
Court of Protection: Property and Affairs

Introduction

Welcome to the February 2015 Newsletters, revamped to reflect our new name of 39 Essex Chambers. We have taken the opportunity of the launch of our new Chambers website to bring together all our mental capacity resources in one [place](#).

Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: a further chapter in the saga of consent to sex; unlawful removals from the family home; and the new DOLS forms;
- (2) In the Property and Affairs Newsletter: failed attempts to prevent the OPG/COP having oversight over an attorney and to get costs against the OPG and the OPG's review of deputy monitoring;
- (3) In the Practice and Procedure Newsletter: an important case on declarations and contempt; a rare decision on permission;
- (4) In the Capacity outside the COP Newsletter: the new Practice Note for representation before the MH Tribunal; the new MHA Code of Practice; and the new offences of ill-treatment and wilful neglect;
- (5) In the Scotland Newsletter: detailed coverage of the Special Case that has resolved the question mark over the validity of powers of attorney raised by Sheriff John Baird, as well as important guidance on vulnerable clients and Practice Rules relating to powers of attorney and an update on the Mental Health (Scotland) Bill.

We also bid temporary farewell and all best wishes to Anna Bicaregui as she goes on maternity leave, and a very warm welcome to Annabel Lee who joins the editorial team in her place.

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Simon Edwards

Scottish contributors

Adrian Ward
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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Short Note: trying to exclude the OPG and COP

Can a LPA have provisions limiting the rights of the OPG and COP?

Senior Judge Lush considered this question in *The Public Guardian v VT* [2014] EWCOP 52. In that case the Public Guardian had applied for the revocation of a LPA (it was duly revoked). Senior Judge Lush remarked that a clause in the deed that the donee had inserted that stated, "I do not want any public authority or body or their employees or contractors to handle my money, financial affairs or property at any time and I do not want them to obtain any information about these at any time" should have been severed pursuant to paragraph 11 of Schedule 1 to the MCA 2005 before the LPA was registered. Senior Judge Lush held that the clause was contrary to public policy because it sought to stifle any investigation into the donee's misconduct, prejudice the administration of justice and oust the jurisdiction of the court.

Short Note: CFAs and incapacity

In *Blankley v Central Manchester and Manchester University Children's Hospitals NHS Trust* Phillips J at held ([2014] EWHC 168 (QB)) that supervening incapacity of the client did not frustrate a solicitor's retainer so that when a deputy was appointed, the retainer (in that case a conditional fee agreement) continued. See our Short Note in the December 2014 [Newsletter](#) (at page 2)

The Court of Appeal dismissed the defendant's appeal [2015] EWCA Civ 18. The Court of Appeal did so on (1) the narrow ground of the precise wording of the CFA that had been entered into; (2) the slightly wider ground that, on the facts of the case, the claimant and her solicitors must

have intended that in a repeat of her incapacity, the retainer would continue until a deputy was appointed. The Court of Appeal also made clear that they agreed with the entirety of the reasoning of Phillips J. Obiter, the Court of Appeal also stated that it was time for a re-examination of the principle in *Yonge v Toynbee* [1910] 1 KB 215 (to the effect that an agent's authority is terminated by the supervening incapacity of the principal exposing the agent to potential liability for an action for breach of warranty of authority).

Costs against the OPG?

The Public Guardian v CT and EY [2014] EWCOP 51 (Senior Judge Lush)

COP jurisdiction and powers - Costs

Summary

Rules 156 and 159 Court of Protection Rules 2007 provide for the general rule in property and affairs cases that costs come from P's estate with rule 159 stating the matters that may lead to a departure from that rule (principally conduct).

In this case, Senior Judge Lush considered those rules and the guidance in *G v E (Costs)* [2010] EWHC 3385 (Fam) 2010 COPLR (Con Vol) 454 in determining the proper costs order to make on the dismissal of an application the Public Guardian brought to determine the capacity of CT.

CT suffered a stroke. Upon discharge from hospital in November 2013 he went to live with his daughter EY. He executed a LPA in her favour on 18 June 2013 and an application to register it was made the same day and it was duly registered.

CT's son raised concerns with the OPG and the local authority's social services also had safeguarding concerns. In January 2014, the OPG commissioned a Court of Protection Special Visitor to visit CT but EY would not let him examine CT.

Hence the application. Eventually, the parties (EY and the Public Guardian) agreed that Professor Jacoby should prepare a capacity report (EY vehemently stating that CT had capacity and that she had not exercised her powers under the LPA).

Professor Jacoby concluded that CT probably suffered from vascular dementia and had periods of delirium when he did not have capacity but other periods when he did. He emphasised that CT needed disinterested advice, into which emphasis the Senior Judge read that EY was not giving such advice.

EY ambitiously asked for her costs against the OPG on the grounds that the OPG had wrongly assumed the CT did not have capacity when he should have assumed to the contrary, that he did not communicate with CT direct and had failed to act fairly in the proceedings. The Senior Judge rejected all the criticisms holding that the OPG had ample grounds for concern and that in fact it had been EY who had behaved poorly characterising her attitude as "aggressive and disingenuous."

In those circumstances, Senior Judge Lush ordered that EY should bear her own costs rather than being able to recover them from CT's estate.

Comment

This is of some note as the first reported case in which costs have been sought against the OPG. It is perhaps noteworthy that Senior Judge Lush – rightly – did not exclude the possibility that a

costs order might be made against the OPG; on the facts of the case, it is no surprise that the application by EY failed.

The case is also of some interest for the approach adopted by Professor Jacoby to capacity, and the repeated references of a them which (Senior Judge Lush) "*like Ravel's Boléro, rises in a continuous crescendo,*" namely CT's need for disinterested advice in order to assist him in making capacitous decisions. This was very clearly a case where questions of capacity and influence were extremely closely entwined, and might, again, serve as a cautionary tale as we seek to move closer to the CRPD vision of supported decision-making. If we do get closer to such a model, identifying when support shades into coercion will become ever more important – and ever more subtle as an exercise.

Relevance of resolution 1859 of 25 January 2012 of the Parliamentary Assembly of the Council of Europe on protecting human rights and dignity by respecting the previously expressed wishes of patients

Senior Judge Lush took this resolution into account when deciding whether to retain one of two attorneys when revoking the attorneyship of the other on grounds of unsuitability.

In Re RG [\[2015\] EWCOP 2](#) Senior Judge Lush dealt with an application the Public Guardian made for the revocation of the attorneyship of one of two joint and several attorneys under an EPA.

The attorneys were brother and sister and had fallen out. P was their step father. The brother excluded his sister from the attorneyship and

refused, despite court orders, to keep or give accounts. The Senior Judge had little difficulty in deciding to revoke his attorneyship.

Senior Judge Lush then had to consider whether to accede to the brother's contention that the attorneyship should be revoked in its entirety and a panel deputy appointed.

Senior Judge Lush decided to continue with the sister's sole attorneyship despite the inter sibling hostility and the fact that the brother still lived in P's house with P living in a nearby nursing home. Factors that swayed him were that appointing a deputy would be more restrictive and expensive and that the Public Guardian was confident in the sister's ability to discharge her functions.

The judge also considered that his order would better coincide with P's previously expressed wishes (in the EPA) and therefore comply with resolution 1859.

The resolution can be seen in full [here](#). It deals mainly with advance expressions of wishes regarding medical decisions.

Fundamental Review of the Supervision of Court Appointed Deputies by the Public Guardian

In October 2012, Parliament sought a review into the way in which the Public Guardian supervises deputies. The review was published in December 2014 and can be found [here](#).

The review was prompted because:

- Customers and stakeholders described some dissatisfaction with the standard of OPG's customer service

- Some Members of Parliament were concerned at the charges being levied by professional deputies in specific cases
- The supervision caseload had more than doubled since the commencement of the MCA and growth is predicted to continue
- Digital technology opportunities became available
- A new Public Guardian provided the vision to address the customer and business imperatives

The review has prompted a number of changes and others are planned.

The most fundamental change that has taken place is the move to supervising according to deputy type, so that staff may specialise in one of the deputy types: lay, local authority or professional/ panel.

In order to provide better control of professional deputy charges, the OPG will implement several new measures, such as requiring annual plans, with work and cost estimates, which can be scrutinised both before-hand and after the fact, and a comparison made.

The OPG maintains a panel of deputies to whom the court can refer any last resort cases, i.e. where there is no-one who is willing, suitable, or able to act as deputy. The OPG aims to include a wider diversity of organisation types on the panel so that there are more options when considering how to protect people lacking capacity.

There will be a move towards digital reporting to lessen the paper burden. There will be a pilot scheme in 2015.

There will be a consultation about fees later this year.

Conferences at which editors/contributors are speaking

Grasping the Thistle: A Discussion about Disabled People's Rights within the United Nations Disability Convention and Scottish Public Policy

Jill will be speaking at this roundtable arranged by Inclusion Scotland on 6th February.

Capacity and consent: complex issues

Jill is chairing, and Adrian will be speaking at, the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see [here](#).

Royal Faculty of Procurators in Glasgow

Adrian is speaking at conferences convened by the RFPG on 11 February (Private Client) and 25th February ('Demand-led' – i.e. on topics selected in advance by attendees). Details available [here](#).

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available [here](#).

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available [here](#).

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see [here](#).

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see [here](#).

Editors

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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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Newsletter will be out in early March. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2015, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. **To view full CV click here.**



Victoria Butler-Cole
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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). **To view full CV click here.**



Neil Allen
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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. **To view full CV click here.**



Annabel Lee
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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. **To view full CV click here.**



Simon Edwards
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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.**



Adrian Ward
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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *“the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,”* he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. **To view full CV click here.**



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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland’s Mental Health and Disability Sub-Committee, Alzheimer Scotland’s Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**