



Welcome to the July 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Permission to appeal granted in *Townsend*; post-AGNI guidance; and a new Guidance Note on Capacity for Care Providers

(2) In the Property and Affairs Report: Statutory wills; charging for being an appointee; and guidance on assessing financial capacity

(3) In the Practice and Procedure Report: Court of Protection and child deprivation of liberty statistics; court fees rising; reasons challenges in the Court of Protection; medical treatment cases – whether to issue, and the consequences of waiting too long

(4) In the Mental Health Matters Report: EU Recommendation of the Committee of Ministers to member States on respect for autonomy in mental healthcare

(5) In the Children's Capacity Report: A CAMHS psychiatrist's view on child deprivation of liberty cases – and what interventions can help to break the 'vicious cycle' of restrictions and institutionalisation

(6) In the Wider Context Report: Adult social care reform; the Muckamore Abbey Inquiry Report is published; and what becomes of solicitors whose clients lacked capacity

(7) In the Scotland Report: Circumvention and undue influence

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

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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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Statutory wills and dispensing with service

Fairweather v AG & Anor [2026] EWCOP 24 (T1)
(District Judge Ellington)

Best interests – statutory wills

Summary

AG is a young woman who has a substantial estate derived from an NHS compensation award. Her professional deputy sought the court’s approval of a statutory will under which AG’s whole estate would pass to her mother, AB, or her brother, GB. The concern driving the application was that, on AG’s intestacy, her estranged father, CG, would be entitled to share equally with AB.

As part of that application, the deputy applied to dispense with service on CG, relying on AB’s concern that contact would expose her to violence, supported by evidence that CG had received a police caution for assault in 2006.

District Judge Ellington dismissed the application to dispense with service. Applying *Re D* [2016] EWCOP 35, and notwithstanding CG’s absence of some twenty years and the historical evidence of violence, she held that the evidence of a current risk of harm was insufficient to override CG’s Article 6 right to participate in proceedings that would directly affect his inheritance. At [43] she stressed that the question before her was procedural, whether CG

should be served, and not a best interests decision.

Comment

DJ Ellington’s distinction at [43] between the procedural question of service and the substantive best interests decision about the will is central to the judgment: these two stages must not be run together.

The strength of the family’s reasons for wanting CG to receive nothing is irrelevant to the earlier and separate question of whether he should be notified and given an opportunity to take part.

For practitioners, the key point is that dispensing with service where a third party has their own financial interests at stake requires clear, up-to-date evidence of risk. A single historic incident, or general concerns (even against a background of long estrangement) will not normally be enough to override that person’s Article 6 right to participate. There may also be intermediate steps short of full non-service, such as an application to restrict the information disclosed to a particular family member if they are notified.

Charging for appointeeship: An article by Alex Cisneros

This guidance considers whether an appointee appointed under the Social Security (Claims and Payments) Regulations 1987 (“the 1987

Regulations”) or the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (“the 2013 Regulations”) may lawfully charge for their services, and if so, on what legal basis.

1. The legal framework for remuneration in analogous roles

The default position

The starting point is the established common law principle that a trustee (or anyone acting in a fiduciary role) has no implied right to be paid for carrying out their role.¹

Because the default position is that the role is unpaid, any entitlement to remuneration must come from a specific legal source.

Deputies

For deputies, attorneys and trustees, that specific legal source is clear. Section 19(7) of the Mental Capacity Act 2005 provides:

The deputy is entitled— (a) to be reimbursed out of P’s property for his reasonable expenses in discharging his functions, and (b) if the court so directs when appointing him, to remuneration out of P’s property for discharging them.

Remuneration is not automatic. It requires a positive direction from the Court of Protection at the time of appointment. As Hayden J said in *Riddle v Parker Rhodes Hickmott Solicitors* [2022] EWCOP 18 at para 8:

The MCA confers a right to remuneration of expenses, but it is the

Court that provides legal authority for remuneration.

Attorneys

An attorney under an LPA has no entitlement to remuneration unless the instrument expressly provides for it. The OPG’s guidance is clear on this.

The donor must therefore have included a charging provision in the LPA instrument at the time of execution, while they had capacity to do so.²

Trustees

A trustee can only charge if one of the following applies:

- the document creating the trust expressly says they can;
- the court authorises it, using its inherent power to do so (*Re Duke of Norfolk’s Settlement Trusts* [1982] Ch 61); or
- sections 28 and 29 of the Trustee Act 2000 allow professional trustees to charge in certain circumstances even without an express provision in the trust document.

2. The Regulations governing appointees

There are two sets of regulations that deal with a situation where someone is unable to manage their own benefits (the 1987 Regulations and the 2013 Regulations):

- **The 1987 Regulations:** Regulation 33 applies to legacy benefits such as Attendance Allowance, Disability Living

“contravened his authority by awarding himself a salary” because the relevant section of the LPA had been left blank.

¹ *Robinson v Pett* (1734) 3 P Wms 249

² See for example *Re DP (Revocation of Lasting Power of Attorney)* [2014] EWCOP B4, where Senior Judge Lush held that an attorney

Allowance, Employment and Support Allowance and State Pension.

- **The 2013 Regulations:** Regulation 57 applies to Universal Credit and PIP. It is in substantially the same terms as Regulation 33. It provides that the appointee’s function includes “receiving and dealing on behalf of P with any sums payable to P”.

Both regulations do the same thing: they authorise the appointee to act on the claimant’s behalf and to handle their benefit income.

Neither regulation says anything about remuneration. Earlier DWP guidance is understood to have addressed the point and to have stated that an appointee should not charge for acting in that capacity.³

The DWP has since removed that clarity and recent guidance does not address the question of charging:

- The DWP’s 2025 internal guidance about appointees is silent on charging.⁴
- The GOV.UK public-facing page is equally silent on the point.⁵

3. Proposed bases for charging

³ Department for Work and Pensions: Agents, appointees, attorneys, deputies and third parties: staff guide Appendix 5 (last updated 5 June 2021 but withdrawn on 29 July 2022) says: ‘You must not take a “fee” or “pay” for acting as an appointee.’
<https://webarchive.nationalarchives.gov.uk/ukgwa/20221103191458/https://www.gov.uk/government/publications/procedures-for-dealing-with-agents-appointees-attorneys-deputies-and-third-parties/appendix-4-aide-memoire-official-use>

The legal basis on which an appointee may charge depends on two questions. The first is whether the person receiving the benefits (“P”) has, or lacks, the mental capacity to agree both to the appointment and to being charged for it. The second is whether the appointee is a local authority or a private appointee (such as a family member, a company or another organisation).

(A) Where the benefits claimant has capacity

An appointee can only be appointed by the DWP where the person receiving the benefits is themselves “unable for the time being to act”.⁶ The regulations do not define what it means to be “unable to act”, and they do not seek to import the statutory test for mental capacity under the Mental Capacity Act 2005. It is therefore possible for a person to be “unable to act” for the purposes of managing their own benefits while nonetheless retaining the mental capacity to decide to pay someone to manage those benefits on their behalf.

In those circumstances, the claimant may choose to pay their appointee for providing that service. However, any appointee seeking to charge for their services should take care to ensure that the claimant has the mental capacity to agree to those charges.

⁴ https://data.parliament.uk/DepositedPapers/Files/DEP2025-0364/011._Appointees_PABs_and_CABs-Guidance_V15.0.pdf

⁵ <https://www.gov.uk/become-appointee-for-someone-claiming-benefits>

⁶ Regulation 33(1)(b) of the 1987 Regulations, under which an appointee may be appointed only where (among other conditions) the person “is unable for the time being to act”. The equivalent provision is regulation 57 of the 2013 Regulations.

(B) Where the benefit claimant lacks capacity

Where P lacks the capacity to agree to the appointment or to being charged, consent is not available as a basis for charging, and the position is more difficult. The route to any lawful charge differs depending on the identity of the appointee.

Private appointee

Some companies and individuals are willing to act as a person's appointee but want to charge that person a fee for doing so. Where that person lacks the capacity to consent to paying such a fee, these appointees have sought other ways to justify the charge.

The proposed basis for charging in this situation is section 7 of the Mental Capacity Act 2005, which provides:

*If **necessary** goods or services are supplied to a person who lacks capacity to contract for them, that person must pay a reasonable price for them.*

Section 7 is intended to strike a balance between two competing interests: protecting P's money from being unfairly reduced, and ensuring that people who provide necessary things to P in good faith are not left unable to recover payment simply because P lacked the capacity to enter into a binding contract.⁷

Appointeeship probably does count as a "service" to P. Whether that service is "necessary" will depend on whether (1) P genuinely cannot manage their own benefits, and (2) if no one else is willing or able to act as appointee.

If a private appointee does charge P for the service provided, this gives rise to an inherent

conflict of interest. In charging P, the appointee is effectively deciding whether to charge, setting the level of the charge, and then authorising payment to themselves out of P's own funds.

The DWP should therefore issue guidance addressing how this conflict is to be managed, and establish safeguards to ensure that charges made by appointees are appropriate and properly scrutinised. No such guidance exists at present.

Local authority appointee

A local authority is not in the same position as a private organisation seeking to charge P. Unlike a private body, a local authority may charge for its services only where statute has given it a specific power to do so.

Section 7 MCA 2005 does not supply that power. What section 7 does is create a liability on P to pay a reasonable price for necessary goods and services supplied to them. A private appointee, not being a statutory body, can therefore supply the service and rely on section 7 to ground P's obligation to pay. A local authority cannot, because section 7 says nothing about a local authority's power to provide a service for a charge in the first place.

Various local authorities, when consulting on the introduction of charges, have considered their legal basis for charging for DWP

⁷ Mental Capacity Act 2005, Explanatory Notes, para 45.

appointeeship.⁸⁹¹⁰ They have largely debated two legal frameworks:

- Section 1 of the Localism Act 2011; and
- Section 14 of the Care Act 2014.

Localism Act 2011

The Localism Act is unlikely to assist a local authority here. Since P cannot agree to the service being provided, condition (b) in section 3(2) cannot be met. In addition, where the authority is dealing with P's benefits as part of its duties towards P under the Care Act 2014, condition (a) may not be met either, because the service may be one the authority is required to provide.

Care Act 2014

It has been argued that managing the benefits of a person who lacks capacity is itself part of a local authority's functions under the Care Act 2014, so that the cost of acting as P's appointee could be charged under section 14. Section 14 is not, however, a free-standing charging power.

By section 14(1)(a), a local authority "may make a charge for meeting needs under sections 18 to 20". The power to charge is therefore dependent on a prior decision to meet a need under one of those sections.

That decision is not confined to eligible needs. Section 18 imposes a *duty* to meet a person's eligible needs; section 19 confers a *discretionary power* to meet needs that are not eligible. A charge under section 14 may be made in either case.

But unless the authority has actually decided to meet the relevant need under sections 18 to 20, there is no power to charge for it under section 14 at all. The appointeeship argument therefore succeeds only if managing P's benefits can properly be characterised as a need the authority has decided to meet under those provisions. There does not appear to be a reported judgment squarely deciding that it can.

Two further points are relevant:

- The authority is free to set the price (that is, the cost) of the appointeeship service. However, what the person actually pays towards that cost is then governed by the financial assessment.
- In some cases the financial assessment can be waived, for example where it is already clear that the person falls above or below the relevant charging thresholds.

4. Conclusion

The common law starting point is that anyone managing another person's affairs does so without payment unless a specific legal authority says otherwise.

In every analogous role, that authority is identifiable: a court order, an express provision in the instrument, or a statute. For appointees, it is conspicuously absent. Neither the 1987 nor the 2013 Regulations says anything about remuneration, and the DWP, which is understood once to have stated that appointees should not

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<https://www.minutes.haringey.gov.uk/documents/s109453/DraftChargingManagedAccountsQuestionnaireappendix4.pdf>

⁹ <https://northnorthants.citizenspace.com/asc-swp/appointeeship/>

¹⁰

<https://cabinet.leicester.gov.uk/documents/s152493/DecisionNotice-AAA-March2024.pdf>

charge, has allowed even that much clarity to lapse.

Whether an appointee may nevertheless charge turns on two questions: whether P has or lacks capacity, and whether the appointee is a local authority or a private appointee.

- Where P has capacity to decide to pay an appointee, charging rests on P's agreement: by ordinary contract for a private appointee, and under the general power in the Localism Act 2011 for a local authority.
- Where P lacks capacity to decide to pay an appointee, the position is markedly less secure: a private appointee's charge would have to be justified under section 7 of the Mental Capacity Act 2005 as a reasonable price for necessary services (a route available only if appointeeship is both a "service" and "necessary" on the facts), which does nothing to resolve the conflict of interest inherent in an appointee charging P out of P's own funds; while a local authority cannot use section 7 at all and must instead rely on section 14 of the Care Act 2014, which is available only where acting as appointee forms part of a need the authority has decided to meet under sections 18 to 20, with any charge then subject to a financial assessment of the person's ability to pay.

The overall picture is that there is no clear route to charging an incapacitous P.

The solution lies with the DWP, which should restore the clarity it previously provided by stating expressly whether, and in what circumstances, an appointee may charge. If charging is to be permitted, it cannot be left unregulated: at present, an appointee may

decide whether to charge, set the level of any fee, and recover it directly from the claimant's funds, all without independent scrutiny.

Clear guidance is therefore needed on how this inherent conflict of interest should be managed, along with appropriate oversight to ensure that claimants who cannot protect their own interests are not exposed to overcharging.

Alex Cisneros

Assessing financial capacity: new guidance

The Association of Lifetime Lawyers has published new [Professional Guidance on Financial Capacity](#) (22 June 2026), aimed at those assessing a person's mental capacity to manage their property and financial affairs. The guidance is intended to support practitioners in approaching financial capacity assessments in a structured and defensible way, and is a useful companion to the issues canvassed above on appointeeship and charging. It can be downloaded from the Association's [resources page](#).

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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.

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](#).

Neil's training dates are available 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.

Our next edition will be out in September. 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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