



Welcome to the September 2018 Mental Capacity Report.
Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: life-sustaining treatment and the courts, fertility treatment in extremis and an update on the Mental Capacity (Amendment) Bill;
- (2) In the Property and Affairs Report: inheritance tax planning and the MCA;
- (3) In the Practice and Procedure Report: a new Vice-President, a case study in poor care planning and its costs consequences, deprivation of liberty of children – the Court of Protection or Family Division?;
- (4) In the Wider Context Report: an important decision on disability and challenging behavior, guidance from the LGA, ADASS and RCN, and deprivation of liberty looked at overseas;
- (5) In the Scotland Report: disability discrimination and unfavourable treatment, AWI consultation response analysis published, and judicial training as part of increasing access to justice for people with disabilities;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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.

Contents

Gifting for tax planning purposes	2
---	---

Gifting for tax planning purposes

Re JMA [2018] EWCOP 19 (Senior Judge Hilder)

Gifts

Summary

In this case Senior Judge Hilder considered an unopposed application for permission to make substantial gifts from P's estate for the purpose of reducing the incidence of inheritance tax.

P was a 72 year old widow with advanced early onset dementia. She lived in a residential care home. She had a substantial estate. The applicant was her only surviving son who is the residuary beneficiary after mainly charitable gifts in P's will.

The application sought permission to make, in effect, an advancement to the applicant of £6m out of P's estate of nearly £19m, together with certain other lesser provisions including a statutory will.

The saving of inheritance tax was calculated at up to £3.2m if P were to survive until 2025. The Official Solicitor was appointed to represent P and submitted that the application was in P's best interests as did the other parties.

The judgment includes a survey of the leading authorities on the best interests test and its application to gifts. Important considerations were affordability (all sides agreed that P's remaining estate was ample for all her needs)

and P's and her late husband's attitudes to tax planning and life time gifting.

The court stated that affordability was a necessary but not sufficient condition (paragraph 64) and that there was no default position or starting point so that each application must be considered on its particular facts according to the requirements of section 4 MCA (paragraph 65/6).

The court then went on to set out a familiar check list of factors and concluded that taking all circumstances into account, the proposals were in P's best interest and would be approved.

Comment

This is an interesting case on how the court approaches an application to make tax planning gifts, confirming that there are no differences in principle to the standard best interests approach. The key factors in the application of that here appear to have been the very substantial size of the estate and previous tax planning and gifting. On the procedural front, a striking feature – not explained in any detail in the judgment – is that the application was made in June 2015, but only reached a hearing in March 2018.

Editors and Contributors



Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



Victoria Butler-Cole: 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 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](#).



Neil Allen: neil.allen@39essex.com

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](#).



Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. 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 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).

Editors and Contributors



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, and is chair of the London Group of the Court of Protection Practitioners Association. 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](#).



Adrian Ward: adw@tcyoung.co.uk

Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. 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; 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, 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 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

Conferences

Conferences at which editors/contributors are speaking

Switalskis Annual Review of the Mental Capacity Act

Neil is speaking at the 10th Annual Review of the MCA in York on 18 October 2018. For more details, and to book, see [here](#).

Taking Stock

Neil and Alex are speaking at the annual Approved Mental Health Professionals Association/University of Manchester taking stock conference on 16 November. For more details, and to book, see [here](#).

Other events of interest

Peter Edwards Law has announced its autumn programme of training in mental capacity and mental health, full details of which can be found [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 next edition 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 Report in the future please contact: marketing@39essex.com.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

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

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



International Arbitration Chambers of the Year 2014
Legal 500

Environment & Planning Chambers of the Year 2015

clerks@39essex.com • DX: London/Chancery Lane 298 • 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 OC360005) 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.

For all our mental capacity resources, click [here](#)