105 form on costs, ‘The completion and submission of OPG105 should not require any further information gathering activity by the deputy and is not anticipated to add any further cost burden to P. Completing the form should take no longer than 30 minutes.’

The guidance notes that if costs bills submitted are ‘are 20% or more above the estimate it will also be necessary to provide reasons to the SCCO as to why there is a difference. Should there be changes in P’s circumstances during the year (and therefore costs to their estate), the deputy should alert OPG if the fees are likely to be 20% or more than the submitted estimate. It is not necessary to file an update with the OPG if the increase of 20% or more is due solely to a change in the guideline hourly rates.’

The Guidance provides a helpful outline of ‘the approach taken by the SCCO when assessing bills.’

#### Hourly rates

*Except in the most exceptional circumstances, the hourly rates charged within the GM bill should be as described in the SCCO Guide to the summary assessment of costs (CPR Vol.1). Rates*

should be claimed in accordance with the Guideline Hourly Rates for the period in which the work was undertaken and evidence provided of compliance with the indemnity principle as appropriate. Current and historic Guideline Hourly Rates for Solicitors are readily available online, for example at the Gov.uk website.

### **Delegation of duties**

Professional deputies are expected to delegate work to the appropriate level of fee earner.

That means routine GM activities such as paying bills or checking bank statements should be carried out by an administrative assistant or a Grade D fee earner at best.

The deputy will need to justify any bill where a higher grade of fee earner is claimed. There are times when the use of a non-fee earner would be considered more appropriate, for example, if delivering goods or money to P.

When considering any time claimed for the act of delegation the SCCO will consider if the time claimed is reasonable, proportionate, progressive and that it serves to reduce costs. For regular, routine activities it is expected that systems will have been put in place to avoid the need for repetitive or excessive delegation.

### **Paying bills**

Three-minute units will usually only be allowed in respect of paying bills either by electronic transfer, cheque or enclosure letter. No further time will usually be allowed for updating records with details of any payment or for any letter advising of payment.

### **Reconciliation of Bank statements**

Reconciliation of Bank statements will only usually be allowed at Grade D.

### **Levels of contact**

The SCCO's usual practice is to allow one home visit in each 12-month period, which is considered to be appropriate in cases which are stable.

It is accepted that more visits may be necessary to meet the particular needs of the case, but deputies should be prepared to justify this with reference to their duties under the Mental Capacity Act.

The SCCO allows the cost of one fee earner to visit in all except the most exceptional cases. Professional deputies should try to limit excessive contact with all parties, including P, their family members, case managers and case workers.

In all cases, professional deputies are expected to use their judgement in deciding the most cost-effective method of communication and take a balanced approach to meeting P's needs against incurring excessive costs.

### **Welfare work**

Where a property and affairs deputy is appointed to manage P's finances, work in respect of welfare is not recoverable from P's estate without permission from the CoP.

If the professional deputy for property and affairs is finding that a large proportion of their time is being taken up in health and welfare related matters, they should ensure they engage with appropriate professionals who can meet those needs (for example, alert agencies to safeguarding concerns).

They may also consider it is in P's best interests for an application to be made to the CoP for the appointment of a health and welfare deputy.

### **Re ACC Judgment**

For work that falls outside of the general authority of a deputy further authority for the assessment of costs may need to be applied for.

Please refer to the *Re ACC Judgement: ACC & Ors* (property and affairs deputy; recovering assets costs for legal proceedings)

### **Financial beauty parades**

Generally, only one senior fee earner will be allowed to attend such meetings to discuss the best investment strategy for P in large damages awards.

### **Estimated costs**

If no documentary evidence is provided in support of the bill, for example attendance notes and copies of the documents to which the attendance note refers, such costs are likely to be disallowed.

### **Overheads**

Research, reading incoming routine correspondence, internal communication if it is considered to be routine and non-progressive, supervision and routine updating of records are taken to be included in the deputy's overheads, except in exceptional circumstances.

These examples are not comprehensive and there may be other items that are considered to be overheads in individual assessments.

OPG expects all deputies to provide a certain level of service and has systems in place to monitor this, such as Assurance Visits and ensuring compliance with deputy standards. Time associated with these obligations is considered by OPG and the SCCO to be part of a deputy's overheads and will not be allowed on assessment.

### **Routine correspondence out**

A three-minute unit is usually allowed for very short straightforward letters, emails or duplicate letters, for example to a financial institution or P's family.

### **Litigation costs**

Costs will be disallowed which could properly be claimed within the context of ongoing litigation, for example, interim payments on account of damages or providing information for the purpose of conducting litigation. See also ACC above.

### **Costs drafting fees**

Apart from in exceptional circumstances, a Grade D rate fee earner will be allowed for drafting bills of costs.

The costs of preparing excessively long schedules that replicate the file notes are likely to be disallowed.

The short form bill must be used for costs claimed of under £3,000 (excluding VAT and disbursements).

### **Limited value estates**

Where P's net assets are below £20,300, a professional deputy is expected to act according to the directions given in Sections 10 and 12 of PD19B.

### **Professional costs on P's death**

On P's death, the deputyship is at an end. As such, the Court of Protection (CoP) no longer has any jurisdiction, and the SCCO has no authority to assess a professional deputy's bill, for any costs incurred post-death.

However, the SCCO can continue with an assessment that has partially progressed before P's death without requiring further authority from the CoP.

This is because the original deputyship order will authorise detailed assessment of the reasonable deputyship costs incurred during P's lifetime.

The deputy should refer to an executor to see if the costs can be agreed (Practice Direction 23(b) paragraph 10).

Where a professional deputy is also the executor for P's estate, there is a potential conflict of interest, and the bill should be

*submitted to the SCCO for assessment. In such circumstances, the SCCO will NOT need permission from the CoP to carry out a final assessment, as explained above.*

### Can a deputy pay a drug debt for P?

*EM and JG v P* [2024] EWCOP 80 (T3)  
(Mcfarlane J)

*Best interests – Property and affairs*  
*Capacity – Property and affairs*

This ex tempore judgment from December 2024 which has only just been published involves an application by financial deputies for guidance from the court in circumstances where P, who had an acquired brain injury but was able to function at a high level, had become involved in drug dealing. P had been arrested, and quantities of Class A and B drugs had been seized from his home and a friend's home. The drug dealer who had supplied some of those drugs to P was demanding a payment of £17,000 from P, which represented the value of the drugs.

The President held that if P lacked capacity to decide whether to pay the drug debt, then there could be no best interests decision or authorisation from the court to pay the debt, as that would involve the deputies in criminal activity. Specifically, the deputies would be potentially liable for a money laundering offence under s.328 Proceeds of Crime Act 2002 and conspiracy to commit that offence: *"the short point is that...it is likely the deputies will have become drawn into engaging in payment of what will be seen under the 2002 Act as the proceeds of crime, although obviously at the moment, the money is not such: it sits in a bank account managed by the deputies on P's behalf."* [6] Further, the deputies would be placing themselves in jeopardy under the Solicitors Regulations as the SRA Principles and Code of Conduct also applied to solicitors when acting as deputies, and solicitors cannot accept instructions that involve them in criminality.

If P had capacity, then he could ask for any sum he liked from the deputies and they would not be at risk of criminal proceedings, since they would be legally obliged to abide by his instructions.

On the facts of the case, P lacked capacity as he could neither hold in mind nor weigh up the salient information. There was no prospect of the court sanctioning the payment in P's best interests: *'the court would effectively itself be engaging, albeit at arm's length, in serious criminality'*, [19] and so the court refused to declare that the payment should be made.

### Comment

It is very unfortunate that this judgment does not contain a reasoned explanation of why the payment of the £17,000 would constitute an offence under POCA 2002, and does not include any of the relevant caselaw on the provisions of that statute.

The purpose of this application as brought is fairly elusive. The judgment records that the application on the papers appeared to seek a best interests decision. However, where the deputies' own position appeared to be that they would be committing an offence by paying this debt (and thus, it would be presumed, unwilling to do so), it is unclear what available option the court was being called on to consider. The deputies had obtained multiple opinions from criminal counsel which took this position, but the rationale of these opinions are not discussed at length. Where multiple opinions had already been obtained on this point, it does not appear that directions were sought or given for the Official Solicitor to obtain yet another advice on the same point of law, and the court does not appear to have heard any contested argument on the point. On the issue of P's capacity (which eventually became the focus of the hearing), the deputies had an expert opinion on P's capacity which the court described as 'a thorough and very impressive account of his assessment establishes that P lacks capacity' which did not appear to lend itself to any credible challenge. It is thus quite difficult to discern why the deputies

brought this matter before the court at all, and what the benefit to P was where P will have born the full cost of two represented parties.

In the absence of a description of any contested hearing or endorsed statement of the relevant law, we are not clear on what if any conclusions were reached by the court in relation to its reasoning about the Proceeds of Crime Act; in the absence of such reasoning, this judgment does not appear to have any precedent value.

From what appears to be the logic of the judgment, the use of 'clean' money to pay for drugs is a money laundering offence. If that is right, then it is unclear why P having capacity would remove the risk of the deputies committing a criminal offence. S.328 POCA refers to a person becoming '*concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person*'. There is no defence of being required to give the money to the person by virtue of some other legal obligation, unless that obligation relates to the enforcement of POCA 2002 or some other enactment relating to criminal conduct.

If the judgment is correct, it would also appear to follow that any payment of 'clean' money to a drug dealer is a money laundering offence, whether through a deputy or otherwise. Anyone buying illegal drugs, or any other illegal substance or product, would be committing the s.328 offence, because their 'clean' funds would automatically become criminal property. That does not sit easily with POCA caselaw in the criminal context which makes clear that money laundering offences involve the acquisition of criminal property, not the criminal acquisition of property. In *R v Porter and Stanley* [2023] EWCA Crim 1485 the court said '*the property in question must already have the quality of being criminal property by reason of conduct distinct from the conduct alleged to constitute the actus reus of the money launder offence*'.

It is to be hoped that there will be a future case in which the points are argued fully and a reasoned judgment given – which may or may not reach the same conclusion. The implications of the judgment for cases where deputies know that P is using an allowance to buy drugs from time to time will also need to be worked out in a future case.

### The Law Commission: Report on Modernising Wills

On 16 May 2025, the Law Commission published its recommendations to reform the law of wills in its Report: Modernising Wills Law, which provides draft bill intended to replace the Wills Act 1837. The Law Commission considered that '*the law surrounding this important topic is not as clear as it could be, which may put people off making wills altogether. In some cases, the law is preventing people's clear wishes about what should happen to their property when they die from being given effect. The law is also outdated – it is largely a product of the Victorian era.*' To address these issues, the Law Commission has recommended several strands of reform:

#### **Testamentary freedom**

*Testamentary freedom – an individual's ability to determine how their estate will be distributed after their death – is a guiding principle throughout the Report. We make several key recommendations which are particularly focused on this aim.*

- *Giving the court the power to dispense with the formality requirements to make a valid will, to be used on a case-by-case basis. This power will allow the court to deem a document or record to be a valid will where the court is satisfied that the document reflects the person's settled testamentary intentions. This will address the strictness of the current law, under which non-*

compliance with the formality rules makes a will invalid no matter how clear the person's intentions were. Creating an power to be used in exceptional circumstances, while maintaining the current formality requirements, ensures that the important protective functions the formalities serve are not lost.

- Reducing the minimum age at which a person can make a will from 18 to 16. Currently, a person must be 18 years old to make a valid will. A child who is terminally ill and who does not wish one of their parents to inherit from them or decide what happens to their body when they die, for example because the parent has not played a role in their life, has no ability to set out their binding wishes. Other countries allow children under 18 to make wills, and the law presumes that children from age 16 have capacity to make other types of decisions.

### **Protecting testators**

We also make recommendations to protect testators, bearing in mind the serious problem of financial abuse, particularly of the elderly.

- Abolishing the existing rule that a person's will is automatically revoked when they marry or enter a civil partnership. This rule can be exploited by those who enter a predatory marriage with a vulnerable person – marrying them in order to inherit from them. Predatory marriage is a form of financial abuse which has devastating consequences for the victims and their families.
- Increasing protections for those who are coerced into making a will.

It is currently too difficult to challenge the validity of a will based on undue influence (meaning that someone made a will that they did not want to because of another person's influence). Evidence of undue influence can be hidden because it often happens behind closed doors and by someone close to the person making a will, and the law places a high evidential burden on anyone alleging undue influence. As a result, the law is not adequately protecting vulnerable people from financial abuse. For that reason, we recommend that it should be possible for the courts to infer that a will was brought about by undue influence where there is evidence which provides the court with reasonable grounds to suspect it.

### **Clarity and certainty**

We have sought to clarify the law where possible. A significant part of our work has been to create a draft Bill for a new Wills Act, which is intended to replace the existing legislation – the Wills Act 1837. As well as enacting our recommendations, the draft Bill comprises a modern, comprehensive and accessible piece of legislation to govern wills law.

We also make recommendations to clarify the law and make it more certain.

- Making specific provision to enable electronic wills to be formally valid – an important update to the law of wills to make it fit for the 21<sup>st</sup> Century. However, we also recommend that electronic wills should have to meet specific requirements to ensure that they are safe and reliable.

- *Clarifying the law on testamentary capacity. There are currently two tests which apply to the question of testamentary capacity, depending on the issue being decided. The common law test applies if the question is whether the person has capacity to make their own will, and the test in the Mental Capacity Act 2005 applies if the question is whether the court has the power to make a will on the person's behalf. This confusing anomaly is the product of the law's historical development. We recommend that only one test should apply: the modern test in the Mental Capacity Act 2005.*

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## Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Neil is running the following courses, with tickets available [here](#):

- BIA/DoLS refresher training: 26 June 2025, 16 July 2025.
- DoLS Authoriser Training: 4 July 2025
- AMHP/MHA 1983 Legal Update: 10 July 2025

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

### **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.

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Our next edition will be out in July. 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](mailto:marketing@39essex.com).

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