



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

(1) In the Health, Welfare and Deprivation of Liberty Report: a judgment looking beyond the diagnosis, paying for sex and the Court of Protection, navigating autism and indoctrination and relevant updates about visiting guidance in relation to care homes;

(2) In the Property and Affairs Report: a staunch judicial defence of *Banks v Goodfellow*, Child Trust Funds and capacity, and updates from the OPG;

(3) In the Practice and Procedure Report: discharging a party without notice, the white leopard of litigation capacity and CoP statistics;

(4) In the Wider Context Report: DNACPR decisions during COVID-19, litigation capacity in the civil context, and the interaction between capacity and the MHA 1983 in two different contexts;

(5) In the Scotland Report: the new Mental Welfare Commission practice guidance on capacity, rights, and sexual relationships. Our Scottish team has been too busy making law in different countries to write more this month, but will bring updates next month about legislative developments on the cards as the new Scottish administration finds its feet.

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](#).

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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

Testamentary capacity – the judicial resistance against the MCA holds firm.....	2
OPG LPA delays.....	4
OPG rapid register search.....	4
Child Trust Funds when the child becomes 18 but lacks capacity.....	4

### Testamentary capacity – the judicial resistance against the MCA holds firm

*Re Clitheroe* [2021] EWHC 1102 (Ch) (High Court (Chancery Division) (Falk J))

*Other proceedings – probate*

#### Summary

This is the appeal against the decision of Deputy Master Linwood reported at [2020] EWHC 1185 (Ch) and digested in the June 2020 Mental Capacity Report. Deputy Master Linwood had had to decide on whether either of two wills should be admitted to probate. He described the dispute as a bitter family dispute that involved the surviving son and daughter of the deceased. The wills cut the daughter out of the estate and made the son the principal beneficiary. The daughter contested the wills on the grounds that her late mother had been suffering from a complex grief reaction or other affective disorder as a result of another daughter’s death and that had led to her having insane delusions about the surviving daughter’s character and behaviour which resulted in her being cut out of the will. In the result, the court decided in the daughter’s favour and the wills were not admitted to proof.

The first ground of appeal was that the court had applied the wrong test, namely the *Banks v Goodfellow* test of capacity rather than that in the Mental Capacity Act 2005. The first hurdle the appellant had to overcome was that this point had not been raised below. In the end, the court refused permission to argue the point (see paragraphs 48-50) because the case might have been conducted differently and it was not in the interests of justice to allow the point especially as the estate was of modest value.

The court, however, then went on to give its views of what the position was, coming clearly down on the side of the *Banks v Goodfellow* test both on the grounds of principle and precedent, see paragraph 82.

The court rejected grounds based on a challenge to the assessment of expert evidence which left the appellant’s grounds 2 and 3 which, amongst other points, challenged the deputy master’s view that it was not necessary to show that the testator could not be reasoned out of her delusions.

The court indicated that perhaps the Master had not approached the matter correctly setting out at paragraphs 103 and 104 the following test:

103. As a matter of principle, it seems to me that the correct focus must be on the individual's state of mind. What is required to determine that the relevant belief has the requisite fixed nature must depend on the particular factual circumstances (which will include the nature of the belief and the circumstances in which it arose and was maintained), rather than itself being part of the test. A test based on proving a hypothetical proposition, namely that if an attempt was made to reason the individual out of the belief it would not succeed, seems to me to be not only an inherently difficult concept in the absence of an actual attempt being made, but also one that does not take account of the potential range of different factual circumstances that may exist. For example, if there is irrefutable evidence known to the individual that a particular belief is unfounded, but they still continue maintain it, I do not follow why further mental gymnastics should necessarily be required to prove a further hypothetical proposition. That risks, at the least, adding additional, and in my view unnecessary, complexity. It also gives rise to particular difficulties in a testamentary context, where the challenge of proving a hypothetical might mean that, in practice, issues of capacity could turn on the happenstance of whether the deceased was in fact challenged about a belief during his or her lifetime.

104. What I consider to be the correct approach would allow a holistic assessment of all the evidence. This would take account of the nature of the belief, the circumstances in which it arose and whether there was an evidential basis for it, whether it was formed in the face of evidence to the

contrary, the period of time for which it was held and whether it was the subject of any challenge."

In the end, though, the court did not decide these grounds as there was a respondent's notice coupled with an application to adduce further evidence (see paragraph 142) and at paragraph 152 set out its conclusions which included a hope that the matter could be settled before more expense resulted.

*In conclusion:*

a) *In the circumstances of this case, it would not be in the interests of justice to allow the question whether testamentary capacity should be determined using the MCA test rather than the Banks test to be pursued on appeal (although, if it were, I would have concluded that the Banks test continues to apply).*

b) *In order to establish whether a delusion exists, the relevant false belief must be irrational and fixed in nature. It is not an essential part of the test that it is demonstrated that it would have been impossible to reason the relevant individual out of the belief if the requisite fixed nature can be demonstrated in another way, for example by showing that the belief was formed and maintained in the face of clear evidence to the contrary of which the individual was aware and would not have forgotten.*

c) *The Deputy Master did not give inadequate or irrational reasons for preferring the evidence of Professor Jacoby to that of Dr Series, and was entitled to conclude that there was a causal link between Debs' terminal illness and the delusions.*

d) In relation to Grounds 2 and 3, I am adjourning the appeal for a period of three months to give the parties an opportunity to reflect on their positions and determine whether agreement can be reached without the expense of any further hearing. I trust that, in doing so, they will pay careful attention to the observations made at [145] to [152] above.

## Comment

This case is another resounding confirmation of the continued applicability of the *Banks v Goodfellow* test regarding testamentary capacity when admitting wills to probate. As Falk J observed:

*75. I appreciate that, to the extent that there are differences between the two tests, there is a potential tension. As pointed out by the Chancery Bar Association to the Law Commission, at an extreme it might mean that no valid will could be executed if it were the case that a testator lacked capacity under the Banks test but was not demonstrated to lack capacity for MCA purposes. [...] given that in my view the purposes of the MCA do not extend to determining testamentary capacity, any difficulties with the existing law are matters for the Law Commission and, ultimately, for Parliament, rather than for this court.*

## OPG LPA delays

In a blog [published](#) on 10 May, the OPG has provided an update to the delays that are being experienced in registering LPAs, noting that:

*While we're working to process applications as quickly as possible, please allow up to 15 weeks from receipt*

*of your LPA for applications to be registered.*

The blog also points to tips as to how to make sure that the application is right first time, including this earlier [blog post](#) on common errors.

## OPG rapid register search

The OPG holds a register of everyone who has:

- a lasting power of attorney (LPA)
- an enduring power of attorney (EPA)
- a deputy acting for them

This can be searched to find the contact details of those involved.

If professionals are making decisions about an adult at risk or are involved in a safeguarding investigation, they may need information urgently. The OPG has now launched a new rapid register search, aiming to respond to requests within 24 hours, Monday to Friday. Requests made over the weekend will be dealt with on Monday as a priority.

Requests that are not for safeguarding enquiries must use the [OPG100 form](#).

Requests that are about COVID-19 patients should use the [dedicated search](#).

For more details, see [here](#).

## Child Trust Funds when the child becomes 18 but lacks capacity

In January 2002, the government launched child trust funds as a way of encouraging saving to build up a nest egg when the child reaches 18.

A laudable aim, but what happens if the child, when 18 lacks mental capacity to manage its financial affairs even if the amount involved is small?

The law would require a LPA or a deputy. The former might not be possible for the self-same capacity issues and the latter results in expense, delay and bureaucracy. This against the background that most of the funds are worth less than £2,000.

This culminated in a proposed amendment to the Financial Services Bill in April 2021 which would, in essence, enable providers to enter into an agreement with someone to receive payments on behalf of the individual where there is medical evidence that person lacks capacity to manage their financial affairs, and where that recipient signed a form stating, inter alia, that they understand their duty to apply the money they receive in the best interests of the person who would otherwise be entitled to it. The payment limit under any agreement could not exceed £5,000, and the proposed statutory provision was time-limited to 2 years.

The debates around the amendment, which was ultimately not pushed to a vote, and the wider issues, are considered in this [article](#) written by Alex.

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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 and the European Court of Human Rights. 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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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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## 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](#).

Neil is doing a (free) event for Dementia Carers on 11 June 2021 at 3pm. The online session provides an overview of carer rights in the context of dementia. It is part of the University of Manchester's research project which is analysing the changes to local authority support during Covid-19. Neil is particularly keen to understand the impact on carers over 70 looking after partners living with dementia at home. For details, and to book, see [here](#).

Neil is doing a DoLS refresher (by Zoom) on 29 June 2021. For details and to book, see [here](#).

Neil and Alex are doing a joint DoLS masterclass for mental health assessors (by Zoom) on 12 July 2021. For details, and to book, 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 June. 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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