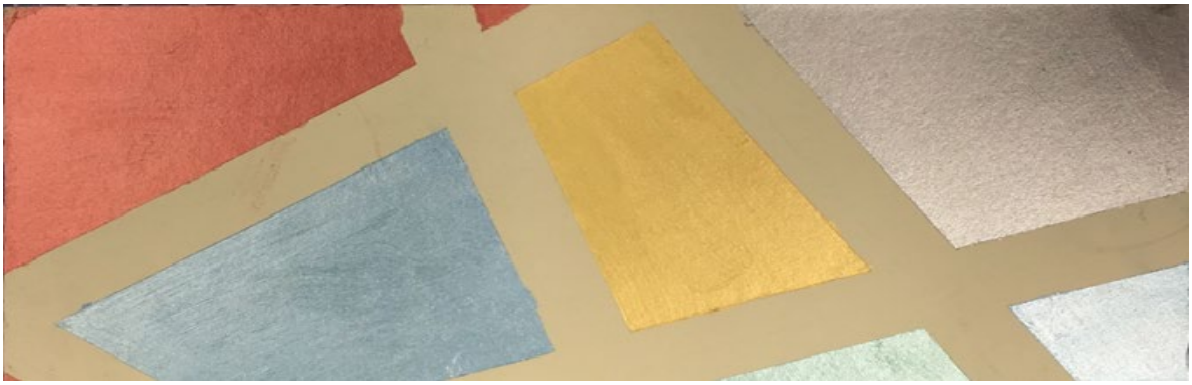
PROPERTY AND AFFAIRS
November 2026 | Issue 165



Welcome to the November 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: key themes from post-AGNI caselaw to date, and two medical treatment decisions showing doctors getting it right;

(2) In the Property and Affairs Report: self-dealing in the rearview mirror, dismay at deputy delegation and blithe ignorance of the obligations on a deputy as regards settlement of monies;

(3) In the Practice and Procedure Report: personal welfare orders after HB;

(4) In the Mental Health Matters Report: the Mental health conditions, ADHD and autism prevalence review; and Royal College of Psychiatrists on coercion and human rights;

(5) In the Children's Capacity Report: information-sharing as regards children, and new procedural rules relating to children in ECtHR cases;

(6) In the Wider Context Report: deprivation of liberty before Strasbourg, guidance on eating and drinking at acknowledged risk, and an important change of position relating to Jehovah's Witnesses;

(7) In the Scotland Report: the death of a Bill that never was, and a new appointment for the Mental Welfare Commission.

With huge thanks to Neil Allen, we have set up a running table of post-AGNI cases allowing rapid identification of the types of scenarios being considered, and the results. The case-tracker can be found here, a page where we also host an 'AGNI annex' summarising and commenting on the cases decided in October.

All our other content that you might need – our Reports, our case-law summaries, and our guidance notes – can be found via here.

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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.

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Self-dealing through the rearview mirror

Irwin Mitchell Trust Corporation v PW & Anor [2026] EWCOP 53 (T2) (Senior Judge Hilder)

Deputies – property and financial affairs

Summary

This judgment followed on Irwin Mitchell Trust Corporation v PW & Anor [2024] EWCOP 16 ("the First Judgment") which concluded that the appointment by Irwin Mitchell Trust Corporation ("IMTC") of IM Asset Management Ltd ("IMAM") as investment manager for an individual, PW, was a breach of the self-dealing rule. This earlier decision affected 260 individuals whose deputyships were held by IMTC, and whose funds were managed by IMAM. Further hearings were held to consider the applications made by IMTC for retrospective and prospective ratification of these appointments; these applications were opposed by both the Official Solicitor and the Public Guardian.

Since the First Judgment, the Irwin Mitchell Group had sold IMAM, such that HHJ Hilder considered that, from 30th May 2027, the conflict of interest which gave rise to the First Judgment will no longer exist. in respect of prospective ratification:

> *a. the parties have agreed, and the Court has authorised by order made on 4th May 2026, a scheme which 'manages' the conflict in so far as it continues until 30th May 2027 in respect of 260 other persons for whom either IMTC or an individual employee of the Irwin Mitchell Group acts as property and affairs deputy;*
>
> *b. in respect of PW herself, the positions of the parties are not crystallised, pending determination of the retrospective ratification issue.*

This further judgment was divided into issues relating to the prospective ratification agreement and retrospective ratification.

Prospective: The issues around prospective ratification did not consider PW's circumstances, but the other 260 individuals "*for whom either the Applicant Trust Corporation or an individual employee of the Irwin Mitchell Group is currently appointed as property and affairs deputy and as such has appointed IMAM as investment manager. Notwithstanding the sale of IMAM, the prospective ratification question still arises for these 260 individuals because of the terms of the sale agreement*" (paragraph 17). The details of the sale were not set out due to commercial

sensitivity, but the court and parties "considered that the terms of sale of IMAM mean that there is potential for a continuation of the breach of the self-dealing rule until 30th May 2027" (paragraph 18). The parties had agreed a scheme (and submitted it to the court for its approval) to manage this conflict of interests, "*essentially that an Independent Financial Adviser with appropriate Court of Protection and personal injury expertise will conduct a high-level independent review of the general suitability of investment arrangements*" (paragraph 20). For each of the 260 individuals, they and one person with an interest in their welfare were to be notified of this arrangement, along with the court's order and an explanatory letter. The purpose of the scheme was temporary:

> *22. In substance, this arrangement 'holds the ring' – managing the continuing conflict of interest for a defined period so as to avoid necessity for hurried reorganisation of many deputyships at once – until there can be full individual reviews in light of this judgment.*

The retrospective ratification took place in respect of PW alone, but it would appear likely to be the basis of consideration of this issue in the other matters. Senior Judge Hilder noted the basis on which the court approached the matter:

> *25. Retrospective ratification means the waiver by the Court of claims that PW has or may have against IMTC or IMAM in respect of the breach of the self-dealing rule. By agreement of all parties, I approach the decision whether or not to ratify on the basis of the following assumptions ("The Assumptions"), which have been set out in recital E to the order made on 7th June 2024:*
>
> *a. that the performance of PW's investments during their period of management by IMAM have been such as would have been achieved by a reasonable and experienced investment manager; and*
>
> *b. that the fees and charges charged by IMAM in respect of PW during this period were such as would have been charged by a reasonable and experienced investment manager.*

HHJ Hilder identified how, "*because the Court is standing in the shoes of PW, it is possible for the Court to impose terms or conditions on any ratification. However, the person whose act may be ratified is not obliged to accept the terms or conditions. If the terms are not accepted, there is simply no ratification*" (paragraph 28). PW did not have an understanding of the matters so as to be able to express wishes and feelings. PW's husband was very positive about the work of the deputy, but raised a concern that he did not want to incur extra costs as a result of instructing IMAM as a fund manager (relative to other fund managers).

On behalf of PW, the Official Solicitor opposed a 'blanket' ratification, and wanted to consider whether PW was entitled to compensation. The Official Solicitor's argument was set out at paragraph 34 of the judgment:

> *a. 'this is not, therefore, a case of an inadvertent breach of the strict self-dealing rules, rather it is a case where IM has quite deliberately – and in the face of the decision in Re MWS – grown a business model based upon the appointment of its own asset management business for incapacitated individuals." [**ps para 5**]*
>
> *b. IMTC has not 'only just discovered it has committed a technical breach….it has been (or ought to have been) aware since 2015 that the appointment of IMAM was a breach of the rule.' The OS sees no justification for saying that such*

> *conduct is not deserving of sanction. [**ps para 13**]*

The Official Solicitor considered that PW had claims with a real prospect of success against IMTC and IMAM, and did not consider that a waiver of the claims was of benefit to PW. The Official Solicitor considered that the likely quantum of such a claim was "*all of the fees and charges levied by IMAM throughout its period as investment manager. From the evidence filed, for the period from IMAM's appointment until the end of 2023 and not including the amount paid to third parties, this amounts to £37 647 [**229**] – "not a small sum of money" [**ps para 9**]*" (paragraph 36). The Official Solicitor was open to the possibility of a commercial settlement to this claim (proposing a settlement for 70% of the claim in correspondence), but it was agreed by all parties that if ratification did not take place, IMTC would need to be removed as deputy as it would be infeasible to pursue these claims with IMTC as deputy. The Public Guardian fully aligned herself with the Official Solicitor.

IMTC accepted the conclusion of the 2024 judgment, and was clear that both IMTC and IMAM wished to preserve the relationship between PW and IMTC (and avoid litigation over these issues). They noted that neither PW nor her husband had strong views about this matter, and wished for the court to determine what should happen. IMTC raised concerns that the family had not been advised of the full range of outcomes of PW bringing proceedings, but had instead had the high-water mark of potential recovery figures in litigation put to them. IMTC considered the likely quantum of recovery was much lower than the total charges raised by IMAM, as allowances would be made for the expenditure incurred in realising profits for PW and the fiduciary's own work and skill. PW's recovery would not be "*to punish the fiduciary but to prevent them from obtaining an advantage from their breach*" (paragraph 47(b)(iii)). IMTC noted that the likely profit was more in the range of £9,000-£9,500 over a six-year period, and that this would be the 'ceiling' of the claim. It was also emphasised (paragraph 47(f)) that:

> *this is not a case where there has been any dishonesty, bad faith or surreptitious dealing. IMAM worked diligently for PW's benefit, providing full consideration for the fees that were charged. Had IMAM not been appointed, PW would still have incurred similar charges with an alternative investment manager. 'This is a paradigm case for a generous allowance to be made for IMAM's work and skill….such an allowance would either eliminate the claim entirely or (at best from PW's perspective) reduce it to a very modest amount.' [**ps para 15(5)**]*

HHJ Hilder summarised IMTC's position at paragraph 50:

> *Overall, IMTC's primary position is that it is in the best interests of PW to provide retrospective ratification of its appointment of IMAM, without any terms/conditions, on the following grounds [**ps para 16**].*
>
> *a. it allows the deputyship relationship to continue;*
>
> *b. it is not in PW's best interests to pursue uncertain litigation;*
>
> *c. drawing a line under the past breach of the self-dealing rule enables both parties to move on from the current situation;*
>
> *d. the conduct of IMTC and IMAM has been honest and reasonable, the connection between the two never hidden but disclosed in in annual deputyship reports; and the 'reasonableness' should therefore be*

> *considered in light of the fact that the OPG as statutory body responsible for supervision of deputies took no action about it because it accorded with policies the OPG was applying at the time;*
>
> *e. IMAM provided full consideration to PW for the fees and charges it rendered. Had a different investment manager been appointed, PW would have been paying similar fees. PW has not been disadvantaged in any way by the breach of the self-dealing rule;*
>
> *f. the resource implications of refusing ratification would have a direct, negative consequence for PW – "it cannot be in PW's best interests to be placed in the position of requiring a new deputy if there are a large number of other Ps in a similar position at the same time, and insufficient deputies available to take up this work".*

In the event that the court was minded to grant ratification, IMTC proposed that this be in the amount of 75% of IMAM's assessed profits, or approximately £6,750.

At paragraph 53, Senior Judge Hilder considered that the main issue around retrospective ratification was "*dominated by* [the parties'] *different approaches to likely quantification of any claim which PW has against IMTC to account for profits gained as a result of the conflict of interest:*

> *a. IMTC says that such claim will be based on net profits ie payments received from PW minus VAT, third party disbursements, a share of IMAM overheads/expenses and an allowance for skill and care undertaken – "**the profits approach**";*
>
> *b. the Official Solicitor (with the Public Guardian in alignment) says that such claim is based on net receipts ie payments received from PW minus VAT and third party disbursements but without any deduction for overheads/expenses and with very limited likelihood of any discretionary allowance for skill and care undertaken – "**the receipts approach**."" [53]*

In PW's case, the difference was approximately £18,500. HHJ Hilder did not reach a view on quantum, as this was not a matter for the Court of Protection, and noted that it was open to either party to make those arguments in the civil court. She did consider that PW "*has a real claim, with real value (albeit presently unquantified) – and that is a factor which I must weigh in the balance when making a 'best interests' determination as to whether IMTC's breach of the self-dealing rule should be ratified*" (paragraph 56). Given that PW had significant assets, while the higher sum proposed by the Official Solicitor was significant, it was not "*likely to be a life-altering one for PW*" (paragraph 57). However HHJ Hilder was also mindful that "[i]*f IMTC's approach were to find favour, the figure is so much lower that, bearing in mind the disruption to deputyship arrangements which would be required (see below), the compensation 'victory' might even be considered pyrrhic*."

Senior Judge Hilder considered that:

> *58.* […] *the amount of compensation which PW may receive from her prospective claim weighs less heavily in the scales than the existence of the claim. That is, it is more important that PW's claim is recognised than that it is pursued to its fullest possible extent. I count it as a factor against ratification that ratification would – at least unless some condition of compensation is attached – extinguish PW's claim. And I give considerable weight to the position of PW's own representatives in these proceedings, that her claim should not be given up.*

59. In the absence of ratification, I consider that PW is likely to be adversely affected to some extent, because a settled and positive relationship with her deputy will have to end. Dispute will continue and litigation be required. All parties accept that in those circumstances, IMTC could not continue to act as PW's deputy. Even if, as her representatives in these proceedings contend, the further litigation itself need not impact on her day to day experience, getting to know a new deputy will. There is adversity in that, but how much?

60. There would inevitably be some financial cost involved in changing deputy, whilst the new deputy 'gets up to speed' with the requirements of getting to know PW and managing her estate. Other detriments are likely too, in terms of confidence, morale, stress etc. The best indication of these comes from Mr. W's observations to the Official Solicitor's representative, as outlined above. He does not want his wife to lose out, but neither is it for them simply a monetary consideration – their past relationship with Irwin Mitchell is valued.... I conclude that changing deputyship would incur some financial cost for PW and some disruption, but not so much as to amount to a 'magnetic factor' in the Court's determination.'

Senior Judge Hilder ultimately included a balance sheet table to weigh up the different factors:

A. In favour of ratification	B. Against ratification	C. Not to be weighed
1. Continuation of existing deputyship relationship	1. Gives up claim of real (unquantified) monetary value - recognition more important than (unquantified) amount	1. Punitive sanction
2. End of dispute and associated uncertainty - level of disruption not so great as to amount to the magnetic factor	2. PW's her legal representatives oppose ratification - PW and her husband consider that court should decide	2. Resource implications
3. The Assumptions - no loss caused to PW's estate		

Senior Judge Hilder stated that she was *"not persuaded that any of the factors in column A, either individually or collectively, justify complete abandonment of PW's potential claim, contrary to the considered position of her legal representatives. Therefore, IMTC's primary position does not succeed*" (paragraph 67). However, these factors "*do carry sufficient weight to conclude that the Court should do what it can to bring about a situation where both PW's claim is recognised and the positive deputyship relationship is maintained, which is her representatives' preferred outcome. The mechanism for that is conditional ratification. In my view, it would be in PW's best interests that IMTC's past breach is ratified on condition that IMTC pays back into PW's funds an appropriate amount to recognise her claim*" (paragraph 68).

Senior Judge Hilder considered that the 'receipts' approach was the method to be adopted, "*because that is the methodology preferred by*

PW's own representatives. They have very considerable experience, and their position is that they serve PW's interests best by pursuing her claim on this methodology, even at the potential cost of disrupted deputyship" (paragraph 70). However, "*the discount should be more than 30%, because that has already been insufficient to produce agreement, which suggests some risk that IMTC may choose not to accept the condition. The discount should be not so far less than the Official Solicitor's open position that the reasoning of PW's representatives is lost, but it should be sufficiently less that IMTC now sees merit in accepting the condition. In my view, both considerations should be met by a reduction of 40%*" (paragraph 70), leaving the ratification open to IMTC at 60% of the higher valuation of calculating the claim. If IMTC did not accept this, Senior Judge Hilder found that "*its appointment as property and affairs deputy for PW must be discharged so that PW's claims in respect of the unratified breach of the self-dealing rule can be pursued elsewhere*" (paragraph 71). Questions of prospective ratification would only arise if the retrospective ratification were accepted, and Senior Judge Hilder set a timetable for IMTC to give this notification, along with inviting the parties to suggest a timetable for seeking relevant directions in respect of the 260 or so other cases raising the same issues.

Comment

It was inevitable given the First Judgment that IMTC was going to be in for (to use a technical term) a rocky time of it. The decision by Irwin Mitchell group to sell the 'offending' IMAM was also perhaps an inevitable consequence of the judgment. What we do not know at the time of writing is whether IMTC had, in fact, agreed to the conditions imposed by Senior Judge Hilder. If they have not, and if matters are then potentially taken to another jurisdiction on PW's behalf, it will be interesting to see whether the veil of privacy around what would ordinarily be highly confidential matters will continue to be pierced (it would, for instance, be highly unlikely that any compromise agreement endorsed pursuant to CPR Part 21 by the civil courts in litigation in the former Chancery Division would be made public).

Deputyship, delegation and judicial dismay

The London Borough of Bromley v the Public Guardian [2026] EWCOP 58 (T2) (Senior Judge Hilder)

Deputyship – property and financial affairs

Summary

Senior Judge Hilder delivered this judgment on her last day in post. It concerned whether the functions of the deputy for property and affairs (the authorised officer of the London Borough of Bromley – 'Bromley') for various 'Ps' had been improperly delegated pursuant to a contractual arrangement Bromley had with Liberata to undertake certain practical tasks of deputyship.

The judgment sets out the legal background against which this case was being determined. Senior Judge Hilder emphasised that deputyship is unequivocally a form of agency, where the deputy is the agent and, where the Court of Protection exercising its jurisdiction on behalf of P, is the principal. Senior Judge Hilder rehearsed a cardinal principle of the law of agency, namely that an agent may not delegate his authority in whole or in part except with the express or implied authority of the principal, and made clear (at paragraph 30) that:

> *An agent may be expressly authorised to delegate or may have implied authority to do so in certain circumstances, or – after the event - the agent's act may be ratified. In each scenario, the authorisation is by the principal.*

> *Therefore, in the context of deputyship, ratification is a matter for the Court of Protection. An agent cannot 'ratify' its own acts.*

Senior Judge Hilder then went on to examine the law in relation to ratifying the deputy's act as agent after the event, concluding that "*ratification by the Court of Protection of actions taken by a deputy outside their authority is a 'best interests' decision, to be taken in accordance with the principles of section 1 of the Act and the requirements of section 4 of the Act*" (paragraph 32).

The analysis of the contractual relationship between Liberata and Bromley comes next. In short, the contract transferred to Liberata 22 members of the Council's Financial Assessment Teams and Appointeeship & Deputyship Team and specified that a wide range of tasks concerned with the deputyship were to be exercised by Liberata. As Senior Judge Hilder noted:

- There was nothing in the contractual documentation "which gives any consideration to the meaning and effect of deputyship authority conferred by the Court of Protection. There is no recognition of the personal and fiduciary nature of the appointment" (paragraph 41).
- The contractual documentation envisaged Liberata '*managing*' all the 'functions permitted/required as set out in the Court order. And specifically, it was envisaged that Liberata had at least some direct engagement with the person for whom a deputy is appointed ('P');
- The contractual documentation did not address any question of delegating deputyship authority, or the implications for the discharge of deputyship functions from the expectation that transferred employees would no longer be part of the appointed deputy's organisation.

Perhaps most critical however, was the fact that the contractual documentation does not address the question of who was making the best interests decisions about the finances of the Ps in question. As Senior Judge Hilder asked at paragraph 50:

> *Setting up direct debits or standing orders sound like ministerial tasks but who is deciding what such arrangements need to be made? Who is deciding whether or not it is in the best interests of P to make other, irregular payments? Who is making any decision, for example, about whether to accept any of the 'offers received' in a sale of property after they have been 'reviewed' by Liberata? Who is deciding whether to 'accept the referral' for a Community Funeral after Liberata has received it and carried out any necessary property search?*

Having considered the contractual arrangements and the witness evidence, Senior Judge Hilder had this to say at paragraph 53 (with some, understandable, frustration):

> *I found it difficult to form an understanding about how the contractual arrangements work in practice. My overall impression is that, after the implementation of the arrangements with Liberata, the people who were previously directly employed by Bromley to do deputyship work carried on going to the same workplace, doing the same tasks, with the same employment terms and conditions, and nobody directly involved in Bromley deputyships considered that anything significant had changed.*

There was even some confusion in the evidence as to who "*the authorised officer for property and affairs deputyship for the London Borough of Bromley*" was, i.e. the individual who was actually holding the deputyship appointment. After some reconstruction work, Senior Judge Hilder found as a matter of fact that it was Bromley's Director of Adult Social Care.

Senior Judge Hilder went on to state that clearly Bromley's Director of Adult Social Care "*is not expected to undertake every task of every deputyship personally, but I found it difficult to extract any clear explanation of how her deputyship functions are actually performed*" (paragraph 56).

It was Bromley's position that it had not delegated decisions to a service provider and that it had acted properly by doing no more than outsourcing functions (such as routine tasks and administrative work associated with managing the individual's finances and assets) over which it had supervision.

Senior Judge Hilder did not accept that the evidence submitted by Bromley reflected the reality of what was happening on the ground. "*Rather, in my judgment, it reflects an understanding of deputyship which has only been reached during and through these proceedings. I have no basis for being satisfied that this understanding has yet become manifest 'at the coal face*" (paragraph 105).

Senior Judge Hilder then went on to analyse the evidence provided by the OPG, who had concluded that not only was Bromley one of the best performing local authority deputy teams (presumably in the country), but also that Bromley have been acting in accordance with the OPG's Deputy Standards; Practice Note SD12 and the MCA Code of Practice. Senior Judge Hilder considered that, in parts, the OPG evidence was incomprehensible, and strikingly, that there was a complete absence of any recognition that Liberata UK was a third party organisation. The OPG saw them as one and the same as Bromley, and had concluded that "[t]*he deputy has not delegated their discretionary decision-making responsibilities to Liberata*" (paragraph 68). The ultimate position taken by the OPG was that the threshold for a finding of improper delegation from Bromley to Liberata under the Act and Guidance was not met.

Senior Judge Hilder held as follows:

- The "outsourcing" of the services and tasks set out in the contractual documentation amounts to the London Borough of Bromley purporting to give at least some tasks which arose on appointment of its authorised officer as deputy to a third party.
- Authority for the outsourcing could not be implied from the making of the deputyship appointment. Nor was it an instance of permitted delegation within a large organisation as Liberata UK was a separate organisation to the London Borough of Bromley.
- While the contractual documentation gave rise to the possibility that Liberata's involvement was limited to ministerial acts, "*the evidence gives rise to real concern, in respect of anything other than the biggest of decisions with Bromley's deputyship cohort (eg sale of property), either that it is not in fact being understood that way or that proper best interests decisions are simply not being made*" (paragraph 104).
- The evidence did not establish that there was a best interests decision making pathway within the Deputy's organisation (i.e. Bromley), and in particular the evidence did not explain how, even if social workers

at Bromley were making financial decisions such as setting personal budgets (which Senior Judge Hilder was somewhat doubtful about), this translated into a best interests decision made by the Deputy.

- Further, the evidence suggested that Liberata were in fact making financial best interests decisions on behalf of P: *"the tasks assigned to Liberata could be permitted delegation as 'ministerial acts' but I am not satisfied that arrangements on the ground are actually happening that way. There is scope for 'mission creep', and no evidence of robust decision making structures to avoid that, or of sufficiently detailed reporting and oversight to enable proper supervision of that*" (paragraph 106)

- Senior Judge Hilder expressed herself "*satisfied that the contractual arrangements between Bromley and Liberata UK are capable of operating as permitted delegation of ministerial acts. However, I am not satisfied that this has always been understood or manifested*" (paragraph 111).

The judgment ends by noting that the OPG's view that Bromley's clients were assessed as receiving an excellent service, therefore "*it is right for the Court to be cautious about 'ruining a good thing' by excessive proceduralism. Nonetheless, statutory requirements must be upheld. Deputyship is a fiduciary relationship, and fiduciary obligations apply.*"

In the course of setting out a way in which Bromley could provide evidence to the OPG (on a cohort basis) to enable it to undertake appropriate supervision going forward (and to allow it to identify any situation in which Liberata had exceeded its ministerial authority), the judgment also set out (at paragraph 107) a checklist of evidence which would serve as a useful tool for any local authority utilising a similar contractual arrangement.

Comment

The judgment is an interesting read for a number of different reasons. The first is because of the way that it came before the court. It appears that the arrangement between Bromley and Liberata came to the attention of one of the resident Tier 1 Judges at First Avenue House in the course of welfare proceedings concerning a P called 'BJ' in January 2024. Thereafter it was the court very much driving an investigation into this practice, which probably explains the very difficult procedural journey there was between the court first making directions to allow it to investigate the arrangements in January 2024 and being (finally) ready for hearing in May 2025. As Senior Judge Hilder said at paragraphs 94 and 95 of the judgment:

> *94. My overriding impression is that both parties have considered throughout that the contractual arrangements under scrutiny "work", in the sense that the estates of all Ps are being managed without issues or complaints arising; and therefore, they have responded to the issue raised by the District Judge with a shared attitude that questions as to whether the arrangements meet legal requirements are intrusive and unhelpful.*
>
> *95. Regrettably, and unusually, I am concerned that the Court has not been given the well informed, focussed submissions of law that it would usually expect, despite assurances and active objection to appointment of an amicus. Arguments which are clearly wrong, such as that the deputy could ratify her own delegations, have persisted for far too long. Obtaining evidence of what actually happens in Bromley once a deputyship appointment has been made has taken repeated directions. The*

> *evidence from the Office of the Public Guardian was that the person with supervisory responsibility for the deputyships in question only appreciated a difference between the entities of Bromley and Liberata on the occasion of the third hearing. None of this is satisfactory. It has made the Court's task considerably more difficult.*

The case also exposes the OPG's practice of directing those that it supervises to seek 'advice' from Court staff – specifically relied upon by the OPG:

> *100. For the avoidance of doubt, neither "the Court" nor any of its staff has any standing to give "advice". That was the case in 2014 and in 2015, just as it is the case now. Nothing that any member of the Technical Specialist Team, or any "Court Appointed Officer",* [1] *may have said or written in an e-mail has any determinative authority on issues of delegation or how a public authority discharges the functions of deputyship. The OPG should have understood that in 2014 and 2015, and should be clear about it now. Like every other court, the Court of Protection speaks through judgments and orders, with a clear appeal structure.*

It is unsurprising given the procedural history in this case that the OPG came in for some criticism. These were expressed in typically measured style, but there should be no doubt that Senior Judge Hilder had serious misgivings about the failure of the OPG to have grasped the difficulties with Bromley's arrangements with a third party (particularly as this is a practice that has been deployed by other local authorities):

> *102. I do not suggest that any persons involved had anything less than positive intention to promote the interests of Ps but the admitted 'struggle' on the part of the body with statutory responsibility for oversight of deputies to see any significance in contractual arrangements between two different bodies is, frankly, cause for dismay.*

Blithe ignorance (1)

Zedra Trust Company (UK) Limited v Graham David Tustain [2026] EWHC 2578 (BP) (High Court (Business and Property Division) (Chief Master Shuman))

Other proceedings – Chancery

Summary

Section 20(3)(a) MCA 2005 provides that a deputy "*may not be given powers with respect to* […] t*he settlement of any of P's property, whether for P's benefit or for the benefit of others*." This decision of Chief Master Shuman shows what happens when that limit is ignored. Six discretionary settlements made by a property and affairs deputy in 2011, without an order of the Court of Protection, were declared void *ab initio*, together with associated loans of more than £2.7 million. Although the assets had been administered as trust property for many years, the beneficial interest in them had never left P.

The consequences for the professional trustee are dealt with in a separate judgment: *Zedra*

[1] A footnote at this point reads as follows: "[i]t is assumed that this is intended to be a reference to 'Authorised Court Officers', a role which was introduced by the Court of Protection (Amendment) Rules 2011 (SI 2011/2753) with effect from 12th December 2011. This role is held by civil servants who have been authorised by the Senior Judge or the President so to act. The authorisation enables them to exercise the jurisdiction of the court, limited in accordance with a Practice Direction effectively to strictly defined, non-contentious property and affairs applications."

Trust Company (UK) Limited v Graham David Tustain (Section 61) [2026] EWHC 2576 (BP), which we note below.

Mr Tustain had lacked capacity to manage his property and affairs since a brain injury in about 1984. Nigel Yeadon, a solicitor, became his receiver in 1993 and, when the MCA 2005 came into force, his deputy. An Extended General Order made in 2006 had expressly withheld authority to execute a settlement on Mr Tustain's behalf without a further order.

In 2010, Mr Tustain won about £4.4 million on the National Lottery. Mr Yeadon applied to the Court of Protection for further authority, putting forward proposals that included a discounted gift trust. The order made on 5 July 2011 appointed him deputy with general authority and referred to a discounted gift trust. A further order in October 2011 authorised gifts of £50,000 to each of Mr Tustain's seven siblings.

In November and December 2011, Mr Yeadon executed six discretionary settlements on Mr Tustain's behalf. Under five of them, more than £2.7 million of Mr Tustain's money was lent to the trustees, unsecured and interest-free. The beneficiaries were his siblings and their descendants; Mr Tustain himself was expressly excluded. The trustees included Barclays Bank Trust Company Limited, now Zedra, the claimant.

No order authorising the settlements was ever made. The trusts were administered for years, and £133,000 was distributed to the siblings, before the problem came to light in late 2020. On Zedra's Part 8 claim, which Mr Tustain's current deputies supported, Chief Master Shuman granted the declarations sought.

The July 2011 order's reference to a discounted gift trust did not help: "[a] *discounted gift trust and a gift-and-loan trust are materially different structures*" (paragraph 41). The settlements engaged s.18(1)(h) MCA 2005, a power that s.20(3)(a) MCA 2005 reserves to the court, and required a further application, which was never made. Chief Master Shuman held that they were void, not merely voidable, because the defect went to the existence of authority rather than the manner of its exercise:

> *54. The Court's involvement is therefore not merely supervisory. The Court's approval supplies the authority which permits the disposition to occur. The statutory scheme contemplates that the settlement derives its legal foundation from that approval.*

In reaching this conclusion, Chief Master Shuman drew support from *Re Beaney* [1978] 1 WLR 770, among other authorities. As the settlements were void, the trustees held the assets on a resulting trust for Mr Tustain, which arose by operation of law (see paragraph 74). The loans, which fell outside both Mr Yeadon's investment powers and the authority granted in relation to gifts, were also void ab initio (see paragraphs 78–79).

Comment

Section 20(3)(a) MCA 2005 means that a deputy can never be given power to settle P's property, however widely their general authority is drawn. Only the court can decide that a settlement should be made, and its order must cover the settlement actually executed.

Zedra shows how easily that can be missed. The restriction had been spelt out in the 2006 Extended General Order, and the July 2011 order referred to a discounted gift trust. But those involved treated the settlements as part of Mr Tustain's investment and estate planning, and no one went back to the court when the plan changed. Deputies and their advisers should read an order for what it actually authorises. If

the plan changes, they should make a fresh application before anything is signed.

Because the defect went to the existence of authority, the settlements were void, and nothing done afterwards could cure them. Some fifteen years of administration must now be unwound and, as the s.61 judgment shows, much of the cost falls on Mr Tustain's own estate.

Blithe ignorance (2)

Zedra Trust Company (UK) Limited v Graham David Tustain (Section 61) [2026] EWHC 2576 (BP) (High Court (Business and Property Division) (Chief Master Shuman))

Other proceedings – Chancery

Summary

In *Zedra Trust Company (UK) Limited v Graham David Tustain* [2026] EWHC 2578 (BP) (discussed above), Chief Master Shuman held that six discretionary settlements made in 2011 by Mr Tustain's then property and affairs deputy were void *ab initio*, because the Court of Protection had never authorised them. The assets had remained Mr Tustain's throughout, held for him on bare resulting trust.

This second judgment deals with the consequences for the professional trustee (formerly Barclays Bank Trust Company Limited), which had administered the assets for about fifteen years on the wrong assumption that the trusts were valid. It sought relief from personal liability under s.61 Trustee Act 1925, authority to keep its past remuneration, payment for unwinding the arrangements, and its costs. It succeeded on all of those applications.

The deputy, Nigel Yeadon, was a solicitor who conducted the 2011 Court of Protection application himself. Barclays Wealth advised on the planning, recommended trust-based arrangements and offered trustee services. The order of 5 July 2011 referred to a discounted gift trust, but did not authorise the settlements eventually executed. Distributions of £133,000 were later made to Mr Tustain's siblings.

To ensure "*the benefit of full adversarial argument*," Chief Master Shuman directed Mr Tustain, acting by his deputies as litigation friends, to argue against relief (paragraph 5). The questions were whether the trustee had acted reasonably and ought fairly to be excused. The standard is reasonableness, not perfection, but it is likely to be higher for a paid trustee (*Santander UK plc v RA Legal Solicitors* [2014] EWCA Civ 183).

Barclays Wealth knew that the planning depended on what the Court of Protection regime allowed. The judge nevertheless held that responsibility for obtaining the necessary authority "*rested principally with Mr Yeadon*" (paragraph 31). The July 2011 order followed an application that had included trust-based planning, it referred to a discounted gift trust, and it said nothing about a further application. That was "*capable of supporting the understanding that the Court of Protection process had supplied the authority required for implementation*" (paragraph 34). The decisive statutory point "*was missed by Barclays Wealth, Mr Yeadon and the other professionals involved*" (paragraph 40). The trustee's conduct "*remained within the range reasonably open to a professional trustee*" (paragraph 41).

On "fairness," Chief Master Shuman distinguished between spending on managing and preserving the assets and the £133,000 distributions, which "*transferred value to persons who possessed no beneficial entitlement under the resulting trust*" (paragraph 47). Both, however, arose from the same mistake. Once the defect came to light, the trustee had investigated and brought the matter to court. Relief was granted

for remuneration and expenses charged to the assets, liabilities discharged and the distributions, up to a date to be fixed in the order (paragraphs 50–51).

The trustee could also keep its remuneration even though the express trusts never existed. The trustee had administered property held on the resulting trust, so s.29(1) Trustee Act 2000 applied; the court's inherent jurisdiction led to the same result (paragraphs 55–63). Chief Master Shuman held that the trustee could also charge its ordinary rates for unwinding the arrangements. Both parties' costs are to be assessed on the indemnity basis and paid from the assets held for Mr Tustain (paragraph 72).

Comment

While Chief Master Shuman's reasoning in the decision is undoubtedly sound, the result is uncomfortable. A solicitor acting as Mr Tustain's court-appointed deputy put more than £2.7 million of his money into trusts from which he was excluded, without the authority the MCA 2005 requires. Fifteen years later, the trustee has been relieved of liability and keeps its remuneration, and both sides' costs are to come out of Mr Tustain's assets. The cost of a professional mistake fell on the person the statutory scheme exists to protect.

Professional trustees should not take too much comfort from the finding of reasonableness, which was closely tied to the facts. Now that the point has been spelt out, it will be harder to say it was reasonably missed in other cases. Anyone asked to act as trustee of a settlement made on P's behalf should check that the order authorises that specific settlement.

Finally, the direction that Mr Tustain's deputies argue against relief is a sensible model wherever P's estate will, in effect, bear the cost of relief granted to a professional.

Estate planning where a loved one has a learning disability

Mencap Trust has published research and guidance in relation to estate planning where a loved one has a learning disability. As they note:

> *In August 2026 we commissioned a survey of more than 500 Independent Financial Advisers (IFAs), financial planners and solicitors, revealing a worrying knowledge gap.*
>
> *Around a third of financial and legal professionals surveyed have 'no idea' about how to financially protect people with a learning disability and lack confidence in how to advise clients who want to leave inheritance to a loved one with a learning disability.*

The guidance can be found here.

Child Trust Funds – new legislation on the cards

It appears that the Government is going to put forward its own amendment to the Financial Services and Markets Bill to set in place a new framework to allow easier access to Child Trust Funds by parents and carers of young adults who lack the mental capacity to manage their finances.

A statement on 3 November 2026 from the Justice Minister, Jake Richards MP, and the Economic Secretary to the Treasury, Rt Hon Lucy Rigby KC MP set out how:

> *The Government will work with various stakeholders to explore how the new process is designed, including who can access funds, what evidence is required and what proportionate safeguards are necessary to protect young people who lack mental capacity without creating unnecessary and costly red tape.*

> *The scheme won't replace the important work of the Court of Protection, which will remain available as an alternative route to protect the financial interests of adults lacking the mental capacity to make financial decisions.*
>
> *The Government will bring forward an amendment to the Financial Services and Markets Bill to enable the new scheme, with the details to be set out in secondary legislation following Parliamentary approval.*

Anon-Governmental amendment to the Bill moved in and adopted by the House of Lords to (clause 24) to this end had considerable technical problems with it; we hope that the Government's approach will be better fitted to (and do less violence to) the MCA 2005.

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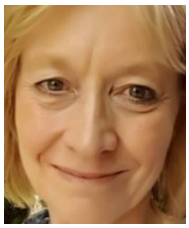
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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does 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 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.

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