



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

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, an important LPS update, and the judicial eye of Sauron descends on new areas to consider (ir)relevant information;

(2) In the Property and Affairs Report: a complex case about when the settlement of an inheritance;

(3) In the Practice and Procedure Report: for how long does a Court of Protection judgment remain binding, and helpful guidance for experts reporting upon capacity;

(4) In the Wider Context Report: challenging reports about the disproportionate effect of COVID-19 upon those with learning disability, young people with learning disability and autism under detention, and capacity and public hearings before the Mental Health Tribunal;

(5) In the Scotland Report: discharge from hospital without proper consideration of ECHR rights.

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. 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](#), and Neil a page [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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### Trusts and benefits

*Re LMS (Settlement of Property into a Trust)*  
 [2020] EWCOP 52 (District Judge Beckley)

*Best interests – property and affairs*

#### Summary

In this case, the court was asked to approve a settlement of an inheritance of which P was beneficiary. The application was made by P’s attorney under an LPA and opposed by the Official Solicitor acting as P’s litigation friend.

P suffered from a significant degree of autism and had a learning disability. She had sufficient capacity to appoint her mother her attorney under an LPA but was assessed as lacking capacity to agree to the settlement of her 30% share of her late grandfather’s estate coming into possession when she attained 25 (she was 21 at the time the case was before the court).

P was in receipt of means tested benefits and the local authority paid her residential care fees, again subject to means testing. When her inheritance came into possession, she would those benefits until the capital dropped below the capital limits.

Thus, P’s mother proposed a settlement of P’s inheritance into a disabled person’s trust where the capital would not be taken into account in means testing.

The OS opposed that, saying that the settlement would not have that effect because P would be deemed to have deprived herself of the capital for the purpose of securing the benefits in question and, therefore, the capital would continue to be taken into account.

The OS further said that the settlement would not otherwise be in P’s best interests and the court at paragraph 39 agreed, saying:

*Firstly, and most importantly, LMS made a capacitous decision that her property and affairs should be managed by her attorneys under the LPA. The proposed deed is contrary to LMS’s wishes as expressed through her execution of the LPA. Secondly, the trustees of the proposed trust would not be bound to apply the principles of the 2005 Act to their decisions. Thirdly, the regime of supervision by the Public Guardian of LPA attorneys does not apply to trustees (I do not intend to suggest in any way that the proposed trustees are likely to act other than in LMS’s best interests). Fourthly, the proposed deed would mean LMS’s capital being managed under the trust and her income under the LPA which does not seem to be the most efficient method of management of her property and affairs.*

Thus, the court had to consider whether the settlement would be caught by the anti-deprivation provisions. The court held that any

decision that the court made on P's behalf would be attributed to her (see paragraph 50).

Principally, the court had to consider the purpose of the settlement applying the following principles at paragraph 17:

*The principles applicable to determining whether a disposal of capital is a deliberate act for the purposes of means-tested benefits were considered by Mr Howell QC then a Social Security Commissioner in R(H)1/06 at paragraphs 20 to 23:*

*"20. 'I direct the new tribunal that as quite correctly assumed by the previous chairman and not disputed on this appeal, the correct test to be applied in determining whether the claimant is shown to have deprived himself of capital for the purpose of securing entitlement to housing benefit is the well-established one applied on similar wording in the main social security legislation, namely whether the securing of such entitlement is shown to have been a "significant operative purpose" of the claimant's relevant actions in disposing of his capital."*

The court was persuaded that securing the entitlement to means tested benefits was not a "significant operative purpose" of the settlement because it would better represent P's grandfather's wishes, namely to benefit P (see paragraph 46). The court applied similar reasoning to that which persuaded the court in a similar fashion in the Northern Ireland case of *In the matter of the will trusts of Sarah McCullagh* [2018] NICH 15.

Thus, the court decided to approve the settlement.

### Comment

The relevant local authority and benefits agency are not bound by this decision and are free to contest the conclusion as to the operative purposes behind the settlement. It must be arguable that if the **only** reason that the settlement is in P's best interests is that it secures her benefits, then that reason is a "significant operative purpose" of the settlement no matter what the COP says.

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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 Visiting Professor 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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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 and created the website [www.lpslaw.co.uk](http://www.lpslaw.co.uk). 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 5<sup>th</sup> 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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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click [here](#).

**Simon Edwards:** [simon.edwards@39essex.com](mailto: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

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](#).

Jill Stavert's Centre for Mental Health and Capacity Law (Edinburgh Napier University)'s Autumn 2020/January 2021 webinar series includes contributions by Alex on 2 December 2020 at a webinar about Psychiatric Advance Statements. Attendance is free but registration via Eventbrite is required. For 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.

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Our next edition 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](mailto:marketing@39essex.com).

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