

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

- (1) In the Health, Welfare and Deprivation of Liberty Report: CANH withdrawal on the papers and DOLs statistics;
- (2) In the Property and Affairs Report: variation of trusts and the Court of Protection, and Charles J's last hurrah;
- (3) In the Practice and Procedure Report: a new President for the Court of Protection and a regionalization update;
- (4) In the Wider Context Report: the interim report of the independent MHA review, capacity and housing, covert medication and capacity in the MHT context, and a guest article on autonomy and mental capacity;
- (5) In the Scotland Report: an appreciation of the Public Guardian and an update on the AWI consultation;

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

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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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### Trust variation and the Court of Protection

*ET v JP and others* [2018] EWHC 685 (Ch) (High Court Business List (Chancery Division)(Morgan J))

*CoP jurisdiction and powers – interface with civil proceedings*

#### Summary

In this case Morgan J had to consider the proper interpretation of section 1(3) Variation of Trusts Act 1958. The issue was whether the High Court could approve a variation of a trust on behalf of a minor who lacked mental capacity or whether that approval had to be given by the Court of Protection.

Section 1 of the 1958 Act allows the court to approve variations of a trust on behalf, of, amongst others, those who lack capacity to approve the variation themselves.

In this case, one of the beneficiaries was 10 and severely autistic so lacked capacity to approve the variation because of his age and mental capacity.

Section 1(3) of the 1958 Act provides:

*the jurisdiction conferred by subsection (1) of this section shall be exercisable by the High Court, except that the question*

*whether the carrying out of any arrangement would be for the benefit of a person falling within paragraph (a) of the said subsection (1) who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his assent is to be determined by the Court of Protection.*

Morgan J held that where the beneficiary is not able to approve the arrangement by reason of his age, then that is the reason why the court has to approve the arrangement and so section 1(3) does not apply and the issue does not have to be determined by the Court of Protection even if, additionally, the beneficiary is unable to approve the arrangement by reason of mental incapacity. (See paragraphs 16-27).

#### Comment

This case is an interesting example of a situation in which it may make a difference as to whether the lack of the relevant legal capacity derives from a lack of the relevant mental capacity or some other cause. In this case it was clear that the beneficiary in question could not approve by reason of age. In other cases, such as with 16 and 17 year olds, that may not be so clear and the question of whether, in those circumstances, a referral to the Court of Protection is necessary will arise again.

## The last hurrah of Charles J

Re AR [2018] EWCOP 8 (Charles J)

*Best interests – property and affairs*

### Summary

In this case Charles J ruled that the practice of making bulk orders for the approval of a deputy's remuneration was wrong and that remuneration was a best interests decision that had to be made on an individual basis.

In a judgment that was significantly critical of previous Court of Protection practice, Charles J ruled that the Court of Protection could and should not approve remuneration for deputies on a bulk basis but, rather, should assess each case individually, see paragraphs 18-19, 21, 24-26 of the judgment.

Charles J held that the bulk orders should all be reviewed by the COP of its own motion without the need for an application fee (see paragraphs 93-94) but until an order that has been sealed has been set aside or varied, it can still be relied upon, see paragraph 27.

Charles J made clear that COP PD 19B (which sets out fixed costs for various types of work), is not a presumptive scale but rather a relevant factor to be taken into account when deciding the level of a deputy's remuneration, see paragraphs 34-35.

As regards the actual case, P had limited means, so the question arose whether a solicitor's higher charging rates (when compared to those of a local authority deputy) could be justified. In the

end, from paragraph 55 on, the judge held that in the individual case, they were. That was on the basis of a more personal approach that had resulted in additional benefit to P.

In many cases, the expenditure on the deputy will be accepted by a local authority as disability related expenditure and so reduce P's means and liability to contribute to care costs. In those circumstances, the issue will not be so acute as P will suffer no loss by virtue of a solicitor deputy's higher charges.

Charles J also held that the court had power to authorise pre-appointment expenditure, see paragraph 49 and that orders should include an inflation index for charges (the CPI), see paragraph 88.

### Comment

There is always a balance to be struck between administrative convenience and specific consideration of individual cases. In his parting shot as Vice-President of the Court of Protection, and in line with other case-law criticizing "bulk" approaches, Charles J made clear that he considered that a regime had developed which had swung considerably too far towards the side of administrative convenience.

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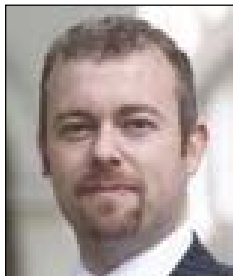
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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, 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](#).



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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](#).



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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](#).



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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](#).



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## Conferences

Conferences at which editors/contributors are speaking

### Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in [London](#) on 9 May and [Manchester](#) on 24 May.

### Other conferences of interest

#### UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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 next report will be out in early June. 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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