



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the 14<sup>th</sup> birthday of the MCA, an important case about the scope and limits of ADRTs, and the impact of coercive control on capacity;

(2) In the Property and Affairs Report: a deputy stand-off and new blogs from the OPG;

(3) In the Practice and Procedure Report: anticipatory declarations and medical treatment – two different scenarios;

(4) In the Wider Context Report: children, competence and capacity in different contexts, the JCHR launches an inquiry into human rights in care settings, and a Jersey perspective on deprivation of liberty;

(5) In the Scotland Report: the Supreme Court, devolution and implications for CRPD incorporation, and resisting guardianship.

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

Resolving a deputy stand-off..... 2

Two new blog posts from the OPG about being a deputy..... 6

### Resolving a deputy stand-off

*Kambli v The Public Guardian* [2021] EWCOP 53 (HHJ Hilder)

*Deputies – property and affairs*

#### Summary

In this case, HHJ Hilder considered an application by a panel deputy for discharge. The deputy had been appointed in 2019 in the circumstances set out in this [judgment](#).

The person at the centre of the proceedings was a child, MBR, who had received a significant damages award in 2014. MBR lived with his family in a property owned by him, and in 2012, had Wrigleys Trustees Ltd appointed as a professional deputy.

MBR’s mother, NKR, had made an application in 2017 to discharge Wrigleys Trustees and have herself and a barrister, Ms Sood, appointed as deputies instead. Wrigleys Trustees agreed to a discharge, on that basis that *“such a degree that we no longer believe that we are able to act in [MBR’s] best interests’ but contended that ‘it is in [MBR’s] best interest for a suitably qualified and experience professional deputy to be appointed ... in our place.”* [Paragraph 10 of the 2019 judgment]. Wrigleys Trustees had also raised concerns that MBR’s funds were being spent too rapidly, in particular for gratuitous care payments made to

the family and the cost of the family’s proposed adaptations to the property.

The parties had been able to agree in a 2018 Dispute Resolution Hearing that an alternative professional deputy should be appointed, but had been unable to choose that deputy. NKR continued to propose Ms Sood and Wrigleys Trustees proposed a panel deputy. Sunil Kambli, an OPG panel deputy, met NKR and was identified as her second choice if Ms Sood was not appointed. NKR considered that both candidates would offer cultural understanding and appropriate language skills, which she considered important.

In 2019, the court ultimately determined that Mr Kambli should act as deputy, noting both his experience as a panel deputy, and Ms Sood’s having failed to provide the court with evidence regarding how she would hold appropriate professional insurance for her work as a deputy. The court also restricted the amount which Mr Kambli was authorised to spend on adaptations to the property to £190,000 in accordance with an agreement reached at the Dispute Resolution Hearing.

In August 2020, Mr Kambli made an application for discharge as deputy and requested another panel deputy be appointed instead, noting similar issues to those raised by Wrigleys Trustees in the previous proceedings. He also

applied for an increase of £15,000 in the permitted expenditure on the adaptation works to allow their completion. The application for additional funding to complete the property adaptations was granted, but his application for discharge was refused in October 2020 on the following grounds (paragraph 5 of the present judgment):

- a. *there has been an exceptional turnover of professional deputies in this matter already;*
- b. *on every occasion, the appointed deputy either seeks or agrees to the discharge of their appointment on the basis of a breakdown in relations with family members, particularly AR (the father of MBR);*
- c. *on every occasion further avoidable costs are incurred, reducing the funds available to meet the needs of MBR;*
- d. *the Deputy was appointed following contested proceedings, in which the person nominated for appointment by the family members ultimately failed to comply with court directions, and the deputyship was clearly referred to a member of the Public Guardian's panel as "a particularly challenging case";*
- e. *the Deputy's statement confirmed that "it is my belief that AR simply wishes for a deputy to accede to his own wishes and demands rather than act in MBR's best interests, and that he deliberately causes a breakdown in relationship so that a*

*new deputy who may accede to his wishes is appointed."*

The deputy applied for reconsideration of the court's order. The court set out its concerns at paragraph 8 that:

- a. *the Deputy's application for discharge is based on grounds/difficulties similar to those experienced by previous deputies;*
- b. *two deputyships failing by reason of breakdown of relations with family members may be unfortunate but three indicates that there is a systemic problem which needs to be addressed if MBR's best interests are to be protected;*
- c. *consideration should be given to appropriate steps being taken to restrain any inappropriate behaviour towards the Deputy and/or his firm, or any deputy appointed for MBR, by AR and others.*

MBR's father, AR, and the Public Guardian were joined as parties. All parties took the view that it was in MBR's best interests for an alternative deputy to be appointed in place of Mr Kambli, with AR suggesting that either himself or NKR should be appointed as deputy. It was noted by way of background the 2019 decision that AR had previously been convicted of fraud. Mr Kambli also drafted a working agreement for MBR's family, and the Public Guardian was directed to file a statement setting out "*what support he is able to provide to panel deputies who are engaged as deputy in difficult cases involving allegedly hostile and abusive treatment from P's family members*" (paragraph 10).

AR ultimately changed his position and proposed both more distant family members or in the alternative, a solicitor he had chosen to act as deputy; however, where the solicitor failed to file any COP4 declaration, the court could not consider this request.

Mr Kambli argued that *"there has been an irretrievable breakdown in the relationship between his, his team and MBR's family, particularly his father AR. He considers that AR is "intent on breaking down any relationship he has with a Deputy by 'Deputy shopping' until he finds a Deputy that will accede to his demands"* (paragraph 9). He contended that AR was *"often rude, obstructive and undermines my authority as Deputy [...] he "continuously calls us corrupt, liars, selfish, criminals, robbing [MBR] and evil"* (paragraphs 11 and 15). Mr Kambli gave numerous examples of the difficulties he had experienced with AR, which often involved AR making financial commitments and demanding Mr Kambli pay for them, requesting payments to the family Mr Kambli was not authorised to make, and making demands for purchases which were clearly not in the best interests of MBR. He also reported that AR objected to regular deputyship fees, while demanding a high level of engagement from him. AR would also make recordings of interactions with Mr Kambli.

Mr Kambli noted that previous deputies had been discharged without difficulty, and that he considered he was being *"effectively...enslaved to a job for life"* (paragraph 17). He considered that if a different deputy was able to better establish a working relationship with AR, the overall costs to MBR were likely to reduce, and that if present trends continued, he would *"have no option but to take legal action against AR to protect [the rights*

*of his firm], which is likely to lead to a conflict of interest between Mr. Kambli acting as deputy for MBR and Mr. Kambli acting as partner of Premier Solicitors"* (paragraph 18). He further argued that s.19(3) MCA 2005 envisages consent from the deputy, such that *"in addition to P's best interests considerations – the court should have regard to the views of the deputy, in particular where he asserts that he does not have unlimited resources and is not being proportionately remunerated for the time and expense of this deputyship. It is said that no professional deputy should be required to carry on in the role where it involves being subjected to behaviour that is aggressive, hostile and defamatory"* (paragraph 19).

The Public Guardian acknowledged that the appointment of another professional deputy would not necessarily change anything in the family dynamics or the ability of the family to work with them but nonetheless considered that the Deputy's appointment should be discharged and an alternative panel deputy appointed instead. He observed that *"the replacement deputy would need to be firm with AR and be able to keep a tight control on expenditure"* (paragraph 24). The Public Guardian suggested that a Case Manager might assist in managing potential conflict.

AR argued that the issues which had arisen were the fault of Mr Kambli, whom he considered was *"playing on the fact that he is the third deputy to be appointed and 'taking advantage of the situation'"* (paragraph 28). AR again submitted that either himself, NKR or others chosen by him should be appointed as deputy, and opposed the appointment of another panel deputy. AR was generally opposed to the Public Guardian's proposals for arrangements to improve working

relationships, and did not agree to communicate with the deputy in writing or limit communications to twice weekly. He refused to transfer assets purchased with MBR's money which had been put into his or NKR's name. He refused a proposal not to incur costs without the deputy's authorisation.

HHJ Hilder allowed the application, and looked to the consideration of the application for discharge of a public authority deputy in *Cumbria County Council v A* [2020] EWCOP 38. HHJ Hilder agreed that while a deputy must consent to an initial appointment, *"it was not accepted that consent to continuation of the appointment is similarly required"* (paragraph 38). The decision was a discretionary one for the court, and would be guided by P's best interests.

HHJ Hilder noted that being on the Public Guardian's panel of deputies was *"a recognition of expertise and experience which carried advantages in terms of referrals of cases but also responsibilities in that panel members are expected to accept such referrals (except in limited circumstances) irrespective of the nature of the case"* (paragraph 38). She expressed a reluctance to discharge a panel deputy simply *"on the basis that the matter is challenging"* (paragraph 38).

HHJ Hilder was clear that a change of deputy should not be a 'default response' to difficulties in managing a deputyship, as it incurs costs for P *"and risks being perceived as 'rewarding' negative behaviour, which in turn undermines the prospects of future stability. Rather the Court should probe the actual circumstances, with a view to salvaging working relationships if possible"* (paragraph 39). However, she considered that that did not

appear possible in the present case, as efforts had been made and had failed.

HHJ Hilder considered that it was *"clearly not in the best interests of MBR for the current deputyship to continue"* (paragraph 42). The stress caused by the breakdown in relations was considered as a primary factor, rather than either Mr Kambli's wish to be discharged or AR's behaviour. The court cautioned that AR should not consider this conclusion vindication of his behaviour, and emphasised the cost to MBR each time a new deputy was appointed.

HHJ Hilder did not consider that there was any reason for optimism that a new panel deputy would have a different experience. The court considered AR was inappropriate to act as deputy due to his conviction for fraud, and noted NKR's *"previous involvement in his unsuccessful business, and her apparent inability to mitigate the difficulties between him and three deputies to date,"* led the court to the conclusion that *"she could not discharge the functions of deputyship with sufficient independence."*

AR had also proposed two more distant relatives, KS and AQ, who had filed appropriate deputyship declarations and had professional/working experience and obligations which he asserted suggested that they could and would understand the responsibilities of deputyship. HHJ Hilder considered that KS and AQ were more likely to have AR's cooperation, and they would not incur management fees for MBR. She also considered that there were disadvantages insofar as they did not have either deputyship experience or indemnity insurance. The court considered that MBR's finances were likely to be less complicated as building works had been

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completed, and risks could be mitigated by a number of steps:

1. They were appointed jointly;
2. The court also proposed to take steps to ensure that the set budget for MBR would be complied with and further funds could not be withdrawn.
3. The court also required KS and AQ to make a further application to the court in respect of any dispute with AR which was not resolved within 3 months.
4. Their appointment was time-limited to allow review after supervision by the Public Guardian of the initial period.
5. They were required to hold a £400,000 security.
6. They did not have authority to sell property or withdraw from investments.

### Comment

The case provides an expansion of the discussion in *Cumbria County Council v A* beyond the realm of public sector deputies, and again reiterates that a deputy will not be released simply because the deputy states that he or she is no longer willing to act (with the earlier case suggesting that a deputy would not be prevented from relinquishing a deputyship due to retirement). While HHJ Hilder did not engage in fact-finding, there had been a consistent narrative on the part of the professional deputies that the family had been extraordinarily difficult to work with, and she clearly had a concern that MBR would be repeatedly subject to the costs associated with new deputies being introduced

repeatedly. Her decision to appoint familial deputies subject to heavy restrictions and supervision, rather than imposing more draconian restrictions on the family, was an interesting one which the court clearly hoped might break the cycle of MBR being repeatedly subject to the cost of new deputies being brought in.

### Two new Blog posts from the OPG about being a deputy

The OPG has issued two new Blog posts about being a deputy. They are mainly aimed at lay people but have useful reminders of the process even for seasoned professionals.

One is about becoming a deputy and the other is about what happens and what you should do after being appointed.

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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.

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Our next edition will be out in November. 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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