



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

(1) In the Health, Welfare and Deprivation of Liberty Report: two deprivation of liberty cases making clear what should (and should not) happen before the court; two important cases about reproductive rights and capacity, and capacity under stress in different contexts;

(2) In the Property and Affairs Report: welcome clarity as to how to make foreign powers of representation effective; and capacity and the financial implications of marriage;

(3) In the Practice and Procedure Report: two important judgments from the Vice-President highlighting different aspects of case management and confirmation as to the procedural rules governing inherent jurisdiction applications in relation to adults;

(4) In the Wider Context Report: news from the National Mental Capacity Forum (and a survey they need completing); an important case about the intersection of capacity, the inherent jurisdiction and the Mental Health Act 1983 in the context of force-feeding; and when you can rely upon your own incapacity to your benefit.

(5) In the Scotland Report: four important publications from the Mental Welfare Commission.

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, where you can also find clear [guidance](#) as to the (non) place of mental capacity in relation to voting, ahead of the deadline for registration in the General Election of 26 November.

Editors

Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
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

Capacity, marriage and financial consequences 2

Making foreign powers of representation effective in England & Wales 3

Lasting powers of attorney – abuse on the increase? 7

Capacity, marriage and financial consequences

Mr Adrian Stuart Mundell v (Name 1) [2019] EWCOP 50 (Mostyn J)

Mental capacity – marriage

Summary

In this case, Mostyn J was asked to consider at some speed (the proposed marriage being three days hence) whether Name 1 (“X”) lacked capacity to marry Name 2 (“Y”) in circumstances where X’s property and affairs deputy was concerned that X did not understand the financial implications of marriage.

X was born in Christmas Eve in 1990 and was 28 years old. From childhood he has suffered from learning difficulties. A property and affairs deputy was appointed to act, in particular because he had been awarded a substantial sum by way of compensation by virtue of a road traffic accident when he lost a leg while working as a refuse collector. The award of damages was carefully calculated to meet his needs, and his needs alone. Part of the award had been used to purchase a home and the remainder has been invested on his behalf.

X and Y began their relationship approximately three years previously, since when she had moved into his home with her two children, now aged seven and sixteen. In so doing, she relinquished a council property, of which she had been a tenant for about 12 years.

X was considered to have testamentary capacity to make a will, and in October 2017 he had made a will leaving his estate to his parents and he specifically indicated he did not want to benefit Y. That will would be revoked if he were to marry, although Mostyn J noted that it would be open to him before the marriage, to execute a codicil to his will which provided that the will shall survive his marriage and be effective thereafter. Mostyn J noted (at paragraph 7) that:

One of the immediate counterintuitive problems that I have to face is that I am being asked to declare today that I have, on an interim basis, reason to believe that [Y] does not have the capacity to marry whilst, at the same time, to accept that he had the capacity to make a will in 2017 and has the capacity today to execute the codicil that I have mentioned. It would be surprising if the degree of mental capacity that is needed to execute a will is in fact less than the degree of mental capacity that is needed validly to contract a marriage.

Mostyn J suggested that it was in his interests, although it was not part of the decision he had to make, that X should execute a codicil to his will to that effect prior to the wedding, if Mostyn J permitted the marriage to proceed.

In accordance with the relevant case law on capacity to marry, Mostyn J considered whether X understood: (a) the nature of the marriage contract and (b) the duties and responsibilities that normally attach to marriage. In respect of (b), Mostyn J disagreed with Munby J in *Sheffield City Council v E and S* [2005] 2 WLR 953 that the essence of marriage is for two people to live together and love one another. While recognising that this is a common expectation, Mostyn J observed (at paragraph 14) that:

There are plenty of examples, both in the distant past and more recently, of marriage being created where the parties like each other could not be said to love each other: where their relationship is one of platonic friendship rather than one of passion. Moreover, there are plenty of examples in this modern age of parties marrying where they do not share a common home or a common domestic life but, nonetheless, their marriage is well and truly a marriage.

Instead, Mostyn J focussed on whether X understood that his marriage could have financial consequences. In this regard he observed (at paragraph 31) that:

it would be inappropriate and, indeed, arguably dangerous to introduce into the test for capacity to marry a requirement that there should be anything more than a knowledge that divorce may bring about a financial claim. This, [X] plainly understands. However, what the extent

of that claim should be is a mystery to even the most sophisticated and well educated of lay, as well as legal, persons and to suggest that there is needed an appreciation of what the result of a financial remedy claim might be, would be to set the test for capacity far too high.

On this basis, Mostyn J did not hesitate to find that X had capacity to marry. He noted, however, that:

if this marriage happens and then later breaks down and a financial claim is made, then the scope of any claim by (name 2) is necessarily going to be extremely limited, given that the entirety of [X]'s means derive from a personal injury compensation payment which will have been calibrated by reference to his needs. There are numerous authorities in the books which have effectively emphasised the near-immunity of personal injury awards from a financial claim. So, the extent of any claim that were to be made on the breakdown of this marriage, were it to happen, would be limited, in my provisional prognostication at this point, to alleviating serious financial hardship and no more.

Making foreign powers of representation effective in England & Wales

Re Various applications concerning foreign representative powers [2019] EWCOP 52 (Senior Judge Hilder)

CoP jurisdiction and powers – international jurisdiction

Summary

In this case, Senior Judge Hilder has returned to the somewhat complex issues that arise where

an attorney seeks to use a power of representation granted in a foreign jurisdiction. She had previously considered these issues in *Re JMK* [2018] EWCOP 5, a decision which attracted a certain amount of comment. In this case, concerning five separate powers, she had the benefit of the Official Solicitor as Advocate to the Court. In each of the applications, the applicant was asking Court of Protection to make orders to give effect in England and Wales to representative powers originating in a foreign jurisdiction.

Senior Judge Hilder started by giving a useful overview of the provisions of Schedule 3 to the MCA 2005, and the way in which they implement (albeit with some differences) the provisions of the 2000 Hague Convention on the International Protection of Adults, notwithstanding the fact that the UK has not, in fact, ratified that Convention in respect of England & Wales. Within that framework, Senior Judge Hilder noted, there were five options for the holder of a foreign power of representation ("R") to ensure that they have necessary powers of management in relation to the property of an adult in England & Wales:

(1) R may simply rely on the power, using it directly to demonstrate their authority

Although this is, in principle, how Schedule 3 should operate (see paragraphs 13 and 14), Senior Judge Hilder noted that "[i]n practice, this approach is generally not found to be effective because, as [three of the cases before her] each demonstrate, financial institutions in England and Wales usually seek some domestic confirmation of authority."

(2) R may obtain an order from the country where the donor is habitually resident permitting him to manage the donor's property (essentially the equivalent of a deputyship order); and then seek

recognition of that order under Schedule 3 Part 4 / Rule 23.4.

As Senior Judge Hilder noted: "[g]iven that powers of attorney are typically granted with a view to avoiding any need for court proceedings, it is not difficult to see why this approach – which requires proceedings in two courts – is not commonly favoured."

(3) R may seek a declaration under s15(1)(c) MCA 2005 and Rule 23.6 that he or she will be acting lawfully when exercising authority under the power in England and Wales.

As Senior Judge Hilder noted: "[t]here is some suggestion from commentators that this should be R's application of choice." She then went on to note the requirements that would have to be satisfied before the Court of Protection could grant that declaration. Importantly, she noted that:

Mr. Rees [on behalf of the Official Solicitor] has posed a question as to whether there is a "threshold" for the exercise of the court's jurisdiction to make this type of declaration: is it exercisable in respect of any foreign power of attorney, or must the donor be an "adult" within the meaning of Schedule 3 paragraph 4, or must the donor lack capacity within the meaning of section 2 of the Act? The question is significant because, if there is no threshold of capacity within the meaning of section 2 of the Act, the Court may be making declarations in respect of persons who would otherwise be outside its jurisdiction.

Mr. Rees suggests that for the court's jurisdiction to make this type of declaration to arise, the donor of the power must be an "adult" within the

meaning of Schedule 3 paragraph 4. I agree. That seems to have been the approach taken by Baker J in HSE v. PA & Ors [2015] EWCOP 38 at paragraph 44, and is consistent with the 'scope of jurisdiction' provisions on paragraph 7(1) of Schedule 3 - "The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to" "adults" in various circumstances.

(4) R may seek an order of the court under s.16 MCA 2005

Senior Judge Hilder noted that it would be possible for the court to make an order under s.16 even if an application asking it to do so was not formally before the court, and that

There are two ways in which the exercise of the full, original jurisdiction may assist:
 (a) *by making an order which appoints R as the adult's deputy for property and affairs; or*
 (b) *where the adult's property in England and Wales is limited and R is simply seeking to remit such property to the state where the adult is habitually resident, by making a "one-off" order authorising R to make the transfer.*

In either case, the court would need evidence that the adult lacked relevant capacity within the meaning of section 2 of the Act, and to be satisfied that the appointment/ authority to transfer is in the best interests of the adult.

If the court is considering making such an application, Senior Judge agreed with the submission of the Official Solicitor that the existence of a valid foreign power of attorney is a material consideration when considering what is in the best interests of the adult in question,

but it is not a bar to the exercise of the full, original jurisdiction of the court.

(5) R may apply for orders of recognition of the power of representation as a 'protective measure.'

This appeared to be the application intended by the applicants in each of the five cases before the court. This meant that Senior Judge Hilder had to consider further what constitutes a 'protective measure' for the purposes of the recognition provisions of Schedule 3 paragraph 19. Whilst she noted that she was persuaded that she had been too narrow in her understanding of the position in *Re JMK* (in which she had held that a 'protective measure' could only be a measure made or approved by a court), she ultimately found that she did not have to decide the 'interesting' question of precisely when and under what circumstances a foreign power of representation would become a protective measure upon registration by an administrative body (such as the Office of the Public Guardian). Senior Judge Hilder noted that:

If, when an appropriate application is made, the court were minded to take the view that a power of attorney can be transformed into a protective measure through a process of registration linked to loss of capacity, application of the recognition and enforcement provisions of Schedule 3 Part 4 still require that the circumstances of disapplication under paragraph 19 (3), (4) and (5) do not apply.

Senior Judge Hilder then turned to consideration of the individual cases before her. Perhaps the most important for wider purposes was that relating to TCM, seeking recognition of a Lasting

Power of Attorney registered with the Office of the Public Guardian of Singapore. The purpose of the application appeared to be to enable TCM's wife and daughter to make decisions on behalf of TCM in respect of his welfare (also his property and affairs but since he did not have any in England and Wales, this was less of a driving factor). Senior Judge Hilder noted the:

39.7 [...] possibility of a declaration pursuant to section 15 of the Act, that the attorneys will be acting lawfully when exercising authority under the power: there is a difficulty with meeting the requirements of Schedule 3. The evidence is that, at the time of granting the power, TCM was habitually resident in Singapore. The power is therefore not within the requirements of Schedule 3 paragraph 13(1). However, the evidence also indicates that England was not 'a connected country': at the time of granting the power TCM was not a UK national, he was not habitually resident in England and Wales, and he had no property in England and Wales. Moreover, TCM has given no written specification that the law of England and Wales should apply. So the power is not within the requirements of Schedule 3 paragraph 13(2) either. It falls into the lacuna identified at paragraph 22.5 above: Schedule 3 paragraph 13 makes no provision for the law applicable to the "existence, extent, modification or extinction" of this power.

39.8. It has been suggested that "logic, and fidelity to the principles of the Convention [...]" point to the applicable law in these circumstances (in respect of "existence, extent, modification or extinction" of the power) being the law of the state of habitual residence at the time

of granting the power, ie Singapore. I agree. That approach also seems to me most closely consistent with the approach taken in Schedule 3 paragraph 13(2). (emphasis added)

On the facts of the case before her, Senior Judge Hilder declared under s.15(1)(c) that the attorneys would be acting lawfully when exercising authority under the power in England and Wales, subject to modifications that the authority to make gifts is limited to the circumstances set out in s.12 MCA 2005 and that the authority to give or refuse consent to treatment did not extend to life-sustaining treatment to accord with s.11(8) MCA 2005, which sets out specific provisions in relation to such treatment which the Singaporean power did not mirror.

Commentary

That Senior Judge Hilder was required (for the second time, following *Re JMK*) to go through the exercise of considering how those acting under foreign powers can actually get institutions (in particular financial institutions) in England & Wales to accept their authority is rather depressing, given the clear wording of paragraph 13 of Schedule 3, which should mean that foreign powers valid on their own terms are automatically effective here.

It is particularly depressing given that, for these purposes, 'foreign' powers include those emanating from Scotland, although, in practice, banks and financial institutions do seem somewhat happier to accept those powers. In due course, were the UK to ratify the 2000 Convention in respect of England & Wales, the provisions of Article 38 of the Convention would be available, enabling the authorities in another

Hague state to issue a certificate to the person acting under the power of representation which would serve as proof of the matters contained within it. The Government, though, has no plans at present to extend ratification to England & Wales (or Northern Ireland).

Lasting powers of attorney – abuse on the increase?

The number of legal actions taken by the Office of the Public Guardian against people with lasting power of attorney has more than doubled in the last two years, with more than 700 applications to court made in 2018/19 in relation to alleged misconduct by attorneys. Concerningly, this increase outstrips considerably the increase in attorneys on the register, indicating that financial misconduct is becoming more and more common. These trends are apparent from data collected by the law firm Nockolds and reported in the Law Gazette.

It should also be noted that the OPG began nearly 3,000 safeguarding investigations over 2018/19, which is 53% more than in the previous year.

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 QC: 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), 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 ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. 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. 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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). 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. To view full CV click [here](#).

**Katherine Barnes: Katherine.barnes@39essex.com**

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](#).

**Adrian Ward: adw@tcyoung.co.uk**

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; honorary membership of the Law Society of 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. 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

Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, 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.

Our next edition – the 100th – will be out in December. 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



Chambers UK Bar
 Court of Protection:
 Health & Welfare
Leading Set



The Legal 500 UK
 Court of Protection and
 Community Care
Top Tier Set

clerks@39essex.com • [DX: London/Chancery Lane 298](https://www.39essex.com) • [39essex.com](https://www.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 0C360005) 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](#)