



Welcome to the January 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: vaccination; life-sustaining treatment decisions and the limits of the court processes; capacity and unusual sexual practices; and the lockdown regulations and care in the context of incapacity;

(2) In the Property and Affairs Report: removing attorneys and Child Trust Funds in the context of those with impaired decision-making capacity;

(3) In the Practice and Procedure Report: party status and restricting the provision of information; a rare judgment on transparency, and the police and the Court of Protection;

(4) In the Wider Context Report: DNACPR decision-making under scrutiny, safeguarding and the MCA – SARs under scrutiny; and important decisions relating to different aspects of childhood;

(5) In the Scotland Report: the interim review of the Scott Mental Health Law Review under scrutiny and recent developments from Scottish Government.

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.

Contents

Attorneys and irreconcilable differences..... 2

Child Trust Funds..... 3

Attorneys and irreconcilable differences

Re KC [2020] EWCOP 62 (HHJ Sarah Richardson)

Lasting Powers of Attorney – best interests – revocation

Summary

In this case, the applicant, one of P’s daughters sought an order that powers of attorney for property and affairs and welfare be not registered. The powers were in joint and several in favour of the applicant and her 3 sisters. The applicant had refused to execute the powers as she was at loggerheads with her sisters and did not believe that the 4 of them could make decisions in their mother’s best interests. The matter was complicated by the fact that P, who had Alzheimer’s lived with the applicant.

The powers were executed in August 2017 and the first reason why the applicant objected to their registration was that P had lacked capacity to execute the powers. However, the applicant then conceded that P had capacity in August 2017 so this ground fell away. It was, however, common ground that she had lost capacity to make a number of decisions, including to revoke the purported powers. HHJ Richardson therefore court went on to consider the alternative reason for refusing to register, namely pursuant to s.22(3)(b)(ii) MCA 2005 that the donee (or any of them if more than one)

proposes to behave in a way that would contravene his authority or would not be in P’s best interests. At paragraph 28 the court considered what HHJ Marshall held:

In Re J [2011] COPLR Con Vol 716 Her Honour Judge Hazel Marshall QC considered the statutory construction of s.22 and in particular the approach that should be taken if an attorney or proposed attorney is considered to be unsuitable:

“It appears to me that the general thrust of s.22(3)(b) is that the court can revoke an LPA if it is satisfied that the attorney cannot be trusted to act in the matter and for the purpose for which the LPA was conferred upon him/her... Further, if there is sufficient evidence that the attorney is behaving in contrary to P’s best interests, even in a different context, then it seems to me that that might quite reasonably provide a sufficient reason to revoke an LPA, perhaps because of conflict of interest.” [73]

In my judgment, the key to giving proper effect to the distinction between an attorney’s behaviour as attorney and his behaviour in any other capacity lies in considering the matter in stages. First, one must identify the allegedly offending behaviour or prospective behaviour. Second, one looks at all the

circumstances and context and decides whether, taking everything into account, it really does amount to behaviour which is not in P's best interests, or can fairly be characterised as such. Finally, one must decide whether, taking everything into account including the fact that it is behaviour in some other capacity, it also gives good reason to take the very serious step of revoking the LPA." [75]

Taking that staged approach, the judge found that there was no prospect of the sisters being able to work together for their mother's benefit. She expressly refused to apportion blame for that state of affairs.

She also noted that, as the applicant did not execute the powers, P's wishes to have all 4 daughters as attorneys could not be achieved.

She held that, in those circumstances of irreconcilable conflict, it was in P's best interests that the powers were not registered and so ordered. She appointed a panel deputy for property and affairs only.

Comment

This is an unusual case of a pre-emptive refusal to register a power on the grounds of irreconcilable differences. The notes to the Court of Protection Practice were cited at paragraph 29 as follows:

The notes to the Court of Protection Practice state that no case has yet been brought before the courts on the ground of the future behaviour of a donee or donees and state that "an application to revoke a lasting power of attorney on such grounds requires a high standard of proof to show why the behaviour of the attorney is not in the donor's best

interests." Insofar as this comment requires the court to undertake a proper analysis of the available evidence, looking at factors such as the context of any evidence, the overall evidential picture and the inherent probabilities (or improbabilities) of the evidence as it relates to the past behaviour of the donee and, applying this analysis, to what it establishes about the likely future behaviour of the donee(s) and whether this is likely to be in P's best interests, I agree. Insofar as this comment suggests that there is somehow a higher standard of proof, or that the seriousness of the matters or the seriousness of the consequences should make any difference to the standard of proof, I respectfully disagree. In the present case, as with any case before this civil court, the standard of proof is to a balance of probabilities.

Child Trust Funds

There has been some progress in England in relation to Child Trust Funds, the Government [announcing](#) on 1 December 2020 that parents or guardians of children who lack mental capacity to manage their money can ask for court fees to be waived when seeking access to a Child Trust Fund. It should be noted that this does not apply in Scotland.

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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. 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. 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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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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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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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.

Our next edition will be out in February. 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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