



Welcome to the February 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: vaccination; interim authority to treat pending a final order, and a further LPS impact assessment;

(2) In the Property and Affairs Report: guidance following ACC for professional deputies;

(3) In the Practice and Procedure Report: a checklist for international relocation, covert treatment and the courts, and recording of court proceedings;

(4) In the Wider Context Report: decision-making and 16/17 year olds, FAQs following the *Devon* judgment on personal assessment, spotting coercion and control and the BIHR's resources for service providers;

(5) In the Scotland Report: further developments relating to the Scott review, including an update from the Chair, and Scottish consideration of relocation.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [here](#), and Neil a page [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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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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ACC and Others: Guidance for Property and Financial Affairs Deputies

The OPG has issued guidance for P&A deputies following the judgment of the Senior Judge in *Re ACC, JDJ and HPP* [2020] EWCOP 9. In that case the Senior Judge dealt with the issue of what steps a deputy should take before taking legal advice and starting proceedings. Our report of the case can be found [here](#).

The guidance, available [here](#), follows what the Senior Judge said and, as it is admirably succinct, we set out the material parts in full below.

2. Within general authority of property and financial affairs deputies

2.1 This is confirmed as including ordinary ‘non-contentious’ tasks such as property conveyancing, managing leases, business and associated employment contracts, preparing tax returns, taking advice on tenancy liabilities and arranging care.

2.2 Paragraphs 1-3 of the Appendix of the judgement outline actions included under the general authority of a deputy.

3. Outside the general authority of property and financial affairs deputies.

3.1 Specific authority is required to conduct litigation on behalf of the protected party except where the contemplated litigation is in the Court of

Protection in respect of a property and financial affairs issue. Deputies can take advice on ‘contentious litigation’ on a property and financial affairs matter up to receiving a letter of response, but no further.

3.2 Specific authority is also needed to use the protected party’s funds to reimburse a third party instructed to act on behalf of the protected party. This includes costs incurred by a member of the protected party’s family.

3.3 A property and affairs deputy has no authority to make decisions that impact exclusively on health and welfare matters, unless stated in the court order. Where such decisions need to be made authorisation must be sought from the court.

3.4 Litigation for Continuing Health Care funding appeals, and Education, Health and Care Plans require authorisation from the court, as these fall outside the scope of authority of a finance and property affairs deputy.

3.5 Where OPG becomes aware of any unauthorised actions, it will refer the deputy to apply to the court for retrospective authorisation. If under OPG’s supervisory role, we find a deputy has not been compliant, then we will refer the matter to the court to decide what is proportionate.

4. Prospective deputies

4.1 Prospective deputies should consider whether there is a potential need to instruct someone else to provide advice or carry out legal tasks at the time they apply to be appointed. If their own firm provides the service and they wish to instruct them, they should include a request for specific authority to do so, subject to a specified costs limit, with their initial application. The court will decide on whether this is in the client's best interests, the period of the authorisation, and the level of expenditure.

4.2 Where a prospective deputy has been granted authority to instruct someone else, but not specific authority to instruct their own firm, the deputy must obtain three separate quotations from appropriate providers, one of which can be from their own firm. The deputy should then make a best interests decision as to which provider best meets the needs of the client, and if they still wish to instruct their own firm should make an application for specific authority if the anticipated costs are in excess of £2,000 plus VAT.

5. Existing deputies

5.1 The judgment makes it clear that there is a continuing expectation that deputies will consider, in detail, the limits of their own specific authority and address any potential conflicts of interest. Authorisation from the court is required for all on-going and future work which falls outside of the authority of the deputyship.

5.2 Deputies will be expected to apply to the court for authorisation in any cases where projected costs exceed £2000 plus VAT.

5.3 The deputy should make a proportionate decision in instances where obtaining three quotations would cost more than the proposed work. In such cases the deputy must detail their decision in the annual report.

5.4 There may be some instances where it is not possible to obtain three quotations. In this case, OPG will take a proportionate approach and consider whether to refer the matter to court.

5.5 OPG expects deputies to have made the appropriate application for authorisation by 1 April 2021. Deputies will be expected to apply to the court for retrospective authorisation where the provision of services to a client may constitute a conflict of interests, and costs have exceeded £2000 plus VAT, in any case occurring or ongoing since the release of the judgment.

5.6 OPG does not envisage the need for deputies to make applications for retrospective authorisation in any cases completed prior to the release of the judgment, but this will be considered on a case by case basis to ensure that the best interest of the protected party are being met.

5.7 OPG's position is that these guidelines extend to any situation where a deputy is considering the procurement of services for a client which may include provision from the deputy's own firm and hence constitute a potential conflict of interest.

5.8 If a deputy believes that urgent action is needed to protect a client's interests, they may proceed at their own risk and

make an application to the court for retrospective authorisation.

5.9 The judgment states that in welfare matters, other authorities may be better placed to act, such as local authorities and the NHS, who do not need court authorisation to carry out urgent work outside of the scope of deputyship. The deputy will need to consider whether they can ask someone else to handle the welfare issue and refer the issues to those agencies.

6. OPG's role in relation to this Judgment

6.1 The Public Guardian, supported by the OPG, has a statutory duty to supervise all deputies appointed by the Court of Protection. When we ask deputies to report to us, we will require them to demonstrate that they have the necessary authority to carry out their work.

6.2 OPG would expect any decisions made by deputies in relation to this judgment to be outlined in the annual report.

6.3 We require applications to have been made in respect of any unauthorised work started or ongoing since the date of the judgment by 1 April 2021. Following this date, action will be taken to address any non-compliance with the judgment which could include OPG making an application to the court.

6.4 The judgment states that if a client has capacity to give instructions for litigation work then they can understand the costs involved. This should always be approached on a case-by-case basis with consideration to the client's circumstances.

Separately, CoPPA, the Law Society, STEP, PDF and SFE have produced their own guidance and flowchart, available [here](#), which HHJ Hilder has reviewed and (whilst not formally endorsed) has made clear she is happy to be circulated.

Comment

The mention of prospective deputies in the OPG Guidance brings into question one aspect of practice with which ACC and the guidance do not deal. That is the appointment of a deputy in severe acquired brain injury damages cases. This commonly happens after solicitors have been engaged, a CFA entered into with a litigation friend and proceedings issued. Commonly also, the deputy will be from the litigation solicitor's firm. In line with the philosophy of ACC and the guidance, should COP ask in such cases for 3 quotations from potential deputies, particularly as the costs of deputyship in such cases are very substantial and not always recovered 100% from the tortfeasor, due, perhaps to contributory negligence or causation doubts?

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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. 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. 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; honorary membership of the Law Society of 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

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

Alex is also doing 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 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 Report in the future please contact: marketing@39essex.com.

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