



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

(1) In the Health, Welfare and Deprivation of Liberty Report: an appreciation of Alastair Pitblado, the Mental Capacity (Amendment) Bill, the Joint Committee on Human Rights considers DoLS reform and fluctuating capacity;

(2) In the Property and Affairs Report: the OPG mediation pilot

(3) In the Practice and Procedure Report: court fees reductions and when to join;

(4) In the Wider Context Report: Lady Hale on *Cheshire West* and the CRPD, Parliamentary debates and developments and a major Council of Europe report on attorneys and advance directives;

(5) In the Scotland Report: AWI consultation responses and Sandra McDonald reflects on her time as Public Guardian;

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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Baker J appointed to Court of Appeal (and please can we have a Vice-President)

It is with mixed emotions that we report that Baker J has been appointed to the Court of Appeal. Whilst we congratulate him heartily and know he will make an excellent appellate level judge, we will miss his wisdom at first instance, and had also secretly been hoping that he would be appointed to be Vice-President of the Court of Protection.

We very much hope – by the way – that a Vice-President will be appointed in short order because the ad hoc Rules Committee remains in limbo without one...

Court of Protection statistics

The latest [statistics](#) from the MOJ for January to March 2018 show:

Continued increasing trend in applications and orders made in relation to deprivation of liberty

There were 1,213 applications relating to deprivation of liberty made in the most recent quarter, up 25% on the number made in January to March 2017. Of these, 113 were applications for orders under s.16 MCA 2005, 331 s21A applications, and 769 for *Re X/COPDOL11* applications.

Record numbers of applications and orders made under the MCA 2005

There were 8,089 applications and 10,262 orders made in January to March 2018, up 3% and 15% respectively – the highest quarterly volumes seen since the start of the series.

CoP application and appeal fees reduced (a bit)

The snappily named [Court of Protection, Civil Proceedings and Magistrates' Courts Fees \(Amendment\) Order 2018](#), coming into force on 25 July, will reduce the fees for applications from £400 to £385, and for appeals from £400 to £320.

The reduction to these fees follows, according to [Parliamentary Under Secretary of State for Justice Lucy Frazer QC MP](#), "*a thorough and detailed review undertaken by officials in the Ministry of Justice into the cost of these proceedings. Our review has identified a number of cases where the fees charged were above full cost recovery levels.*" It is not clear at this stage whether those who have been charged the higher sums in the CoP will also benefit from the refund scheme that is being applied in relation to excess fees identified in other areas.

Human rights claims, the CoP and statutory charges

In a document linked to the judgment in *Northamptonshire County Council & Anor v The Lord Chancellor (via the Legal Aid Agency)* [2018] EWHC 1628 (Fam), the Legal Aid Agency has set out how it is possible to bring a HRA 1998 claim linked to family proceedings without attracting the statutory charge in relation to the linked proceedings (and hence losing all the damages that might be recovered in the HRA claim to the statutory charge. As the LAA puts it:

[I]f the judicial guidance [in H v NCC and LAA [2017] EWHC 282 (Fam) and Re W (Children) (Convention Rights Claim: Procedure): Practice Note [2017] 1 WLR 3451] is followed and HRA damages are obtained outside of the care or other family law proceedings (e.g. within separate civil proceedings, or by means of a settlement outside of the care or other family law proceedings), only the legal aid expenditure incurred in respect of pursuing an HRA claim will be treated by the LAA as provided in connection with it. If the LAA is asked to give an early indication as to whether the statutory charge will apply to any HRA damages in these circumstances, it will request undertakings from the provider and counsel in the care proceedings that they will not make a claim for costs in respect of any HRA work carried out as part of the care or other family law proceedings. Once the undertakings have been received, the LAA will be able to confirm that the statutory charge will not extend to the legally aided care costs. Note that, unless a certificate or amendment to a certificate specifically authorising an HRA claim has been granted, there could be no valid claim for such costs in any

event.

Although the LAA's position does not formally apply to proceedings before the Court of Protection, we anticipate that it will apply the same approach as these are so similar to family ones (and it should undoubtedly be asked to do so).

When to join?

Re Z [2018] EWHC 1488 (Ch) (Norris J)

Practice and procedure (Court of Protection) – other

Summary

Although given a Chancery Division neutral citation, this was a procedural application in existing Court of Protection proceedings concerning the capacity of an elderly man (Z) to manage his property and affairs and the validity of a lasting power of attorney (LPA) apparently granted by Z.

Z was a successful business man who carried out some of his ventures jointly with his brothers (X and Y). X was still alive but Y was deceased. X was a party to the proceedings. The other parties to the main proceedings were Z's wife, CD, and two of their four children, EF and GH. CD and X each had different views on whether Z had capacity to manage his property and affairs and whether a valid LPA had been granted.

The applicant, OO was Y's son and Z's nephew. OO asserted that over the years he has spent an enormous amount of time with Z and that they had a very close relationship that was "akin to a father-son relationship". He also alleged that Z had promised to pay him a sum of money arising from business dealings with his late father, Y. He

supported X's stance regarding the issues of Z's capacity and validity of the LPA. OO was concerned that CD was trying to take control of Z's estate for herself and her children to prevent Z from fulfilling the promise which he had made concerning payment of the sum of money.

Although the judge found that OO had relevant evidence to give, he also considered that OO had a commercial interest of his own and that it would not be helpful to give that commercial interest any prominence in the main proceedings. The judge decided that it would not be appropriate to join OO as a party to the proceedings for five reasons:

1. It was of the utmost importance for the proceedings to be resolved speedily. Anything that had the potential to delay or prolong the resolution of proceedings had to be avoided;
2. OO had produced sufficient material to support a serious argument that he had a "sufficient interest" in the "best interests" aspects of the proceedings as he was a family member with some insight into Z's character and to whom Z may have expressed some intentions. OO had relevant evidence to give on those matters and that his evidence should be admitted into the proceedings so that it was before the court to be tested. However, OO did not need to be a party for that purpose;
3. OO had a separate commercial interest and it would not be helpful to give that commercial interest any prominence in the proceedings;
4. OO was adopting the same position as X who was already a party to the proceedings;

5. Standing back and weighing the pros and cons of joining OO as a party, the need for a just and proportionate determination of the issues meant that it was not desirable to permit it.

Comment

The outcome of this application is somewhat surprising. It may reflect the cultural differences between those brought up in the Chancery Division and those brought up on welfare cases in the Court of Protection. Rarely (in our experience) does the Court of Protection refuse to join a family member as a party where they explicitly wish to be joined. This is all the more so where it is acknowledged by the court that the family member has close relationship with P so as to have a "sufficient interest" in P's best interests, and that they have relevant evidence to give on P's circumstances and wishes and feelings which needs to be tested by the court.

The court's concern about not giving prominence to OO's financial interests (as the proceedings are about Z's best interests) is understandable. However, the Court of Protection regularly deals with contested matters of best interests (both financial and welfare) where it may be necessary to delineate P's best interests from the separate interests of any family members. This is routine. We would expect that any judge would be astute enough to ensure to that the proceedings focused on Z's best interests rather than OO's commercial interests.

The court's desire to avoid further delay and expense by joining another party is also understandable. However, the court has

available to it a plethora of case management tools including limiting the amount of evidence that a party is permitted to file and the amount of time that is allocated to each party at any hearing. It is difficult to immediately identify from the judgment any insurmountable difficulties that could not have been overcome with robust case management directions to ensure that proceedings were dealt with fairly and proportionately.

Notwithstanding the outcome of this case, we suggest that it would ordinarily be very rare for the Court of Protection to refuse an application by a family member to be joined as a party to the proceedings where it is clear that they have a "sufficient interest" in P's best interests and have relevant evidence to give on P's circumstances including P's wishes and feelings.

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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](#).



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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](#).



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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.



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Conferences

Conferences of interest

Costs and summer drinks reception

On 26 July a training event and summer drinks reception will be hosted by London CoPPA in association with Hardwicke Chambers covering hot topics in the world of Court of Protection costs. For more details, see [here](#).

Towards Liberty Protection Safeguards

This conference being held on 24 September in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, see [here](#).

5th International conference on capacity: ageing, sexuality & human rights

Capacity Australia is hosting this fascinating-looking conference in Rome on 3 October. For more details 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.

We are taking a summer break (from this, but not from the world of mental capacity law, which is going to be a very busy one over the next few months). Our next edition will be out in early 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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