MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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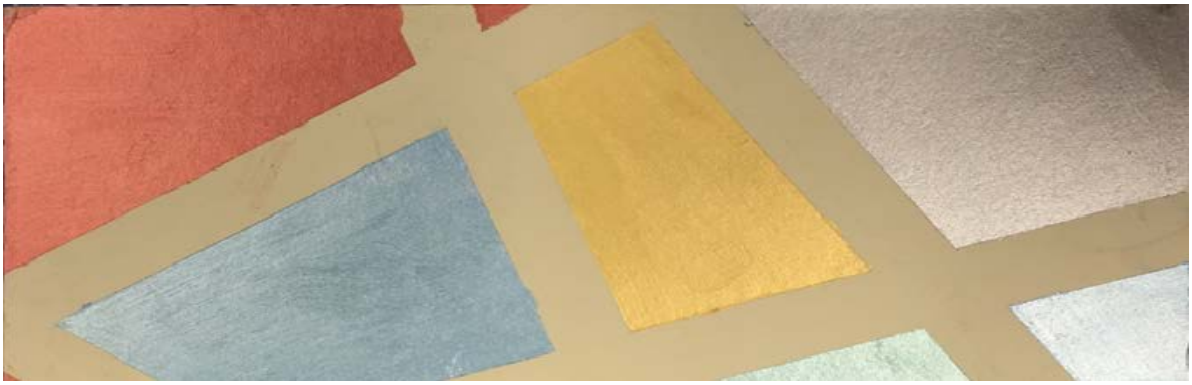

Welcome to the April 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a very difficult dilemma arising out of covert medication, and key deprivation of liberty developments;

(2) In the Property and Affairs Report: fixed costs for deputies, deputies and conflicts of interest, and the Child Trust Fund saga continues;

(3) In the Practice and Procedure Report: three amended Practice Directions, when (and why) should the judge visit P and fact-finding in the Court of Protection;

(4) In the Mental Health Matters Report: the Government (rather surprisingly) responds to the Joint Committee on the draft Mental Health Bill, and important reports from the PHSO and CQC;

(5) In the Wider Context Report: a snapshot into litigation capacity and Jersey sheds light on the concrete realities of assisted dying / suicide;

(6) In the Scotland Report: the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Updated fixed costs Practice Direction

As noted in the Practice and Procedure section, Practice Direction 19B has been updated with effect from 1 April 2024, to reflect cases such as *ACC* and also to uplift the costs fixed costs deputies can claim.

The tendency of human nature to be swayed by interest rather than duty

Irwin Mitchell Trust Corporation v PW & The Public Guardian [2024] EWCOP 16 (Senior Judge Hilder)

Deputies – property and financial affairs

Summary

The Court of Protection has given a clear statement that there is an actual conflict of interest when a Trust Corporation acting as property and affairs deputy appoints an Asset Management company with the same corporate owner. To avoid breaching rules against conflicts of interest, a deputy must seek ratification for any such conflict of interest from the Court of Protection.

This application was brought by Irwin Mitchell Trust Corporation (IMTC), a wholly owned subsidiary of Irwin Mitchell LLP, which acted as property and affairs deputy for PW. PW had significant assets following a personal injury award which had been paid partly as a lump sum and partly by ongoing annual periodical payments. IMTC had acted as PW's property and affairs deputy since 2017, and had appointed Irwin Mitchell Asset Management (IMAM) 'as investment manager for a significant part of PW's damages award' [19] in the same year. In 2020, following a successful statutory will application, IMTC was directed by the Court of Protection 'to make an application "to seek retrospective authority" to instruct IMAM.' [10] The matter was delayed due to issues of funding representation for PW in proceedings.

> *14. The unchallenged evidence of IMTC…is that £600,000 of PW's funds was initially invested with IMAM. There have been two subsequent withdrawals. The total return during the period of investment is £49,255, equivalent to approximately 3% per annum. The total charges for the calendar year 2019 were 1.89%, including 0.59% in IMAM's advice fees and 0.08% in IMAM transaction costs.*

Senior Judge Hilder rehearsed the propositions of fiduciary duties, noting:

- A person with a fiduciary duty should not ordinarily put himself in a position "where his interests and duty conflict"; *Bray v Ford* [1896] AC 44 at paragraph 51, but this may be departed from 'in many cases';
- "*The consequence of this rule, and the underlying rationale for it, is that transactions entered into where the fiduciary's duty conflicts with their interests are capable of being set aside as of right by their principal. This is 'the self-dealing rule'*" (paragraph 20);

- "*Where the principal lacks capacity to make decisions about their property and affairs, only the Court of Protection may grant…ratification*" (paragraph 21) of a conflict of interest.

The MCA 2005 provides at s.19(6) that "*A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part*."

Senior Judge Hilder considered that "*the primary question which I am now asked to determine is whether the conflict of interest rule applies to the appointment by IMTC as deputy of IMAM as asset manager for PW's funds: ie would a reasonable man looking at the relevant facts and circumstances of this particular case think there was a real sensible possibility of conflict?"* (paragraph 26).

The central argument of IMTC was that while there is *"'a theoretical potential'..for a conflict of interest…there is no "real sensible possibility" of conflict because it has adopted procedures which eliminate that potential*" (paragraph 32). Looking to case law from New Zealand and Hong Kong, IMTC argued that where a management company was a well-recognised specialist and other options had been considered, there was not necessarily any actual conflict of interest if a trustee selected the firm to which it had links after considering the market more generally.

Senior Judge Hilder was not persuaded by the non-binding case law and observed that *"'human nature being what it is,' neither pre-eminence nor success of the linked business is any guarantor of unconflicted motivation in the fiduciary. Indeed they may just encourage complacency, so that the fiduciary fails to consider the alternatives properly. The rule is founded in practical expediency and applies even though it may be breached without disadvantage to the beneficiary*" (paragraph 33(a)).

IMTC made the following submissions as to why its processes prevented a 'real sensible possibility of conflict':

- It is a highly experienced deputy and is accustomed to taking decisions regarding the appointment of investment advisers.
- It is not alone in using a linked financial adviser or investment manager.
- IMTC *"maintains a 'panel' of investment advisers for consideration on behalf of any person for whom it acts as deputy. Inclusion on that panel is a matter kept under review by an 'investment executive committee' of IMT…All the companies on the panel have specialist teams that deal either exclusively or largely with Court of Protection clients and it is a strict requirement that they do not have any entry charge fees nor any exit fees applicable to the portfolio"* (paragraph 39(a));
- IMTC undertakes a 'beauty parade' for deputyship firms, and a family member of the protected person will be invited to participate. Each firm selected for the 'beauty parade' is given the same instructions and invited to prepared a proposal, and the assessment of the bids are by set criteria;
- IMAM will be excluded from the 'beauty parade' if the family member objects, but the shortlist will typically include IMAM if there has been no objection.
- The family member participating in the 'beauty parade' will be informed of how IMAM and IMTC are related.
- If a family member is involved, the 'beauty parade' will be an attended event.

- A best interests decision is taken which takes into account the views of P's family members and other relevant matters.
- The performance of the portfolio and investment are kept under continuous review.

This process was followed in PW's case, and her husband attended a 'beauty parade,' following which IMAM was chosen.

Expert evidence filed in the case and evidence filed by deputies did not support the position taken by IMTC, and expressed views that appointing an internal investment manager would create a conflict of interest.

IMTC's position was opposed by both the Official Solicitor and the Public Guardian, and both considered that there was a clear conflict of interest. They expressed concern that IMAM would have specialist knowledge which would advantage it in the 'beauty parade', and felt that IMTC had wrongly attempted "*to treat members of the family as if they were the person for whom it is appointed, capable of consenting to the conflict of interest*" (paragraph 59). The Official Solicitor argued that:

> *The actual conflict of interest would only be "wholly extinguished" in the following circumstances…:*
>
> *a. where IMTC was not responsible for the appointment, for example because it was made before IMTC had been appointed as deputy (and even so, the subsequent reviews would be problematic, giving rise to concern as to whether a subsequent appointment of IMTC would be in P's best interests);*
> *b. the appointment process was conducted in a wholly independent way unconnected to IMTC (the independent expert identifies the possibility of using an external adviser but again the reviews would be problematic);*
> *c. the Court approved the appointment.* (paragraph 40)

Senior Judge Hilder accepted the position of the Official Solicitor and Public Guardian. She considered that taking to account the views of family members was relevant to the decision but "*an insubstantial safeguard against conflict*" (paragraph 42(a)). The family member is already in a position of trust with IMTC, and in PW's case, PW's husband had instructed Irwin Mitchell LLP to act in the personal injury proceedings. "*The IMAM proposal is then presented with familiar graphic style and express reference to its close relationship to the Irwin Mitchell law firm. Such inclusion of a family member is hardly robust oversight*" (paragraph 42(a)). The court also noted that "*the frequency with which IMAM is invited to take part in the 'beauty parade' seems very likely to give IMAM an advantage in knowing how to pitch its presentation*" (paragraph 42(b)). Finally, the 'objective' scoring system was *"manifestly subject to subjective interpretation and then human error as well, to a degree capable of changing who actually comes out with the highest score*" (paragraph 42(c)).

Senior Judge Hilder found that the appointment of IMAM had been a conflict of interest. IMTC did not deny that the appointment of IMAM made IMTC better off, and "[t]*he processes which IMTC has adopted when considering the appointment of IMAM do not target the substance of the self-dealing rule: that is, they do not remove the financial gain to IMTC. Such processes could have been adopted, for example by agreeing to waive any fee to IMAM where the instruction comes from IMTC as deputy. Then there would be no financial advantage to IMTC in the instruction of IMAM, no interest to be in conflict with the interests of the person for whom IMTC acts. Of*

course, I recognise that the Irwin Mitchell group would be likely to reject this approach as lacking commercial sense but that merely reinforces the existence of IMTC's interest in the appointment of IMAM" (paragraph 63). She did not consider that the participation of a family member protected against the risk, and the family member could not give consent to a conflict of interest on behalf of the protected person where IMTC was property and affairs deputy: only the Court of Protection could do so.

The judgment concluded that "[t[*aking into account all the evidence in respect of IMTC processes, in my judgment there remained a very clear, not remotely fanciful, actual conflict of interest in IMTC appointing IMAM to manage PW's funds. IMTC's processes were not capable of extinguishing, and did not extinguish, that conflict*" (paragraph 67).

Senior Judge Hilder went on to consider whether the appointment had been ratified, and concluded that it had not. Senior Judge Hilder considered that the judgment of Senior Judge Lush in *Re MWS* was "*unequivocal (at paragraph 23) that there is a conflict of interest in appointment of IMAM by IMTC as deputy*" (paragraph 77) and did not act as ratification or provide general authority for an appointment of this nature. Senior Judge Hilder similarly found that email communications following the judgment did not provide any such authorisation, and was clearly somewhat uncomfortable about the communications, noting that "*such informal communications, without input or even awareness of the other parties to proceedings, are not capable of establishing any binding authority. That they took place at all is probably best put down to a lingering cultural hangover from a time when the Court of Protection was an Office of the Supreme Court, as opposed to the independent court of record which it is now*" (paragraph 79). In any event, she found, they did not amount to such authorisation.

Senior Judge Hilder declined to consider whether the appointment ought to be ratified pending receipt of further evidence and submissions. Senior Judge Hilder accepted that "*management of damages awards is a specialist expertise, significantly different to the management of earned or inherited wealth, with a relatively small pool of firms offering such expertise and experience. However, there is a limit to the impact of these accepted points: fiduciary duties are well settled, as demonstrated by the age of the authorities cited above as fundamental propositions, and the pool of specialist firms is not so small that IMTC cannot maintain a standing panel more than twice the size of the numbers considered appropriate to engage in a beauty parade*" (paragraph 76).

Her conclusion was pithy:

> *93. In my judgment the appointment by IMTC of IMAM to manage the assets of PW clearly conflicts with the rule against self-dealing. There is actual conflict of interest in that the Irwin Mitchell group gains financially. There is nothing in Re MWS or subsequent e-mail communications which can reasonably be understood as approval of appointment of IMAM if it follows a beauty parade in which a family member of a protected person participates. The processes adopted by IMTC do not and could not extinguish that conflict. In my view, that these proceedings have been necessary at all is a paradigm example of Lord Herschell's wise recognition of the tendency of human nature to be swayed by interest rather than duty.*

Comment

The conclusions in this case could not be clearer or more robust in finding that a conflict of

interest existed. Beyond the implications for asset management, this judgment appears likely to cause significant consideration on the use of 'in-house' services by property and affairs deputies, and likely many applications for ex post facto ratifications of conflicts of interest. It also throws into sharper light other situations where conflicts might arise – an obvious one being where the firm instructed on a personal injury claim also puts itself forward to act as deputy for the management of any monies received. That, in fact, had happened in the instant case, but the judicial Eye of Sauron did not descend upon that aspect. It may not be very long before it does.

Child Trust Funds

A debate in the House of Commons on 19 March 2024 highlighted the ongoing concerns about access to the money of former beneficiaries of such accounts, now adults, who lack capacity to make decisions to manage their affairs. For the background to this, see this post from Alex. We set out here the material parts of the concluding remarks of Mike Freer MP, the Parliamentary Under-Secretary of State for Justice:

> *I will not tiptoe down memory lane, as colleagues have — I am not sure that revisiting the coalition Governments of 2010 onwards is particularly helpful to today's debate. What I want to do and what is important — and I am sorry if it is dry — is lay out the legal framework that is there is to protect vulnerable people. I understand clearly that the actions of the vast majority of parents are well intentioned, and that they act with great honour and kindness looking after their child or young adult. However, my job is also to protect vulnerable people from any form of abuse, and that weighs heavily on any reforms that we take forward. I appreciate that people will disagree vehemently with me, but I have to take into account the fact that not every parent would act with the best of intentions when accessing the funds. It is a well-established common-law principle that an adult must obtain proper legal authority to access or manage the finances or property of another adult. That includes, for the purpose of today's debate, a matured child trust fund of a young adult. People are understandably unaware of that legal principle, and it may be surprising to parents and carers who have been heavily involved in decision making for their young person prior to their turning 18. I want to iterate the steps that we have already taken to try to improve the process, particularly as regards awareness of what steps need to be taken as the young person reaches the age of 18.*
>
> *Ed Davey*
>
> *Before the Minister talks about reforms that have been made, can I bring him back to the point of principle that he outlined at the beginning of his remarks? I do not think anyone disagrees that there is an important principle, but there is equally a principle of proportionality that I mentioned in my speech. Can the Minister address that point? Where does proportionality arise in his thinking about the principles involved?*
>
> *Mike Freer*
>
> *I have to say to the right hon. Gentleman that I am happy to have an ongoing conversation. In fact, this is the first time we have discussed the matter face to face since I took on my portfolio. Proportionality is a valid point, but what is the level of risk that the right hon. Gentleman is willing to take? It will be different from the one that I or the Government are prepared to take. The right hon. Gentleman or anybody in this room may be prepared to say that 10, 20, 100 or 1,000 young people could*

have their money accessed inappropriately. That is a proportionate risk that they are willing to take. My view is that I want to minimise that risk and that proportionality is not easily measured.

I am not a lawyer. I look to my right hon. Friend the Member for Horsham and my legal friends to say that there may be a legal definition of proportionality. However, the definition of proportionality for those who are making decisions against those who are asking for change may be different. I am willing to see if we can bridge the gap, but my view is that I want to ensure that we can both improve access and that protections remain in place so that those who may not have the best interests of the young adults in mind do not get access to funds with total liberty.

Ed Davey

I am grateful to the Minister for that answer. It was direct and to the point, and he has given way again, which is generous.

When we look at the risk, we have evidence from the industry, which has looked at the case and many firms and funders have said that they are prepared to take on the risk themselves. Even though the Government are behind it, because the risk and the amount of money are so small, the firms have taken on that risk themselves. Is that not a lesson that the Minister should dwell on? If the MOJ is not prepared to act on that, would he at least go and talk to his colleagues at the Treasury and see if they can make a statement about the way in which the financial services could take on that risk and how the Government would support that?

Mike Freer

I am always happy to discuss with any provider and certainly the provider I have spoken to. No provider has beaten a path to my door saying, "We think you have got it wrong and our risk assessment is right." Any organisation is entitled to make their own risk assessment and accept the consequences if they get it wrong. That is their decision. As for my risk assessments, perhaps I am being over-cautious. I am willing to be challenged on that and I appreciate that people have a different view, but I want to ensure that I take the least risk regarding vulnerable adults.

I will talk briefly in the time left about the work we have done with the Investing and Saving Alliance to try to improve accessibility and knowledge. Given the time, I will have to skip over the part of my speech about the legal framework of the Mental Capacity Act 2005. I think everyone in the room is probably aware of the methodology of applying for the deputyship that gives people access or the ability to act on other people's behalf. I will not go through that in any great depth.

We have heard that the court process was cumbersome, which is why we looked at how we could change that. We consulted on what kind of different system we could put in place, but there was not a consistent view from the consultation on how we should reform access to the funds.[1] *In fact, if we go into the consultation, many people wanted to add safeguards to a new form of access that actually made the system even more cumbersome than the one we were trying to reform. That was a difficulty, as we did not get a common view on what checks and balances*

[1] See here.

needed to be in place. We talked not just to parents, but to charitable organisations, the legal and finance sectors, groups representing the elderly and so on, and we heard that it was too complex. The big message that came out was that people were not really aware of what they had to do or when they had to do it.

I think that the first ask from my right hon. Friend the Member for Horsham was whether we would extend appointeeships to cover child trust funds. We are working with the Department for Work and Pensions to extend the availability of information. I am more than willing to go back to the DWP and talk about whether its process is suitable for child trust funds. It is a very different process: it is about accessing regular payments rather than lump sums, so there is a different quantum at risk. It would take primary legislation to access the DWP-type processes—we double-checked that today. It is not a quick fix, but it is certainly one that I am more than happy to go back and have another look at.

I want to ensure that we are streamlining the processes. Can we take the paper out? Can we use more digital processes? We have seen that the time has reduced from 24 weeks to 12 weeks. We will continue to liaise with the President of the Court of Protection to monitor performance and see what more can be done.

A key issue is that people often do not know what they have to do until the child turns 18, and then they are locked out. We have done two things; I apologise if this sounds a little disjointed. I sat down with TISA, the major provider of child trust funds, and we agreed that as part of its normal maturity mailing, it will include advice and information about how to access and use the Court of Protection to get the relevant legal powers in place. We are taking early steps to educate people as to what they need to do before the person turns 18. That comes alongside the toolkit, which, as hon. Members have noted, provides practical guidance on how to access and navigate the legal process.

My right hon. Friend's second ask was about making people aware of how to find lost funds. We are doing more work to provide information. People can use the "Find my child trust fund" service on gov.uk. We can continue to do more to raise awareness of that.

Alex Cunningham

It is a good idea that providers are prepared to write out and provide additional information. I welcome that, but it is not going to solve the problem. Does the Minister agree that it is no good just having a one-off? It will have to be done on a regular basis, as more young people become mature and approach the age of 18.

Mike Freer

The shadow Minister pre-empts me. This is a regular communication strategy: TISA will continue to notify those who are heading towards maturity of what they need to do to access the fund once they turn 18.

I have also been working with the Department for Work and Pensions on accessing its client bank. We have agreed with the DWP that we will contact the cohort of parents and carers who receive personal independence payments and who may lack the mental capacity to access their child trust fund. We have an agreement in principle that we will do a mailing—not a one-off, but a constant mailing—so that people in this cohort, which we think is particularly

relevant to child trust funds and difficulties of access, will become aware in advance of what they need to do. One of the big messages from the consultation was about the lack of understanding and knowledge of the steps until it was too late.

I appreciate that hon. Members have said, "Give them the money." I get that. As I mentioned at the start of my speech, the vast majority of parents act in the very best interests of the child. I am not a parent, so I cannot possibly understand the role of a parent having to juggle all the demands of everyday life while having a child who needs additional support. I accept that my knowledge is limited, but the risk of just one parent not acting in their child's best interests, but accessing those funds inappropriately, weighs very heavily on me.

I accept all the points about proportionality, and I am happy to have a conversation about where the line on risk is drawn. Broadly speaking, where I am coming from is improving education, improving access and improving knowledge, but I cannot in all good conscience say that I am going to throw open the accounts and give unfettered access without some checks and safeguards to ensure that the very small minority do not have the ability to abuse a young adult. However, I will commit to following through with colleagues at the DWP to see whether there is anything we can do to copy or piggyback on their approach and make the system more accessible.

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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 regularly present at seminars and 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.

Adrian will be speaking at the following open events: the World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here) and the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law has announced its spring training schedule, here, including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

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 May. 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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