

## Court of Protection: Practice and Procedure

### Introduction

Welcome to the November 2015 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter, a decision about deprivation of liberty in hospital and the meaning of state detention under the Coroners and Justice Act 2009, and the final instalment in the Rochdale deprivation of liberty saga;
- (2) In the Capacity Outside the CoP newsletter, an introduction to the work of the new National Mental Capacity Forum from its Chair, Baroness Finlay;
- (3) In the Practice and Procedure Newsletter, an update on the regionalisation of the Court of Protection;
- (4) In the Property and Financial Affairs Newsletter, a number of decisions concerning powers of attorney;
- (5) And in the Scotland Newsletter, the annual report of the Mental Welfare Commission for Scotland.

We also take this opportunity to remind readers that where one of the Newsletter editors is instructed in an ongoing case which is summarised, that editor does not play any part in drafting the summary or comment.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#).

### Editors

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Anna Bicarregui  
Simon Edwards (P&A)

### Guest contributor

Beverley Taylor

### Scottish contributors

Adrian Ward  
Jill Stavert

### Table of Contents

Introduction	1
<i>Procedure – fact-finding</i>	2
Issuing proceedings in medical treatment cases involving children	2
Publicity	3
Jigsaw identification	3
Court of Protection Regional Hubs: an update	4
NICE quality standard on ‘behaviour that challenges’	5
Learning resources: Mental Capacity Act 2005 (MCA) in social work	6
A step towards Rule 3A accredited legal representatives	6
Conferences at which editors/contributors are speaking	7

For all our mental capacity resources, click [here](#). Transcripts not available at time of writing are likely to be soon at

## Problems with a fact-finding hearing

*Re M-B (Children)* [\[2015\] EWCA Civ 1027](#)

*Procedure – fact-finding*

### Summary

This appeal arose from a fact finding exercise in a family case involving the death of a 10 month old baby, A. The cause of A's death could not be ascertained but during post mortem examination, at least 7 fractures were discovered which had occurred prior to the date of his death, affecting all four long bones and in 5 distinct locations. At the time of his death he was living with his mother (EB) and her partner (FB). He also visited his father (CM). As a result of the post mortem findings, EB's 4 other children were taken into care.

The local authority sought to appeal the fact finding judgment on the basis that the judge was wrong not to make findings on the evidence that the fractures were the result of non-accidental injury and to identify the probable perpetrator, or otherwise the pool of possible perpetrators.

The appeal was allowed. The Court of Appeal held that the judge's fact finding exercise was 'fatally flawed in all matters relating to the central and significant issue of A's injuries, and the judgment rendered unreliable' and incapable of forming the basis of any future welfare evaluation of the children's needs. The flaws included: confused and partial reliance on the 'unequivocal' medical evidence; an incorrect assumption that the local authority's reliance on a lack of a satisfactory explanation necessarily indicated a reversal in the burden of proof (given the medical evidence); contradictory findings; and a 'bewildering, confused and, in the absence of a finding of culpable harm, unnecessary attempt at attribution of fault'.

Despite the local authority's request, it would not be appropriate for the Court of Appeal to substitute its own findings of fact in place of the first instance judge in circumstances where it had not heard the evidence and evaluated the witnesses. The hearing would be conducted de novo.

### Comment

For those drafting a schedule of facts for local authorities in COP cases, the judgment contains a clear (and stern) warning that such schedules should focus on the substantive issue and should not descend into trivia. In a case where the local authority was asking the court to make a finding that a child had suffered serious, non-accidental injuries, *'the local authority prepared a schedule of numerous findings they asked the court to make, which descended to the fact that the mother smoked in the family home [...] the unnecessary distraction created does not assist the parties, case management or the efficacious use of valuable court time'*.

## Issuing proceedings in medical treatment cases involving children

*Re JM (A Child)* [\[2015\] EWHC 2832 \(Fam\)](#)

*Best interests – children – medical treatment - procedure*

In this case, Mr Justice Mostyn has clarified that where final declarations are sought in respect of medical treatment to which a child's parents do not consent, the court proceedings should be framed as a combination of an application for a specific issue order under s.8 Children Act 1989 and declaratory relief under the inherent jurisdiction of the High Court. The application

should be issued in the High Court and would be listed before a full-time High Court Judge.

## Publicity

*Aidiniantz v Riley and others* [\[2015\] EWCOP 65](#)

*Anonymisation – best interests*

In this case Peter Jackson J had to determine several issues concerning Mrs Aidiniantz who had become the centre of a bitter family dispute that had been litigated in the Chancery Division, the Family Division and the Court of Protection. The protagonists were her children and they had sought publicity and one set of proceedings (in the Chancery Division) had taken place in public. The press had published details.

The question arose as to whether these, CoP, proceedings should receive publicity and whether there should be anonymity. The judge decided that the decision should be reported without any anonymity because there already had been publicity and so any attempt at anonymity would be futile. He further held that it was in the public interest to learn of the case as a deterrent to warring families as the result was that in relation to these proceedings alone the two factions had each spent about £100,000 and they were each ordered to bear their own costs. So far as Mrs Aidiniantz's rights to privacy were concerned, he held that due to previous publicity there would be little further intrusion into her private life and in any event there was nothing in the judgment in any way critical of her.

## Jigsaw identification

Click [here](#) for all our mental capacity resources

*H v A (No. 2)* [\[2015\] EWHC 2630 \(Fam\)](#)

*Anonymisation – jigsaw identification*

This case raised the issue of 'jigsaw identification' in family cases where there had been prior press reporting of related criminal proceedings. In this case the court was alerted by a reporter that the anonymised family proceedings case contained facts which allowed him to identify the family due to wide reporting of the previous criminal case (where the father had eventually been given a discretionary life sentence following attempts to do grievous harm to the mother and the children). The mother then brought an application seeking that the judgment not be reported or only reported in a heavily redacted format. The mother also sought a restricted reporting order prohibiting the publication of the identity and whereabouts of the mother and children and any information likely to identify them or their whereabouts without the standard 'public domain' proviso.

The judge decided that his judgment should be published in its original format (without further redaction). He also decided that there should be a reporting restriction order prohibiting the names of the children and their current whereabouts being reported (whether or not in the public domain) but that all other facts be subject to the public domain proviso.

The judgment sets out in detail the balancing exercise carried out between the children and mother's Article 2 and Article 8 rights and the right to freedom of expression (Article 10).

The judge concluded that 'jigsaw identification' would arise more frequently in the Internet age where information remained accessible over

time but stated that the risk of 'jigsaw identification' was not a reason in itself to withhold the publication of a judgment. The question in each case was whether, having regard to the evidence before the court and all the circumstances of the case, the interference in the Article 8 rights constituted by the 'jigsaw identification' arising out of publication outweighed the interference in the Article 10 right of freedom of expression constituted by withholding publication. Whilst this had not been an easy case, the judge considered that the mother and children's rights in this case did not outweigh the right to freedom of expression.

The judge made clear that he considered that the decision whether or not to publish a judgment in a suitably anonymised form should be a simple case management decision to be taken at the conclusion of the judgment. Neither the fact that it may be possible to identify the family by conducting an internet search using key facts from a judgment, nor the possibility of 'jigsaw identification' necessarily meant that the decision to publish needed to be subjected to the level of scrutiny of the present judgment.

## Court of Protection Regional Hubs: an update

Court of Protection work is issued in First Avenue House, London, which has long been the single administrative centre for England and Wales. Over the years arrangements have evolved which has led to some of this work being sent to the regions across England and Wales for case management and hearings.

With a continued rise in Court of Protection work HMCTS has introduced a standardised process to

ensure workload is allocated out to the regions efficiently. The aim of this is to improve the administration process and turnaround times for Court of Protection work in the regions.

To achieve this designated regional hubs for Court of Protection work have been appointed and they are responsible for:

- allocating cases that are received from First Avenue House to the relevant local hearing centre within their region, and
- case managing and administering the case until the final hearing.

The regional hubs are in Birmingham, Bristol, Cardiff, Leeds, Newcastle, Manchester and Reading.

The number of judiciary able to deal with Court of Protection work has increased and a Regional Lead Judge, responsible for the allocation of Court of Protection work, has been appointed in each region. They will be supported by one or more District Judges experienced in Court of Protection work who will act as gatekeepers.

### What do these changes mean for court users?

Overall the aim of these changes is to improve the level of service provided to court users with a more efficient process delivering a quicker turnaround of work and reducing delays in the system.

Court of Protection applications will continue to be issued at First Avenue House, but if suitable will be transferred to the relevant regional hub for hearing. As the number of judiciary able to deal with Court of Protection work has increased this means that there will be more venues available for hearings to take place. To ensure an

application is allocated at the correct venue the application form will be changed to include a box where you can state the preferred local hearing venue. In the meantime users can indicate the preferred venue in a covering note.

Once transferred to the regional hub, all future queries and documentation should be directed there. Details of the regional hub will be provided with the hearing notice.

If you have any questions in respect of the above you can email the Court of Protection team at: [regional.courts@hmcts.gsi.gov.uk](mailto:regional.courts@hmcts.gsi.gov.uk)

<https://www.gov.uk/courts-tribunals/court-of-protection>

*We are grateful to James Batey and Emma Petty at the Ministry of Justice for this update.*

## **NICE quality standard on 'behaviour that challenges'**

The National Institute for Health and Clinical Excellence has published a 'quality standard' for "Learning disabilities: challenging behavior" available [here](#). As well as providing guidance to commissioners, the 12 "quality statements" are likely to be valuable in assessing whether appropriate care is in place for people with challenging behavior who are subject to restrictive interventions:

Statement 1. People with a learning disability have a comprehensive annual health assessment from their GP.

Statement 2. People with a learning disability and behaviour that challenges have an initial assessment to identify possible triggers, environmental factors and function of the behaviour.

Statement 3. People with a learning disability and behaviour that challenges have a designated person responsible for coordinating the behaviour support plan and ensuring that it is reviewed.

Statement 4. People with a learning disability and behaviour that challenges take part in personalised daily activities.

Statement 5. People with a learning disability and behaviour that challenges have a documented review every time a restrictive intervention is used.

Statement 6. People with a learning disability and behaviour that challenges only receive antipsychotic medication as part of treatment that includes psychosocial interventions.

Statement 7. People with a learning disability and behaviour that challenges have a multidisciplinary review of their antipsychotic medication 12 weeks after starting treatment and then at least every 6 months.

Statement 8. Parents or carers of children aged under 12 years with a learning disability and behaviour that challenges are offered a parent-training programme.

## **Learning resources: Mental Capacity Act 2005 (MCA) in social work**

The new CPD curriculum guide, together with the “Mental Capacity Act 2005 in Practice”, [published](#) by the Department of Health, is targeted at social workers and aims to improve the practical application of the Mental Capacity Act 2005. The curriculum guide, written by Anna Beddow, Mark Cooper and Lisa Morriss (University of Manchester), focuses on identifying and meeting learning development needs to equip social workers to implement the MCA effectively in practice. It is well-referenced to supporting guidance and online resources, and serves as a useful point of reference for anyone delivering or receiving MCA training.

## **A step towards Rule 3A accredited legal representatives**

Recruitment is now live for the roles of [chief assessor](#) and [assessors](#) for the Mental Health (Welfare) Accreditation. Recruitment for the chief assessor closes on 30 November 2015. Recruitment for assessors closes on 7 December 2015.

---

## Conferences at which editors/contributors are speaking

---

### Cross-Border Guardianship

Adrian and Jill will be participating in a half-day seminar for CPP Seminars Scotland on 4 December at Brodies LLP in Edinburgh. For further details, and to book, see [here](#).

### MBL Court of Protection Conference, London, 11 December

Neil is chairing and speaking at this full-day conference on topics from deprivation of liberty to medical treatment to statutory wills. Further details [here](#).

### Editors

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Anna Bicarregui  
Simon Edwards (P&A)

### Guest contributor

Beverley Taylor

### Scottish contributors

Adrian Ward  
Jill Stavert

---

### 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 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 Newsletter in the future please contact [marketing@39essex.com](mailto:marketing@39essex.com).

### David Barnes

Chief Executive and Director of Clerking  
[david.barnes@39essex.com](mailto:david.barnes@39essex.com)

### Alastair Davidson

Senior Clerk  
[alastair.davidson@39essex.com](mailto:alastair.davidson@39essex.com)

### Sheraton Doyle

Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

### Peter Campbell

Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)

**London** 39 Essex Street, London WC2R 3AT  
Tel: +44 (0)20 7832 1111  
Fax: +44 (0)20 7353 3978

**Manchester** 82 King Street, Manchester M2 4WQ  
Tel: +44 (0)161 870 0333  
Fax: +44 (0)20 7353 3978

**Singapore** Maxwell Chambers, 32 Maxwell Road, #02-16,  
Singapore 069115  
Tel: +(65) 6634 1336

For all our services: visit [www.39essex.com](http://www.39essex.com)

Thirty Nine Essex Street LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 39 Essex Street, London WC2R 3AT. Thirty Nine Essex Street's members provide legal and advocacy services as independent, self-employed barristers and no entity connected with Thirty Nine Essex Street provides any legal services. Thirty Nine Essex Street (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 39 Essex Street, London WC2R 3AT.

## Editors

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Anna Bicarregui  
Simon Edwards (P&A)

## Scottish contributors

Adrian Ward  
Jill Stavert

## CoP Cases Online



Use this QR code to take you directly to the CoP Cases Online section of our website





**Alex Ruck Keene:** [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has 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, is an Honorary Research Lecturer at the University of Manchester, and the creator of the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). **To view full CV click here.**



**Victoria Butler-Cole:** [vb@39essex.com](mailto:vb@39essex.com)

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. 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:** [neil.allen@39essex.com](mailto:neil.allen@39essex.com)

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:** [annabel.lee@39essex.com](mailto:annabel.lee@39essex.com)

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.**



**Anna Bicarregui:** [anna.bicarregui@39essex.com](mailto:anna.bicarregui@39essex.com)

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. **To view full CV click here.**



**Simon Edwards:** [simon.edwards@39essex.com](mailto:simon.edwards@39essex.com)

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** [adw@tcyoung.co.uk](mailto:adw@tcyoung.co.uk)

Adrian is a practising Scottish solicitor, a consultant at 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.**



**Jill Stavert:** [J.Stavert@napier.ac.uk](mailto:J.Stavert@napier.ac.uk)

Professor 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 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**