



Welcome to the July 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: when to appoint welfare deputies, termination and best interests, capacity in the context of sexual relations and birth arrangements, and the interaction between the MHA and the MCA in the community;

(2) In the Property and Affairs Report, fraud and vulnerability; news from the OPG, and deputyship and legal incapacitation;

(3) In the Practice and Procedure Report: Court of Protection fees changes; contingency planning, costs and s.21A applications; mediation in the Court of Protection;

(4) In the Wider Context Report: the Chair of the National Mental Capacity Act Forum reports, a new tool to assist those with mental health/capacity issues to know their rights, older people and the CPS/police; and books for the summer;

(5) In the Scotland Report: establishing undue influence and update on the Scott review.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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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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Fraud and vulnerability

Two new reports highlight different aspects of financial vulnerability.

Protected by Design, a new report by Demos into fraud and the vulnerable and how to protect them, published in July 2019, makes 23 recommendations mainly though not exclusively aimed at the financial services industry concerning how to protect the vulnerable from financial abuse. The recommendations range from better identification of the vulnerable and those at risk, to special products designed for vulnerable investors to a call for more oversight of LPAs (a call that will find support from the former senior judge of the Court of Protection Denzil Lush).

A Little Help from My Friends, a report from the Money and Mental Health Foundation, looks at tools to support financial decision-making for people with mental health problems. The report looks at the potential benefits of enabling third party access (for instance via powers of attorney) but identifies that existing mechanisms are felt to risk abuse, delegate excessive power, undermine privacy and be too difficult to set up and use.

News from the OPG

As highlighted in this [post](#), Alan Eccles has retired from his post as Public Guardian and chief executive of the OPG and on 1 July Nick Goodwin was appointed to that role.

One of Alan's more notable achievements has been the greatly increased uptake of LPAs, though as noted above, there are those who feel that this is not without its problems.

The OPG has published a [brief guide](#) to how it carries out safeguarding investigations. In 2018/19 the OPG carried out 2883 investigations, an increase of about 1000 on the year before. A cause for alarm? Perhaps not when account is taken of the fact there are nearly 4m registered LPAs and deputyships.

On 12 June the OPG published its [business plan](#) for 2019/2020. It included the intent to raise awareness of LPAs and the digital future. There is a call for comments.

On 28 May the OPG updated its guidance on investment, available [here](#).

Deputyship and legal incapacitation – don't (always) believe what you read

Bashir v Bashir [2019] EWHC 1810 (Ch) High Court (Chancery Division) (Master Clark)

Deputies – property and financial affairs

Summary

It is rare, but unfortunate, when a judge misdirects themselves as to the law, but in *Bashir v Bashir*, Master Clark did so in the context of a complicated claim seeking the order of a property, and in so doing gave a distorted picture of the effect of a deputyship appointment.

The claimant lacked capacity to conduct litigation, and sued by his litigation friend, who was also his property and affairs deputy; the defendant, his sister, also lacked capacity and defended the claim by her litigation friend, who appeared in person. The underlying facts of the claim are complex, and for these purposes irrelevant, save and to the extent that they turned upon the question of whether there was a binding agreement between claimant and defendant. The claimant had suffered a brain injury in a criminal assault; his affairs were managed initially by his sister before she was removed as a deputy following an investigation.

Master Clark raised as a preliminary issue, of her own motion, the question of whether “even if the claimant had regained capacity by the date of the alleged settlement agreement, he could enter into a binding agreement whilst he remained under the jurisdiction of the Court of Protection.” She raised the issue at a case management hearing, but the claimant’s counsel made no submissions on it in her skeleton argument, and did not refer me to any authorities on the point in her oral argument.

Master Clark nonetheless considered it necessary to consider the point. Her conclusion was as follows:

44. Under the framework provided for by previous legislation (most recently, s.99 of the Mental Health Act 1983), it was

held that once a patient had been placed under the jurisdiction of the Court of Protection, they could not make any valid lifetime disposition of their property, even in a lucid interval: Re Beaney [1978] 1 W.L.R.770 at 772, summarising the effect of Re Walker [1905] 1 Ch.160 and Re Marshall [1920] 1 Ch.284. This was because upon the making of the order their property had passed out of his control. Any disposition was inconsistent with that control, and therefore void.

45. With effect from 1 October 2007, Pt VII of the Mental Health Act 1983 was repealed and replaced by the provisions of the Mental Capacity Act 2005. This established a new Court of Protection with more comprehensive powers (along with a new statutory office of Public Guardian). The 2005 Act provides that the Court may by order make decisions on behalf of the person incapable or may appoint a “deputy” to make decisions on his or her behalf. The deputy will have such powers as the court determines. The role of the deputy is therefore similar to that formerly of a receiver under the Mental Health Act.

46. There appears to be no direct authority on the effect of the appointment of a deputy on the patient’s ability to dispose of or deal with property: in this case, his rights against the defendant in respect of the judgment debt. However, in my judgment, the principle established under the previous legislative framework applies to mentally incapable persons within the jurisdiction of the new Court of Protection. In this case, the order of 19 August 2011 conferred general authority on Ms Giles to take possession or control of the property and affairs of the claimant; and

any purported disposition or dealing with that property would be void.

47. It follows that even if the claimant had regained capacity during the relevant period, he could not, as a matter of law, enter into a binding agreement with the defendant.

Master Clark, in the alternative, decided that on the evidence before the claimant did not, in fact, have the capacity to enter into the agreement in question.

Comment

It is unfortunate, and perhaps reflecting the fact that Master Clark was not given assistance by the parties, that Master Clark's conclusions in relation to the effect of deputyship was reached without consideration of s.20(1) MCA 2005, which provides that "[a] deputy does not have the power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to a matter." This provision, which had no equivalent in Part 7 Mental Health Act 1983, means that the framework in relation to deputyship is no longer the legal incapacitation which occurred upon the appointment of a receiver, but is intended to be calibrated to the **current** ability of P to make the decision(s) in question. It is reflected in the standard wording of the deputyship order, which provides that the deputy is appointed "to make decisions on behalf of X that he/she is unable to make for him/herself in relation to his/her/property and affairs." *Re Walker* and *Re Marshall* are therefore no longer good law.

Because of the way in which she approached matters in the alternative, Master Clark's ultimate decision does not appear on its face

impugnable, but it should be emphasised that the claimant's legal incapacity to enter into the decision did not flow from the fact that he was subject to deputyship, but rather from his mental incapacity in relation to the specific decision.

Deputyship can undoubtedly serve as a tool for legal incapacitation if not properly utilised, in particular if the deputy does not (as they are bound both by statute and the orders appointing them) abide by the principle in s.1(3) MCA 2005 that a person is not to be taken as unable to make a decision unless all practicable steps have been taken to support them. But the decision in *Bashir* does not stand as authority to suggest that the compatibility gap between the MCA and the CRPD (and/or the CRPD as interpreted by the Committee) is anywhere near as great as paragraphs 46-7 would make it appear.

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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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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. To view full CV click [here](#).

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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](#).

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Adrian is a recognised national and international expert in adult incapacity law. 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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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. 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

Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. The conference is also be held on 5 December in Manchester. For more information and to book, see [here](#).

Clinically Assisted Nutrition and Hydration Supporting Decision Making: Ensuring Best Practice

Alex speaking at a conference about this, focusing on the application of the BMA/RCP guidance, in London on 14 October. For more information and to book, 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 break over summer, and 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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