



Welcome to the April 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the DHSC emergency guidance on MCA and DoLS, the Court of Protection on contact and COVID-19, treatment escalation and best interests, and capacity under the microscope in three complex cases;

(2) In the Property and Affairs Report: the Golden Rule in (in)action and the OPG's 'rapid response' search facility for NHS and social care staff to access the register of deputies / attorneys;

(3) In the Practice and Procedure Report: the Court of Protection adapting to COVID-19 and an important decision on the s.48 threshold;

(4) In the Wider Context Report: COVID-19 and the MCA capacity resources, guidance on SEND, social care and the MHA 1983 post the Coronavirus Act 2020, dialysis at the intersection between the MHA and the MCA and an important report on the international protection of adults;

(5) In the Scotland Report: the response of the legal community to AWI law and practice under COVID-19, and an update from the Mental Health Law Review.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#). Chambers has also created a dedicated COVID-19 page with resources, seminars, and more, [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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### The Golden Rule in (in)action

*Re Templeman Deceased* [2020] EWHC 632 Ch High Court (Chancery Division (Fancourt J))

*Mental capacity – testamentary capacity*

#### Summary

In this case one of the children of the late Lord Templeman disputed the validity of his last will, made in 2008.

At that time, he was suffering from episodic memory problems but was otherwise mentally fit. It was contended that he had forgotten the terms of his earlier will and was operating under an illusion that two potential beneficiaries had been done a wrong that needed to be put right. This factual case was rejected (see paragraph 128 and 129 of the judgment) but the court went on to consider what the position would have been had that case been accepted.

At paragraphs 132 and 133 the court held as follows.

*132. Even if I had concluded that Lord Templeman had forgotten the terms of his 2004 codicil and/or the gift of Rock Bottom by Sheila when making his new will and was acting in the belief that a*

*wrong had been done to Jane and Sarah that needed to be put right, I would still have held that he had testamentary capacity. The argument of the Defendants was put in two different but complementary ways. First, that because Lord Templeman could not recall the arrangement that had been deliberately made and the reasons for it, he could not sufficiently comprehend and appreciate the nature and extent of the claims on his estate: he could not appreciate that Jane and Sarah did not have a legitimate and substantial claim for provision under his will, whereas his own family did have. Second, that his mind was so prejudiced by an illusory belief that a wrong had been done to Jane and Sarah that had to be put right that he lacked a just appreciation of those claims.*

*133. Comprehension and appreciation of the calls on a testator's bounty does not require actual knowledge of other gifts that have been made to, or the financial circumstances of, a potential object. A testator does not have to have all the facts with which to make a correct or justifiable decision; he has to have the capacity to decide for himself between competing claims. That means that he must have the ability to inform himself about those claims, to the extent that he wishes to do so, but not that he must*

*remember the relevant facts about each of the potential objects or have correctly understood their financial circumstances. Whether Jane and Sarah had a legitimate claim on him and if so to what extent, compared with his blood relations, was a matter for Lord Templeman, as long as he had the capacity to weigh the rival claims.*

The emphasis, therefore, is on the capacity to understand and it is not necessary to show that the testator had all the facts in his mind so long as he had the capacity so to do.

The result was, therefore, that the Lord Templeman's last will stood and we should all bear in mind these words from the judgment.

*18. In such circumstances, Mummery LJ (with whom Patten LJ agreed) concluded in Hawes v Burgess [2013] EWCA Civ 94; [2013] WTLR 453 at [57] that it would be a "very strong thing" to conclude that a testator lacked testamentary capacity because he did not "comprehend and appreciate the claims to which he ought to give effect". Mummery LJ continued at [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 "*

### Comment

As others have observed, it is ironic that Lord Templeman had, himself, not followed his own Golden Rule as to the obtaining medical advice in the case of an "aged testator or testator who has suffered a serious illness." It is doubly ironic that this judgment reinforces that that 'rule' is a matter of practice, as opposed to a legal requirement.

### OPG guidance for attorneys and deputies

The OPG has issued guidance for attorneys and deputies as to how to discharge their roles during COVID-19, reinforcing that the obligations under the MCA imposed upon them are not relaxed. The guidance makes clear that a person cannot give up their role temporarily, but that they do not have to take steps to step down permanently simply because they cannot visit the individual in question at the moment. It also emphasises that:

*Being an attorney or deputy does not mean that you can tell a health or care provider they have to use their resources to help the person. This includes resources such as care provision, particular medical equipment or a doctor's time.*

### OPG 'rapid response' register search process

The OPG has launched a 'rapid response' search process for NHS and social care staff to be able to obtain information quickly about whether a COVID-19 patient has an attorney or deputy. The details, and the template email to use, can be found [here](#).

### OPG survey on COVID-19 and LPAs

The Office of the Public Guardian is gathering information on the impact the coronavirus outbreak is having on the process of making a lasting power of attorney (LPA).

If you are someone who helps people plan for the future, they would like to know more about how the outbreak is affecting you and your clients. Please complete this [short survey](#) which includes the opportunity to leave your contact details if you would like to discuss your responses in more detail.

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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](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).



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## Conferences

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

### **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.

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Our next edition will be out in May. 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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