



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

(1) In the Health, Welfare and Deprivation of Liberty Report: a rare appellate level decision considering best interests (and confirming that they should be rare);

(2) In the Property and Affairs Report: (partially) endorsing an attorney's actions after the event;

(3) In the Practice and Procedure Report: choosing litigation friends;

(4) In the Wider Context Report: the National Mental Capacity Forum reports, and an important Strasbourg re-cap of the principles applying to capacity;

(5) In the Scotland Report: a new Public Guardian and the MWC is cautious about attorneys consenting to restrictions on liberty;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#).

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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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Choosing a litigation friend

Flora Keays by her litigation friend Sara Keays v The executors of the estate of the late Right Honourable Cecil, Baron Parkinson [2018] EWHC 1006 (Ch) (Court of Appeal (Arden, Sharp and Peter Jackson LJJ))

Other proceedings – Chancery

Summary

Flora Keays is the adult child of the late Cecil Parkinson and Sara is her mother. Whilst a child, Sara obtained a maintenance order against Cecil Parkinson in the sum of £20,000 per annum for Flora. Cecil Parkinson continued that payment after Flora’s majority because Flora suffers from serious physical and mental disability.

Cecil Parkinson died on 22 January 2016 and his will made no provision for Flora (or Sara). He referred to a life insurance policy of which Flora was said to be the sole beneficiary.

The £20,000 per annum payments stopped and Flora brought Inheritance Act proceedings seeking financial provision from Cecil Parkinson’s estate. The executors alleged inability on the part of Sara to conduct the litigation on Flora’s behalf and a conflict of interest and brought an application for her removal as litigation friend. CPR21.7 gives the court power to terminate a litigation friend’s

appointment and appoint another but does not give any guidance as to how that discretion should be exercised.

So far as authority is concerned, Master Clark relied on, in respect of adverse interest, a passage from *Davilla v Davilla* [2016] B14 (Ch) (a judgment of Laurence Rabinowitz sitting as a deputy High Court Judge) at paragraph 137 as follows:

(1). As noted above, CPR 21.4(3)(b) stipulates that in order for a person to act as a litigation friend that person must have "no interest adverse to that of the ...protected party". The relevant inquiry here is directed towards the conduct and outcome of the litigation for which the individual is to be appointed as litigation friend, and it will in most cases not be relevant to search, outside the bounds of the particular litigation, for some factor that might suggest some potential conflict between the interests of the party and the interests of the litigation friend unless it can reasonably be said that this potential conflict may also affect the manner in which the litigation friend is likely to approach the conduct of the litigation itself.

(2). Moreover, what this prohibition is directed towards is an interest that is "adverse" to that of the protected party. It follows that the fact that the person

appointed as litigation friend has his own independent interest or reasons for wishing the litigation to be pursued ought not, in general, to be a sufficient reason for impeaching that appointment. Such an interest would, at least in general, run in the same direction as the protected party rather than being adverse to the protected party's interests.

(3). *However, it is necessary in this context to have regard to the decision of the Court of Appeal in Nottingham CC v Bottomley and another [2010] EWCA Civ 756, the only authority on this issue to which I was referred. In dealing with the position of a litigation friend, Stanley Burnton LJ (with whom Rix and Maurice Kay LLJ agreed) emphasised the need for the litigation friend to "seek the best outcome" for the protected party and for a litigation friend to "be able to exercise some independent judgment on the advice she receives from those acting for a claimant, and ...be expected to accept all the advice she is given", something that might be difficult where, as in that case, the litigation friend worked for an organisation that would benefit from a settlement in a form that might not necessarily be to the benefit of the protected party itself.*

(4). *This highlights the fact that, even where the interests of the protected party and litigation friend generally run in parallel or coincide, this does not of itself preclude the possibility that, in some contexts, those interests might diverge and become adverse. Whether or not that is so will, of course, always depend upon the facts of the particular case.*

Master Clark rejected the executors' allegations against Sara Keays of conflict of interest and

lack of ability to conduct the litigation. Sara Keays had, however, agreed to the appointment of an independent solicitor as Flora's litigation friend but the executors would not agree to her choice, hence the need for the hearing.

As Master Clark noted at para 47:

The application notice seeks the appointment of a solicitor proposed by the executors as being an appropriate litigation friend. That is an unusual application. The practical reality is that the litigation friend will have extensive dealings with the parent or person responsible for the child or protected party. The court should therefore in my judgment be reluctant to impose a litigation friend on the parent or responsible person; and should only do so if there is no other viable candidate.

Master Clark, further, noted that the executors could not veto a solicitor chosen by Sara: provided that the solicitor was otherwise a suitable appointee, she should be entitled to choose the solicitor that she preferred.

The executors gave a number of bases for objecting to the solicitor chosen by Sara, but ultimately accepted that she could fairly and competently conduct the proceedings on the claimant's behalf. However, they nonetheless submitted that it would not further the overriding objective for her to be appointed, when personal difficulties had arisen between her and the partner acting for the executors. However, Master Clark noted that "*the suggestion that the overriding objective requires harmonious personal interactions between solicitors acting for opposing parties seems to me to be unrealistic*" and that, in any event, it would be possible to circumvent any

such personal difficulties. In the result, therefore, Master Clark appointed the solicitor of Sara's choice.

At the end of her judgment, Master Clark remarked upon the fact that the executors were not taking a neutral stance as regards the claim or the application. She stated that that was not desirable as costs attributable to the role of an executor as such in a claim such as this ought to be clearly distinguishable from those incurred in defending the claim, see CPR PD 46, para 1.

Comment

The circumstances of this case are somewhat unusual, but they provide a useful reminder of the meaning of "adverse interest" for purposes of identifying whether a person is a suitable litigation friend. The observation that the court should be reluctant to impose a litigation friend over the choice of that of a parent or responsible person in civil proceedings sits at interesting odds with the position in relation to the appointment of litigation friends before the Court of Protection, where (perhaps as a function of the inquisitorial nature of the proceedings) the views of others as to who might constitute a suitable litigation friend play much less of a role.

Finally, in the context of litigation capacity more generally, the facts of this case arguably pale into comparison to the fascinating case of *Wembley v Wooten* [2018] FamCA 334, determined recently in Australia, where in the context of determining that a man did, in fact, have capacity to conduct parenting and property proceedings, the court had to consider whether the man's ability to give instructions was affected by, inter alia, alcohol consumption, his heavy chain smoking, and his focus on proving

that he was right and his legal representatives were wrong. As Macmillan J noted: "[t]he husband in this case is not the first nor will he be the last litigant who thinks he is smarter than those advising him. Nor will the husband be the first or last litigant to make foolish decisions. That in my view does not make him a person with a disability."

Court of Protection online

As part of the HCMTS reform programme, work will start in Spring 2019 to enable people using the Court of Protection to initiate and manage their cases online. We will watch this development with care – not least to with an eye to whether, to serve the needs of some, the result is that the court is moved yet further out of the reach of those Ps/their families who are unable to make use of these online facilities.

Lady Hale on openness and privacy in proceedings

Those concerned with transparency issues in the Court of Protection may find it useful to read and reflect upon how many of the observations made by Lady Hale in her Sir Nicholas Wall Memorial Lecture 2018 relating to openness and privacy in family proceedings either could or should apply in proceedings before the Court of Protection.

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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](#).



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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



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Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



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Conferences

Conferences at which editors/contributors are speaking

Court of Protection seminar: The capacity to marry and divorce, and damages in the Court of Protection

Tor is speaking, with Fenella Morris QC, at a seminar organised by Irwin Mitchell on 21 June in London. For more details, and to book, please use this [email address](#).

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details, see [here](#).

Towards Liberty Protection Safeguards

This conference being held on 24 September in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, 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 early July. 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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