



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

(1) In the Health, Welfare and Deprivation of Liberty Report: LPS delayed to April 2022; alcohol dependence and other capacity conundrums; stem cell donation and altruism, and when to come to court in medical treatment cases;

(2) In the Property and Affairs Report: updated OPG guidance on making LPAs under light-touch lockdown and a face-off between potential professional deputies;

(3) In the Practice and Procedure Report: a basic guide to the CoP; litigation capacity and litigation friends and observations about intermediaries and lay advocates;

(4) In the Wider Context Report: capacity and the Mental Health Tribunal, a change of approach to s.117 aftercare and lessons learned from a close encounter with triage;

(5) In the Scotland Report: the Scott Review summary of responses to its initial survey and a response from the Chair to the critique in our last issue.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [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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### “Use an LPA service”

From 17 July, the OPG is offering a new service. Once an LPA is registered, attorneys and donors will be sent an activation key. They can create an account [online at Use a lasting power of attorney](#) and use the activation key to add LPAs to their account. A donor or attorney can then make an access code which they can give to organisations to view an online summary of an LPA. For more details, see this blog [here](#). We understand that the intention is that this service is going to be rolled out in the future in relation to LPAs registered before 17 July 2020.

### Short note: discontinuing as a deputy

In *Cumbria County Council v A* [2020] EWCOP 38, Hayden J considered the position in relation to the situation where a local authority wishes to cease being a property and affairs deputy, and have a professional deputy appointed. In almost all cases, this will come at greater cost to the person – in the test cases before Hayden J, it appears from the identified comparator that the cost would be more than twice as much.

Hayden J made clear that where a deputy wishes to discontinue in the role, an application

must be made to the court. Critically, the application will not be granted automatically:

*30. [...] The decision is one for the court, acting within the parameters of reasonable discretion. Frequently, the reasons for the application will be obvious e.g. retirement or ill health. On other occasions the basis for the application will be less straightforward and the court will have to evaluate the strength of it through the prism of P's welfare interests. Those factors identified in the passages above i.e. the complexity of P's estate; conflicts of interests; P's own wishes and feelings; the value of the estate etc, may be relevant considerations in any particular case. There can be no presumption of the outcome of the application, nor any fettering of the court's discretion. The guide will always be P's best interests, including his financial interests.*

There had been a suggestion before the court that it could examine whether the approach taken by Cumbria County Council in identifying groups of people where it no longer wished to act as deputy complied with s.149 Equality Act 2010 (i.e. the Public Sector Equality Duty). However, Hayden J made clear that the Court of Protection could not undertake such a review:

31. [...] it is manifestly the case that this court is not able, within its statutory remit, to grant any public law remedy. This should not be taken as inferring that the court is required to disregard any failure by a public body to protect from discrimination, merely that it has no power to remedy it.

Hayden J emphasised that:

33. [...]The Mental Capacity Act 2005 and the jurisprudence of the Court of Protection reflect precisely the same philosophy as that underpinning the Equality Act. The central ethos of both legal frameworks is entirely consonant. The MCA aims, ultimately, to promote equality for the incapacitous to the same degree as their capacitous coevals. It imposes an obligation actively to promote capacitous decision taking and it erects a presumption of capacity in order most effectively to promote personal autonomy.

34. When the court comes to consider an application by a deputy to be discharged from the role it will, as I have analysed above, arrive at its decision by focusing on the impact on P of either granting or refusing the application. When approaching its task, the court will consider whether the application is consistent with the objectives of the MCA i.e. whether or not the application is motivated to promote P's best interests in accordance with the principles that I have identified. If the application appears to be driven by arbitrary or discriminatory criteria devised, for example to save costs, then the court (if it identifies them) will take them in to account to whatever degree is appropriate when coming to its decision. This will not be in consequence

of a public law style review of compliance with Equality legislation, but rather the application of the principles of the MCA. The issue here is not one of jurisdiction (see *N v A CCG* [2017] UKSC 22), but of how the application should be approached within the framework of the Mental Capacity Act 2005. It is unnecessary to say more on the point.

### LPA guidance update

On 7 July 2020, the OPG updated its Guidance on making LPAs in the context of Coronavirus to reflect the changes to lockdown.

The most obvious issues are signing, witnessing and the certificate provider's conversation with the donor.

As these are critical, they are set out in full here:

#### **Signing and witnessing the LPA**

You should follow government guidance on social distancing to ensure that you satisfy requirements when signing and witnessing an LPA. Do not:

- use digital signatures - the document must be printed out and signed by hand with a black pen
- send people photocopies or scans of the LPA to sign - everyone must sign the same, original document
- ask people to send you a scan or photocopy of the page they've signed - we cannot register an LPA that includes scans or copied pages

#### **Witnessing the donor and attorneys' signatures**

Someone must watch the donor signing the LPA, then sign it themselves to say they've witnessed the signature. Each attorney and replacement attorney's signature must also be witnessed, as long as that person:

- is aged 18 or over
- has mental capacity
- is not an attorney or replacement attorney on the LPA
- Rules on witnessing

The witness must:

- be shown the blank signature and date box before they're signed
- have a clear view of the person signing the LPA, so they can see the signature being made
- be shown the completed signature and date box immediately afterwards
- Signatures must be witnessed in person.

### **If the donor cannot sign the LPA**

If the donor is not able to use a pen and cannot sign the LPA, someone else can sign on their behalf.

The donor and 2 other people must be there in person to witness the signature being made. The 2 witnesses must also sign the LPA.

You must follow all the rules on witnessing in accordance with the government social distancing guidance.

### **Make sure the LPA is signed in the right order**

It's very important that the LPA is signed in the right order. If it's not, we cannot register it. The donor may have to make a new LPA, get it signed again, and pay another application fee.

### **The certificate provider and donor conversation**

The certificate provider must talk to the donor about the LPA to make sure the donor understands it and is not being pressured to make it.

We recommend this conversation happens face to face, but you must consider the government social distancing guidance. If this must be over phone or a video call, the certificate provider should make sure the call is private.

## **Short note – the professional deputy as friend?**

In *Re OT* [2020] EWCOP 25, the court had to decide who to appoint as deputy to manage the property and affairs of an 81 year old woman, OT. The rival contenders were:

1. KKL, a trust corporation working closely with (both in terms of being the subsidiary of and working from the same office with) a charity called JNF Charitable Trust ("JNF UK"). OT had, when capacitous, approached KKL and chose them over many years to write and rewrite her Will.
2. Ms Lynsey Harrison, a partner in Clarion Solicitors, a professional deputy approached by OT's social worker SAH under an approved scheme used by Leeds City Council for referrals required

on behalf of vulnerable people for legal advice or deputyship.

Ms Harrison objected to KKL being appointed on three main bases:

*The first is its lack of independence from JNF UK and the potential for a conflict of interest to arise between OT's interests and the interests of JNF UK as the main and residuary beneficiary of OT's latest will. The second is KKL's lack of experience as a deputy and the third is KKL's geographical distance and their apparent conflict with others with whom the deputy would need to work in OT's best interests pursuant to section 4(7) of the Act.*

KKL objected to Ms Harrison being appointed in part because of their assertion that they should be higher in the ranking order, and in part because of an asserted conflict of interest associated with her ability to charge a fee for her work as a professional deputy and to pay solicitors costs to her own firm for legal services. DJ Geddes made observations of perhaps wider import to other situations where a local authority approaches a professional deputy in similar circumstances, rejecting the following specific allegations:

*a. That the arrangement under which Leeds City Council refers vulnerable people to a small pool of approved solicitors is somehow "cosy" or improper. There is nothing wrong with such a system in my judgment and no evidence to substantiate the hint that it is somehow against OT's interests.*

*b. That the inclusion within the application and draft order of the words "to authorise the deputy to pay Clarion*

*Solicitors Limited the costs of this application and if this amount sought exceeds the fixed costs allowed the deputy is authorised to agree their costs and pay them from the funds belonging to OT. In default of agreement or if the deputy or solicitor would prefer the costs to be assessed and to be carried out on the standard basis" is a "cosy arrangement regarding costs that is buried in the small print in her application". Appreciating some licence for advocacy given that this is taken from Counsel's skeleton argument this is nevertheless (literally) factually wrong (this element of the order is printed in exactly the same uppercase print as the other orders sought in the application) and reflects standard wording within the templates produced by the Court of Protection. It is perhaps right to say, however, that where the deputy is a partner in the solicitors' firm whose fees stand to be agreed it might be wise for them to agree either to stay within the fixed regime or to have an assessment or, if appropriate, for the court to restrict the licence to agree costs in a similar way.*

*c. That it is somehow surprising that Ms Harrison is not being funded by Leeds City Council to make this application or to oppose the application of KKL. This is not surprising at all. It certainly does not raise "serious questions" as asserted by Mr Arkush in his skeleton argument. The role of Leeds Social Care was limited to making the referral through Lawdesk. They are not the client of Ms Harrison, nor is OT. There is a risk to Clarion Solicitors of taking such referrals in that if their application were rejected they might be left to bear their own costs of bringing the application which they do so purportedly in OT's interests. Of course, in this limited sense they have an*

*interest in either the success of the application or at least in not being criticised for bringing the application to the point of disapplication of the general rule about costs contained in rule 19.2 of the Court of Protection Rules 2017 namely that "Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings... shall be paid by P or charged to P's estate".*

As regards where KKL sat in the pecking order, DJ Geddes noted that the fact that she had approached them and trusted them to write and rewrite,

*52. [„] shows both that she trusted the company to act in her interests and is likely evidence that she identified with JNF UK's aims and objectives. This is relevant to her values, and to her wishes for the purpose of section 4 of the Act but the evidence simply does not allow me to accept the submission that they should be treated - in particular where there is clearly potential for a conflict of interest as I have found - as if they are family or close friends of OT.*

*53. In my judgment they may well fit into the description of professional adviser. The difficulty with preferring KKL to Ms Harrison on this basis is their lack of independence from JNF UK. A solicitor or accountant who knows their client well from years of managing their personal affairs is clearly an appropriate deputy but would be expected to maintain independence. It would be unthinkable and a clear breach of their code of conduct to facilitate the writing of a Will or to act as deputy or executor of a Will under which they stood to gain.*

Ultimately, having conducted a detailed examination of the factors for and against the appointment of KKL, DJ Geddes found that;

*59. In my judgement the magnetic features have to be the need to investigate whether KKL's conduct of OT's affairs to date has been in breach of the Fundraisers Code and the clear potential for a future conflict as a result of JNF UK being the sole beneficiary of OT's estate. Nothing in Mr Arkush's submissions addressed those points to my satisfaction. The undertaking offered was certainly not enough to reassure me that OT's interests could be adequately protected if KKL were appointed as OT's deputy. On the other hand by requiring an assessment of Ms Harrison's costs if they exceed the fixed rate regime I can mitigate or even eliminate any concern arising from her relations with Clarion solicitors in respect of this application.*

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## Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

### **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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We are taking a break over August, and hope that at least some of you are able to do so too. 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](mailto:marketing@39essex.com).

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