



Welcome to the January 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, a further round in the *Re X* saga, a briefing note on PJ/MM, the Chief Coroner's annual report and Manuela Sykes' obituary;

(2) In the Property and Affairs Report: case-law and OPG guidance on gifts, and whether its effect on a will is information relevant to the test of whether a person has capacity to marry;

(2) In the Practice and Procedure Report: fluctuating capacity in the face of the court, Court of Protection statistics and a useful case for human rights claims arising out of the misuse of the MCA;

(3) In the Wider Context Report: interim guidance on CANH withdrawal, the NICE consultation on decision-making and capacity, an important study on everyday decision-making under the MCA and a book corner with recent books of interest;

(4) In the Scotland Report: Court of Protection orders before the Scottish courts and an update on the Scottish Government consultation on adults with incapacity;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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

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Fluctuating capacity in the face of the court

Re MB [2017] EWCOP B27 (HHJ Parry)

Mental capacity – residence

Summary

This case was concerned with the capacity of MB to make decisions about his residence, care and contact arrangements. It is the culmination of a series of judgments, the first being reported in 2007.

MB had since 2007 been treated by the local authority providing care to MB, all the Court instructed experts, MB's litigation friend and ultimately the Court as someone who lacked capacity to make decisions as to his residence, care assessment and treatment for his learning difficulties, epilepsy, autistic spectrum disorder behavioural problems and as to the nature and extent of his contact with his mother.

In 2017, in the course of yet further litigation, the court received a report from Dr Leighton, an independently instructed Consultant Psychiatrist. Dr Leighton was of the view that MB had capacity to make the relevant decisions, but *"would, from time to time, in circumstances that could not be accurately predicted, lose capacity to*

make decisions about his immediate wellbeing." Dr Leighton was unable to predict the duration of that loss of capacity: *"[i]t could be 'for a matter of hours or even for a matter of days.'"*

The judge was clearly troubled as to what could have caused what she described as a radical change in MB's capacity to make decisions. A second consultant psychiatrist was therefore instructed to report – Dr Lisa Rippon. Her report concurred with Dr Leighton's. The two experts produced a joint statement. This paragraph is set out in the judgment:

Both Dr Rippon and Dr Leighton agreed that MB's capacity could fluctuate during times of seizure activity but also when his level of anxiety rises and he becomes distressed because of environmental triggers. It was Dr Leighton's view that these periods could last for several days and he gave the example of the time that MB had become angry with his RPR and had refused to see her for a week. However, what is less clear is whether his capacity was affected over the whole of this period. Therefore, although both doctors agreed that MB's capacity had fluctuated, what is less certain is how long these periods could last.

The parties did not wish to challenge the expert evidence, and submitted a consent order

bringing the proceedings to an end on the basis that the Court lacked jurisdiction over MB. Her Honour Judge Parry held that she was:

satisfied on the basis of the evidence that is placed before the Court that I should approve the consented disposal of these proceedings. I do so on this basis, all Courts make decisions on the evidence that is presented to that, to that extent, the Court is the servant of the evidence that is provided by the parties. Whilst the Court has an overall directing role in identifying the type and nature of evidence that it requires to make decisions, ultimately those decisions must be faithful to the evidence that is capable of being accepted.

[...]

It would therefore be illogical for the Court to arrive at a different position from that which is jointly argued for on the basis of evidence which is jointly accepted as valid.

The difficulties this would pose those providing services to MB on the ground was not lost on HHJ Parry QC, who noted that:

It is a clear undercurrent in these proceedings that those who know MB particularly well, including those who have been providing care to him over a number of years and his social worker, have worries about MB's future and how he will adapt to the changes that may become open to him. There are also understandably legitimate concerns and worries as to the impact upon him of making changes to a routine that he has become very used to over the last nine years or so. Those are legitimate concerns for professionals to have both

at a personal and professional level for MB.'

Lastly, HHJ Parry noted that the "proceedings conclude without any clarity as to what alternative care arrangements could be made available for MB" but unsatisfactory as this was, she correctly identified that this was no longer the concern of the Court.

Comment

This case is an interesting example of what the court should do in the face of joint expert evidence as to capacity that it does not find convincing. Reading between the lines, it appears as if the judge felt that her hands were tied by the parties' willingness to accept that evidence.

While it is difficult for a court to take a different approach to that of the parties, the court's jurisdiction is ultimately an inquisitorial one. It would have been interesting to see what the court had done had (as is not uncommon) all the evidence been to the effect that MB lacked capacity but the court was not satisfied as to its quality. There is, of course, the asymmetry introduced by the presumption of capacity, but HHJ Parry did not make express reference to this. Further, what is not clear from the judgment is whether was an exploration of (1) the extent to which the current care package was maximising MB's capacity (by reducing his anxiety and minimising the environmental triggers that may cause him to slide into incapacity); and (2) the likelihood of him losing the capacity to make decisions in the absence of the care package.

We suggest that this could have been a legitimate avenue of exploration in this case.

There are cases in which it is only after a period of time in which a care package has been imposed on P via the MCA (in respect of a non-compliant diabetic for example), that P is able to make capacitous decisions. Once P has regained capacity to make decisions about care (and makes the unwise decision to refuse all care), P's health declines and P again loses the capacity to make decisions about care. We suggest that the court must have power in a case of that nature to put in place a regime that kicks in once P loses capacity, and we have had – unreported – experience of the court making 'contingent' declarations/decisions to cater for sufficiently foreseeable circumstances.

Court of Protection statistics

The MOJ published the '[Family Court Statistics Quarterly, England Wales, July to September 2017](#)' on 17 December 2017. The salient points in so far as the Court of Protection is concerned are as follows:

- There were 8,049 applications made under the Mental Capacity Act 2005 (MCA) in the period, up 4% on the equivalent quarter in 2016 (7,762 applications). Just under half (49%) related to applications for appointment of a property and affairs deputy and 1,077 applications related to deprivation of liberty, up 38% on the equivalent quarter in 2016. 630 applications were made for *Re X* orders. Deprivation of liberty orders were up 57% over the same period, from 362 to 569.
- There were 10,023 orders made, 50% more than the same quarter in 2016, driven by a clearance of outstanding cases and an increase in the number of cases being dealt

with by regional courts. A third (33%) of the orders related to the appointment of a deputy for property and affairs.

- There were 193,285 Lasting Powers of Attorney (LPAs) received in July to September 2017, up 32% on the same quarter for 2016 thus maintaining the strong upward trend. There were 2,774 Enduring Powers of Attorney (EPAs) in July to September 2017, down 11% on the equivalent quarter in 2016.

Short Note: continuing violations and HRA claims

The case of *O'Connor v Bar Standards Board* [2017] UKSC 78 is of interest to COP practitioners in considering the limitation period for bringing a claim under the Human Rights Act 1998. Section 7(5) HRA 1983 states that proceedings have to be brought before the end of the period of one year beginning with the date on which the act complained of took place. In the context of disciplinary proceedings brought by the Bar Standards Board (BSB), the Supreme Court held that "the date on which the act complained of" did not have to be interpreted as meaning an instantaneous act. A barrister's claim that the BSB had indirectly discriminated against her by bringing and pursuing disciplinary proceedings therefore amounted to a single continuous course of conduct which continued until the conclusion of the barrister's appeal. Time ran from the date when the continuing act ceased, not when it began. The decision is therefore useful for confirming, by analogy, that lengthy periods of unlawful detention could amount to a single continuous course of conduct in respect of which a claim could be brought under the Human Rights Act 1998.

Cross-border cases involving Scotland

For anyone involved in an 'outgoing' Court of Protection case involving Scotland, we strongly suggest that you read the discussion of the *Darlington* decision from Glasgow Sheriff Court in the Scotland Report, as it comprehensively puts to bed a somewhat odd interpretation of the Adults with Incapacity Act 2000 by Scottish Government, and makes clear that orders of the Court of Protection can be recognised and enforced in Scotland under the provisions of the AWI.

Editors and Contributors



Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



Victoria Butler-Cole: 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

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

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).

Editors and Contributors



Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click [here](#).



Simon Edwards: 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

Adrian is a non-practising Scottish solicitor 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.



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. 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](#).

Conferences

Conferences at which editors/contributors are speaking

5th UCLH Mental Capacity Conference

Alex is speaking at the 5th University College London Hospital mental capacity conference on 20 February, alongside Sir James Munby P and Baroness Ilora Finlay. For more details, see [here](#).

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see [here](#).

Other conferences of interest

SALLY seminar

The next seminar in the ESRC-funded seminar series on Safeguarding Adults and Legal Literacy will be held on 16 February at the University of Bedfordshire's Luton campus, the topic being "Safeguarding Adults Boards and Reviews." See [here](#) for more details.

COPPA seminars

The Court of Protection Practitioners Association have a packed programme of seminars coming up, including (in the North West) a seminar on differing perspectives on proceedings on 31 January and (in London) a seminar on financial abuse on 7 February. For more details, and to book, see [here](#).

Finder's Deputy day

The Third Finder's International Deputyship Development Day is taking place on 1 March in York. It is a free event open to all local authorities carrying out deputyship and appointeeship work, and includes a specific focus on hoarding. For more details, see [here](#).

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 report will be out in late February. 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.

Michael Kaplan

Senior Clerk

michael.kaplan@39essex.com

Sheraton Doyle

Senior Practice Manager

sheraton.doyle@39essex.com

Peter Campbell

Senior Practice Manager

peter.campbell@39essex.com



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clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

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

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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