Essex CHAMBERS

MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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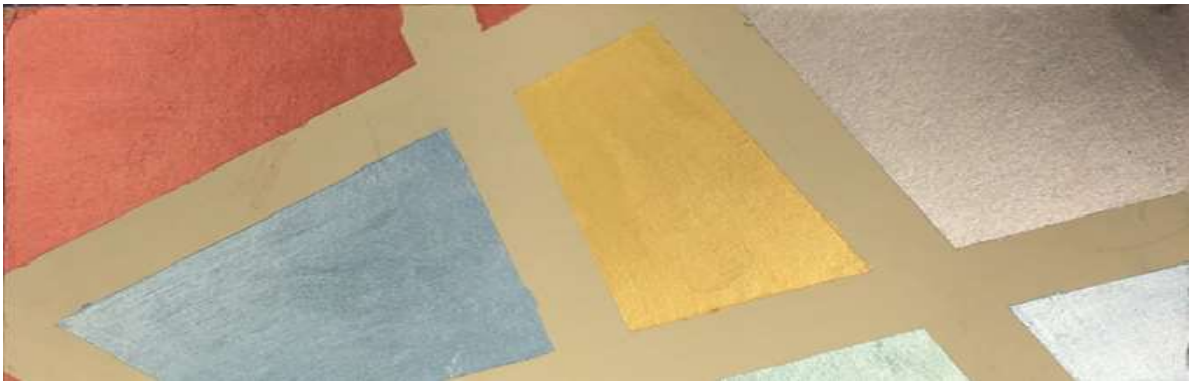

Welcome to the February 2020 Mental Capacity Report, which is, even by our standards, a bumper one. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a tribute to Mr E; fluctuating capacity; improperly resisting a deputy appointment; DoLS, BIAs and RPRs, and finding the right balance with constrained resources;

(2) In the Property and Affairs Report: the OPG, investigations and costs; e-filing for professional deputies, and a guest article about the National Will Register;

(3) In the Practice and Procedure Report: the Vice-President issues guidance on serious medical treatment; an important judgment on contingent declarations; the permission threshold; and disclosure to a non-party;

(4) In the Wider Context Report: brain death and the courts; deprivation of liberty and young people;

(5) In the Scotland Report: supplemental reports from the Independent Review of Learning Disability and Autism; the Scott review consults; and relevant cases and guidance.

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.

Contents

Death of the former Master of the Court of Protection

With thanks to former Senior Judge Lush for informing us, we are sad to report that Mrs Anne Bridget ('Biddy') MacFarlane, died on Sunday 24 November 2019. She was 89. She was the first female County Court Registrar (District Judge) in England & Wales, and was appointed as Registrar of Bromley County Court in 1978. She became the first female Master of the Court of Protection (indeed, the first female Master in the Court Service) in 1982 and was also the first solicitor to be appointed to that office. She retired in 1995.

The OPG, investigations and costs

The Public Guardian v DJN [2019] EWCOP 62 (HHJ Marin)

CoP jurisdiction and powers – costs

Summary

In this case P executed an LPA and subsequently became incapacitous. The OPG became concerned about the actions of the attorney and also about whether P had capacity to execute the LPA and so issued proceedings to revoke the LPA on the grounds that P had lacked capacity to grant it and on the grounds of the attorney's alleged misbehavior. At the same time the OPG sought and obtained interim without notice orders suspending the operation of the LPA and appointing an interim deputy.

The attorney disputed the application on all grounds and, after a 2 day hearing, he was vindicated and the application dismissed and the interim orders discharged. The attorney had, however, incurred £82,000 in costs and the question arise as to who should pay.

The usual rule in property and affairs is, of course that P's estate pays. Rule 19.2 of the COPR 2017 sets out the general rule for costs in cases relating to property and affairs, namely:

> *19.2 Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to P's estate.*

Rule 19.5 provides that:

(1) The court may depart from rules 19.2 to 19.4 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including –

(a) the conduct of the parties;
(b) whether a party has succeeded on part of that party's case, even if not wholly successful; and
(c) the role of any public body involved in the proceedings.
(2) The conduct of the parties includes –
(a) conduct before, as well as during, the proceedings;
(b) whether it was reasonable for a party to raise, pursue or contest a particular matter;
(c) the manner in which a party has made or responded to an application or a particular issue;
(d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and
(e) any failure by a party to comply with a rule, practice direction or court order.
(3) Without prejudice to rules 19.2 to 19.4 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.

In this case, the court ordered that the OPG should bear its own costs and 50% of the attorney's costs. There were a number of reasons for this, summarized at paragraphs 47-58 of the judgment as follows.

47. It was abundantly clear at the outset that the real issue was JN's capacity at the time of the sale of his property.

48. Accordingly, before commencing proceedings the Public Guardian should have reviewed the capacity evidence. In my judgment, had he done so with care, he would have concluded that it was weak. Indeed, even the Special Visitor's report was guarded.

49. Nonetheless, the Public Guardian was content to commence proceedings solely on the basis of the desk-top evaluation of the case carried out by an investigator. I am clear that this led to proceedings being issued which went beyond what was necessary and reasonable.

50. The Public Guardian should have appreciated the obvious deficiencies in the capacity evidence. He could have invited DN to agree to a joint expert being instructed to consider the matter before issuing proceedings so that he could consider his position carefully or he could have issued proceedings and asked the court to adjudicate only on the issue of capacity. Instead, he embarked upon litigation which sought a range of reliefs and orders.

51. It is particularly concerning that the Public Guardian sought without notice orders of a very serious nature, namely the suspension of the LPA and the appointment of an interim deputy.

52. This approach completely ignored the fact the DN was co-operating with the Public Guardian and had offered to place monies in an account to cover all care costs.

53. It is not surprising that interim orders were made on paper given that the tenor of the application and evidence in

support suggested serious wrong-doing on the part of DN that required a response from the court. This did not though reflect the reality.

54. At the very least, the application for interim orders should have been on notice to DN. Had this happened, the court would have had a fuller picture and the case could have been directed on a path to address the real issues that arose. My view is that the application for interim orders should never have been made; that it was reflects the lack of consideration given to this case by the Public Guardian.

55. What flowed from the interim orders was acrimonious litigation with DN defending every issue raised against him and the appointment of an interim deputy which caused further acrimony and litigation costs, as well as achieving next to nothing for JN at a high price for which he ultimately had to pay.

56. The Public Guardian adopted what seemed to be a standard approach to litigation based on his approach to other cases. This was a serious failure especially when rule 1.4 COPR 2017 expects litigants to comply with the overriding objective. This obligation applies equally to the Public Guardian.

57. His approach also seemed strange in the context of JN having told Dr C that he was upset about the investigation of DN and the history of joint financial dealings between JN and DN at times when JN had capacity.

58. This all amounts in my judgment to a good reason to depart from the normal costs order especially having regard to rules 19.5(2)(a) to (c). I accept Ms Galley's criticisms in this regard.

Comment

Orders for costs, especially against public bodies whose task it is to investigate and protect the interests of those lacking capacity, are unusual but this case illustrates the type of behaviour that might give rise to such an order. On a procedural point, the interim orders (which were of draconian effect) were made without notice and without a return date for their reconsideration (although there was a liberty to apply). In other jurisdictions in such circumstances a return date is mandatory.

Testamentary Capacity. *Banks v Goodfellow* (still) rules

There has been some debate about whether the courts, when assessing a deceased testator's capacity to make a will proof of which is being sought, should continue to apply the test in *Banks v Goodfellow* (1870) LR 5 QB 549 namely:

> *It is essential … that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*

Or apply the MCA test of capacity. So far, the courts have held Banks is still the correct test.

The latest example of this is *Todd v Parsons and others* [2019] EWHC 3366 (Ch), a decision of HHJ Matthews sitting as a judge of the Chancery Division, where the point was not argued though one of the parties reserved the right to argue it on appeal.

In a similar vein, the High Court in Northern Ireland determined a dispute about such capacity applying the *Banks* test in *Guy v McGregor and others* [2019] NICh 17. Along the way, there was a helpful discussion about the weighing of relevant evidence as follows at paragraphs 10-15 per McBride J.

> *10. The burden of proof as to testamentary capacity was conveniently summarised by Briggs J in Re Key (Deceased) [2010] EWHC 408 (Ch) as follows at paragraph 97:*
>
> *The burden of proof in relation to testamentary capacity is subject to the following rules:*
>
> > *(i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.*
> >
> > *(ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.*
> >
> > *(iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless: see generally Ledger v Wooton [2008] WTLR 235, paragraph 5, per Judge Norris QC."*
>
> *The standard of proof is on the balance of probabilities.*
>
> *11. The test for testamentary capacity set out in Banks v Goodfellow is not a medical test although the court will pay particular attention to and will generally be greatly assisted in most cases by expert medical opinion. The court will however also take into account and give weight to the evidence of drafting solicitors and lay witnesses who knew the testator.*
>
> *12. Obiter dicta in some recent cases has given rise to academic debate about whether there is a hierarchy of evidence in cases where capacity is disputed. In Hawes v Burgess [2013] EWCA 94 Mummery LJ compared the view of an expert medical witness who had never met the testator, unfavourably against the first hand opinion of an independent experienced solicitor. Mummery LJ stated at paragraph 60:*
>
> > *"My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood*

that she was making a will and also understood the extent of her property".

13. The comments made by Mummery LJ were strictly obiter. They have however been the subject of academic criticism, not least by the authors of Theobald On Wills who note that the value of the view of a busy solicitor, lacking in medical training should not be overstated. They also note that numerous solicitor-drafted wills have been held to be invalid on the grounds of testator incapacity.

14. In my view, in determining whether a testator has capacity the court must consider the evidence of all the witnesses including the medical experts, the drafting solicitor and the other lay witnesses. The weight to be given to each type of evidence will depend upon a number of factors, including the witness's expertise, knowledge, experience and independence. In some cases the assessment of a medical expert may be limited by the fact he has never met nor examined the testator and there are limited medical notes and records available to him, for example in respect of the severity of the testator's speech problems or memory loss as of the date of execution of the will. In such cases the weight to be attached to the medical evidence may be significantly less than that attached to the evidence of an experienced solicitor who knew the testator well or who carried out a specific assessment of capacity at the date of execution of the will. In other cases the nature of the medical evidence may be such that it outweighs the evidence of even an experienced solicitor. In general the weight to be attached to the view expressed by a solicitor as to capacity will depend on that solicitor's experience, his knowledge of the testator, and the nature of any assessment carried out by him in respect of capacity. The weight to be attached to the evidence of lay witnesses will generally depend on their independence, experience and knowledge of the testator. In cases where there is a divergence in the views of the expert medical witnesses or where there is a paucity of medical notes and records, the evidence of lay witnesses who can give detailed evidence of the testator's behaviour, demeanour and activities around the time of the execution of the will, by reference to conversations they had with the testator or in respect of activities conducted by the testator at the relevant date, will be of much assistance and will be given great weight.

15. Accordingly, I consider that there is no hierarchy of witnesses. Each case will be fact specific. In some cases the medical evidence will be the weightiest factor. In other cases the evidence of the solicitor will be of magnetic importance and in yet other cases the evidence of the lay witnesses will be decisive."

OPG blog on LPA applications and common mistakes:

The OPG published on 10 January 2020 a blog entitled "Get it right the first time - hints and tips to help you complete your LPA application."

It is a useful read and includes the top 8 errors and how to avoid them, namely:

- Missing and mixing pages
- Signing the application in the wrong order
- Family members as certificate providers

- Using initials instead of full names and not signing in the appropriate boxes
- Pencil, Tippex and photocopies
- Bound applications
- Being unclear in the life sustaining treatment section
- Contradictions in instructions and appointment types

E-filing for professional deputies

Professional Deputies who are appointed by the Court of Protection are required to submit estimates of costs and bills for assessment at the end of a reporting period. From Monday 20 January 2020, deputies have been required to send a Bill of Costs, N258 and authority to assess (deputyship order) through the e-filing system in PDF Format. For more details, see here.

The National Will Register

[*We are pleased to include here a guest article on behalf of the National Will Register, highlighting the importance of Will searches, not merely in relation to probate disputes, but also in relation to decisions about property and affairs, as well as health and welfare, for living individuals with impaired capacity*]

The National Will Register (operated by Certainty and endorsed by the Law Society of England and Wales), plays a crucial role in the work of those involved in applying for Statutory Wills, or who need to expedite their Property and affairs, and Welfare deputy and attorney responsibilities with the utmost due diligence.

The SRA Ethics Guidance Access to and disclosure of an incapacitated person's will states that the Will forms part of the financial affairs belonging to the donor and highlights scenarios of possible adverse outcomes which can occur without knowing the contents of the Will.

Having knowledge of the contents of the will and/or codicils(s), means that the attorney or deputy is in a position to act in the best interests of the person, to make appropriate investments; apply to the Court of Protection for an order to save a specific legacy, create a Statutory Will, dispose of an asset or arrange for safekeeping and storage of the asset.

The content of an existing or past Will will help to avoid adverse outcomes, and to understand the emotional mindset and relationships of the person both in property and affairs, and in relation to their welfare. What is the impact of a financial decision, for example, regarding the cost and location of a care home upon the welfare of the person? Notionally, financial decisions can have an impact on the wellbeing of the person, so it is important to understand the mindset and relationships of P/donor, and as former Senior Judge Lush has said "I can think of no written statement that is more relevant or more important than a will" in determining a person's wishes and wishes for purposes of s.4(6) MCA 2005 (*Re Treadwell decd* [2013] WTLR 1445).

We understand that the Official Solicitor recommends that a Will Search should be conducted in appropriate cases for Statutory Will applicants. The Official Solicitor will require an exhaustive search of the existence of any unknown Will(s) prior to the creation of a

Statutory Will and be satisfied that the Will presented is the last Will. Certainty, the National Will Register, has created a new digital portal for Statutory Will applicants.

Where it is thought that the person did not have a Will it is important to undertake a Will search to ensure an unknown Will has not indeed been registered with the National Will Register or is being stored with a law firm or Will writer.

It is therefore essential that professional and lay deputies and attorneys are aware of the service the National Will Register's Certainty Will Search provides, in order to ensure Will search due diligence and the ability to honour the wishes of the testator, as far as is possible, both in life as well as in death.

Deputies and attorneys can conduct a Certainty Will Search via the Certainty website.

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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), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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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.

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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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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.

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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. 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; 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.

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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

LSA Mental Health conference

Adrian will be chairing and Jill speaking at the LSA Mental Health conference in Glasgow on 13 February. For more details , and to book, see here.

The law and brain death

Katie will be chairing and Tor speaking at a seminar and discussion taking a critical look at cases concerning brain death in the High Court and Court of Protection. It will take place on 26 February in London. For more details, and to book, see here.

SOLAR conference

Adrian will be speaking on "AWI: Don't wait for legislation – the imperatives apply now!" at the annual conference of the Society of Local Authority Lawyers and Administrators in Scotland, being held on 12 and 13 March in Glasgow. For more details, and to book see here.

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see here.

Other conferences and events of interest

Mental Diversity Law Conference

The call for papers is now open for the Third UK and Ireland Mental Diversity Law Conference, to be held at the University of Nottingham on 23 and 24 June. For more details, see here.

Peter Edwards Law courses

Peter Edwards Law have announced their new programme of courses, covering a wide range of topics across the mental capacity and mental health field. 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.

Our next edition will be out in March 2020. 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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