# Mental Capacity Law Newsletter March 2016: Issue 63

Essex CHAMBERS

# Compendium

## Introduction

Welcome to the March 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: what we don't know about the MCA and further observations on 'using and weighing';

(2) In the Property and Affairs Newsletter: calibrating testamentary capacity to the nature of the estate and updates from the Office of the Public Guardian;

(3) In the Practice and Procedure Newsletter: the draft Case Management Pilot, the s.49 Pilot and an update on the transparency pilot;

(4) In the Capacity outside the COP Newsletter: further follow-up from Winterbourne View, the Mental Health Taskforce report's 'fusion' recommendation, and immigration detention and the MCA;

(5) In the Scotland Newsletter: the shortage of Mental Health Officers (again), total or complete incapacity in the context of homelessness, the Carers (Scotland) Act 2016 and an update on the consultation on the AWI.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.


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For all our mental capacity resources, click here.

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## The Mental Capacity Act – what do we still not know?

To mark the first Mental Capacity Action Day, at which Tor will be highlighting our Newsletter, we thought that we would ask what we still don't know about the Act (over and above why it is still not embedded as part of everything that is done in health and social care). Some of the issues that most bother us are:

1. How should we approach cases where P is able to explain how they would make decisions but is unable

to implement them in 'real life' situations?

2. Why are there so few cases where the court has considered whether s.1(3) has been satisfied?

3. What is the relationship between lacking insight and lacking mental capacity?

4. Is contact really person-specific or act-specific?

5. When will the Supreme Court address the question of capacity to consent to sexual relations and, in particular, whether it is act- or person-specific?

6. What is the real dividing line between the MCA and the inherent jurisdiction? How far does the MCA stretch in cases where a person is under pressure from others- conversely, how far does the inherent jurisdiction stretch in terms of enabling the court to make orders affecting the person concerned other than third parties? (and why are we so hung up on capacity anyway?)

7. Is the continued attempt to maintain a division between the MCA and the MHA really appropriate? I.e. should we be following the Northern Ireland 'fusion' model?

8. What is the relationship between best interests and funding decisions to meet a person's eligible needs?

9. How far do we go in determining what decisions P could have made if P had capacity? What is the ambit of the Court of Protection jurisdiction in the face of adverse public law decisions? Lodging complaints with public bodies? Contacting the local MP? Initiating disability discrimination or judicial review proceedings?

10. Does the information relevant to the test for capacity to marry include the financial and testamentary implications?

11. Why is there such resistance to adopting the MCA test in respect of wills and gifts?

12. What exactly does the Convention on the Rights of Persons with Disabilities imply for the Act – repeal, amendment or business as usual (hint, the last is unlikely to be the correct answer)?

## Short Note: balance is everything

*PB v RB & Ors* [2016] EWCOP 12, a decision of District Judge Eldergill's, merits note not because of its elucidation of any particular legal principles, but as a case study in the careful application of the s.4 principles in the context of a finely balanced decision relating to the long term care and residence of an elderly lady with dementia. Social and health care practitioners in particular could very usefully take the step by step discussion and application (at paragraphs 155-247) of each of the components of s.4 as a model of how to reach a best interests decision.

## *Re MN* to the Supreme Court

Permission has been granted to one of MN's parents to appeal the decision of the Court of Appeal on whether the Court of Protection is constrained solely to consider available options. We do not anticipate that the hearing will be listed until very much later this year, but will keep you posted.

## His Honour Judge Martin Cardinal

We were very sad to learn of the death of HHJ Martin Cardinal on 25 February. He was a good friend of the Newsletter, and a judge who in our experience was unfailingly courteous and sensitive in his approach. We will miss him, and our thoughts are very much with his family.

## Retort to a Rebuttal: Use or Weigh: A Reply to Alastair Pitblado

[This guest further note is prepared by Wayne Martin and Fabian Freyenhagen of the Essex Autonomy Project]

We are grateful to the Official Solicitor to the Senior Courts of England and Wales for his detailed Reply to our Note on the expression "use or weigh," as it is used in sec. 3(1) of *The Mental Capacity Act* 2005 (MCA).

On one fundamental point we wish to emphasise our agreement with the Official Solicitor's remarks. The first principle of the MCA is the *principle of presumption* – that is, the principle that "a person is to be presumed to have capacity unless it is established that he lacks capacity."[1] Nothing in our original Note was intended to suggest that patients or care recipients should be required to "prove their capacity" by passing some test, or "getting over a bar." The burden of proof is precisely the reverse: it is *incapacity* that must be proven, and it falls to the one alleging incapacity to provide evidence sufficient to overturn the presumption.

Beyond this point of agreement, however, we find ourselves unconvinced by the Official Solicitor's arguments. His remarks are presented as a refutation of our position, but close consideration of the evidence he cites in fact provides further support for our principal conclusion.

Before turning to the relevant details, it will be worthwhile to orient ourselves with a mundane example. Suppose that in a certain game every player must be able to run, hit, throw and catch. If we are characterizing the *positive ability* to play that game, we will use "and" as our conjunction: every player must be able to run *and* hit *and* throw *and* catch. If your job is to recruit new talent to the team, you will scour the land looking for individuals who have the full package of all of those abilities. That is, you will operate with a *conjunctive standard*, and you will be on the lookout for *abilities*.

[1] MCA sec. 1.2.

But now suppose that your job is to winnow the roster. As part of the first cull, your assigned task is to cut anyone from the team who *lacks the ability* to play the game. You must now be on the lookout for *inabilities*, and you will operate with a *disjunctive standard*. Anyone on the roster with an inability to run *or* an inability to hit *or* an inability to throw *or* an inability to catch is liable to be thanked and dismissed. Note that you need not establish the absence of *all* these abilities; the demonstrable lack of any one is disqualifying.

In our Note, we argued that the definition of decision-making ability in MCA sec. 3(1) follows the same basic pattern. The text of the MCA implicitly relies on a *conjunctive* understanding of the *ability* to make decisions. That positive ability comprises the ability to understand *and* retain *and* use *and* weigh *and* communicate. The demonstrable absence of *any one* of these abilities (for a particular decision at a particular time) would therefore suffice to warrant a finding of the *lack* of decision-making ability. On this basis we respectfully submitted that MacDonald J had erred in claiming that a finding of incapacity requires the person asserting lack of capacity to demonstrate *both* an inability to use *and* an inability to weigh.[2]

So what contrary evidence does the Official Solicitor offer in reply to our Note? His rebuttal begins by drawing attention to para 3.7.2 of *Bennion on Statutory Interpretation*, which concerns the use of the terms "and" and "or" in statutes.[3] According to *Bennion,* a single occurrence of an appropriate conjunction can be taken to imply that each of the preceding paragraphs is separated by the same conjunction.

We are grateful to the Official Solicitor for drawing the attention of readers of this *Newsletter* to this authority, for it directly supports our interpretation of MCA sec. 3(1). By Bennion's principle, the use of the word "or" in sec. 3(1)(c) warrants the conclusion that there are implied uses of the word "or" throughout the list of inabilities. This is exactly the claim we made in our Note. In the words of the Official Solicitor:

> *The list which the paragraphs of the subsection constitute is short, and no contrary indication is discernable, so I suggest that it is clear that the paragraphs of the subsection should be read as if 'or' were between them.*

We are wholly in agreement. That is precisely why we referred to the definition as a *disjunctive* definition. It follows that absence of any one of the enumerated abilities suffices to establish the inability to make a decision.

A second piece of evidence cited in Official Solicitor's rebuttal comes from the 2015 edition of *The Court of Protection Practice*. Para. 2.80 describes the MCA as "translating this former common law provision into statute." But note carefully how that same paragraph describes the common law provision:

> [T]*he courts … defined the process as the ability to weigh all relevant information in the balance as part of the*

[2] *Kings College Hospital NHS Trust Foundation Trust v C and V* [2015] EWCOP 80; para 35.
[3] Oliver Jones, *Bennion on Statutory Interpretation*; 6th ed. (London: LexisNexis Butterworths, 2013).

*process of making a decision, and then to use the information in order to arrive at a decision.*[4]

Once again we are grateful to the Official Solicitor for drawing the attention of readers to this important piece of evidence. There are two crucial points that merit particular attention. Notice first that unlike MCA sec. 3(1), the definition that is offered here is a definition of decision-making *ability*, rather than decision-making *inability*. Secondly, notice the use of the words "*and then*" – clearly implying not a 'single composite phrase' describing one ability, but two discrete abilities. According to this definition, the *ability* to make a decision requires the ability *to weigh and then to use* relevant information! This is precisely the point that we have respectfully urged against the claim advanced in MacDonald J's judgement. If the *ability* to decide requires the ability to weigh *and then* to use, then the demonstrable absence of either ability is a sufficient basis for a finding of incapacity for the matter at hand.[5] Compare: if the ability to play requires the ability *to hit and then to run*, then I will be cut from the roster if I lack either ability.

A third source upon which the Official Solicitor relies in his Reply is the *MCA Code of Practice*. In our Note, we cited an example of a pre-MCA case which would seem to support MacDonald J's interpretation of the "use or weigh" clause of MCA sec. 3(1).[6] But in our view care must be exercised in making use of that precedent. The task of the courts has changed since the time of that 1997 ruling. Because we now have the MCA, a judge's role is to interpret and apply the definition of incapacity that has been adopted by Parliament. Prior case law can certainly be consulted in order to provide context for interpreting the statute. But if Parliament diverges from precedent, it is the statutory formulation that must prevail. By way of reply, the Official Solicitor refers us to para 4.33 of the *MCA Code of Practice*, which asserts that "the new definition of capacity is in line with the existing common law tests, and the Act does not replace them." [7]

We respectfully submit that the Official Solicitor may have misinterpreted the force of this remark by failing to attend to its context. It is imperative, first, to read para. 4.33 in the context of the paragraph which immediately precedes it. Para 4.32 states:

*There are several tests of capacity that have been produced following judgments in court cases (known as common law tests). These cover:*

- *capacity to make a will*
- *capacity to make a gift*
- *capacity to enter into a contract*
- *capacity to litigate (take part in legal cases), and*
- *capacity to enter into marriage.*[8]

When the *Code* proceeds in the next paragraph to state that the MCA "is in line with the existing common

[4] Ashton *et al.* 2015: *Court of Protection Practice* (Bristol: Jordan Publishing); para. 2.80.
[5] We are abstracting (here and throughout) from the need to establish that the relevant functional inability is "because of an impairment of, or a disturbance in the functioning of, the mind or brain." MCA sec. 2(1).
[6] *Re MB* [1997] 2 FLR 426; para 223.
[7] Department for Constitutional Affairs 2009: *Mental Capacity Act 2005: Code of Practice* (London: TSO); para. 4.33.
[8] *ibid.* para 4.32.

law tests," this latter phase must be understood in the sense that has just been defined.

That is, where the common-law has provided tests specific to particular classes of action, the *Code* states that these remain valid. But this by no means entails that every earlier attempt by judges to provide a *general* definition of decision-making capacity is to remain in effect. The fact is that those earlier attempts at a general definition have been superseded by the authoritative definition adopted by Parliament.

But there is a further point to be made here. In his Reply, the Official Solicitor quotes only one sentence of para. 4.33 of the *Code*. It is crucial to interpret that sentence in the context of the whole paragraph in which it appears:

> *The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think it is appropriate. The Act will apply to all other cases relating to financial, healthcare or welfare decisions.*[9]

Read in its context, then, the passage cited by the Official Solicitor provides no support for the claim that the *MCA Code of Practice* asserts what we deny, viz., that the definition in the MCA is to be understood as synonymous with every prior attempt by the courts to frame a general definition of decision-making capacity.

One final corpus of evidence merits comment.[10] In his Reply, the Official Solicitor appeals to a trio of cases to buttress his claim that the common law definitions are continuous with the MCA. We shall not here undertake to provide commentary on all these cases, but the case of *RT v LT* [2010] EWHC 1910 (Fam) merits a remark. The judge in the case was Sir Nicholas Wall, who was then President of the Family Division of the High Court. The Official Solicitor cites para. 51: "[T]here will be cases in which it may be necessary to look at pre- or even post Act authority on the question of capacity." We are in agreement. As we have seen in the *Code of Practice*, there will be cases in which it will be appropriate to consult the common law tests for specific classes of action. Moreover, looking at the history of common law tests can also prove helpful in interpreting the test articulated in statute. We note, however, that *looking at* pre-MCA authorities is not the same *being bound by* such authorities. But we also wish to draw attention to the remark that the President (as he then was) made two paragraphs earlier in the same ruling:

> [W]*hat we now have is the Act (as amended) and the essential judicial task is to apply the plain words of the Statute to the facts of the case before the court.*[11]

[9] Emphasis added.
[10] We have not here taken up the portion of the Official Solicitor's argument which invokes the formulation by Mr Justice Charles in *R (on the application of B) v Dr SS, Dr AC and the Secretary of State for Health* [2005] EWHC 86 (Admin). Suppose a selector tells me that I am unable to play on his team because I can *neither* run *nor* hit *nor* throw *nor* catch. This is perfectly compatible with his operating with a policy that any *one* of those failings would suffice for finding me unfit to play. In my case the outcome is simply overdetermined. The application to the R case is left as an exercise to the reader.
[11] *RT v LT* [2010] EWHC 1910 (Fam); para. 49. emphasis added.

As we have shown, the plain words of the statute express a disjunctive standard of decision-making incapacity.

The foregoing remarks conclude our response to the Official Solicitor. But we cannot resist the temptation to take up the gauntlet thrown down in the last sentence of his Reply. The Official Solicitor there wrote:

> *I can find no case before or after the MCA in which the court has construed "use or weigh" in the disjunctive way suggested in the Note as the correct interpretation of section 3(1)(c) MCA.*

By way of reply to this challenge, we refer readers of the *Newsletter* to three cases: *Re Mrs A* [2010] EWHC 1549 (Fam.) (COP); *Re E* [2012] EWHC 1639 (COP); *Re X* [2014] EWHC 35 (COP). These cases may not explicitly articulate a disjunctive reading of MCA sec. 3(1)(c), but close attention to the details of the rulings clearly show that such an interpretation is presupposed. The crucial feature shared by all three rulings is that the judge reaches a finding of incapacity on the basis that the person in question was *unable to weigh*. Nothing is said in these cases is said about the person's *inability to use*. Notice that if MacDonald J's reading of MCA sec. 3(1)(c) were correct, then all three of these rulings would reflect incorrect reasoning. Why? Because according to MacDonald J, a finding of inability to weigh cannot warrant a finding of incapacity unless supplemented by evidence of an inability to use. It should therefore be clear that the judges in these three rulings are *not* relying on MacDonald J's conjunctive standard, but on the disjunctive standard that we have defended here and in our earlier Note.

In light of this further analysis of the evidence, we would invite the Official Solicitor and other readers of this *Newsletter* to endorse our interpretation of MCA sec 3(1)(c). The crucial point of law is as follows: A finding of *either an inability to weigh* relevant information *or an inability to use* that information can suffice (provided that other requirements of law are satisfied) to warrant a finding that the person lacks the ability to make a particular decision at a particular time.

## Supporting the deputy

*Re FH* [2016] EWCOP 14 (Senior Judge Lush)

*Deputies – Property and Financial Affairs*

Summary

In this case the Senior Judge dealt with an application by P's husband to become her property and affairs deputy where he had limited command of spoken English and none of written English.

P suffered from advanced dementia but lived at home with her husband who provided all her care with limited local authority support. He was her second husband and had come to England from Pakistan in 1998. She had two children by her first marriage. One, the daughter, lived nearby, the other, the son, lived in Spain.

The children, principally the daughter, objected to the husband's application to become financial deputy and asked that the daughter be appointed. The ground of opposition that raised a point of principle was the husband's inability to speak good English and his inability to read or write English at all.

To that end, the Senior Judge commissioned a section 49 report from the Public Guardian asking the following questions;

> *1) Whether the Public Guardian considers that a person who is unable to understand and speak the English language can be considered suitable for appointment as a deputy for property and financial affairs.*
>
> *(2) Whether he considers that someone who is illiterate and unable to read the English language, or any other language, can be considered suitable for appointment as a deputy for property and affairs.*
> *(3) Whether the response to the above questions would be the same in respect of an application to be appointed as a personal welfare deputy.*
> *(4) What an acceptable minimum would be in terms of literacy and numeracy skills for appointment as a deputy for property and affairs.*
> *(5) What an acceptable minimum would be in terms of literacy and numeracy skills for appointment as a deputy for personal welfare.*
> *(6) The extent to which support in performing the deputyship functions may be acceptable.*
> *(7) The extent (if any) to which Abdul (P's husband) may lack the essential skills required of a deputy for property and affairs or personal welfare.*
> *(8) Whether Fahmida (P) is capable of expressing any wishes or feelings in respect of this application.*

The Public Guardian reported as follows;

- In answer to questions 1-5:

*"The Public Guardian is unable to comment on this in a general sense and is of the opinion that it will depend*

*upon whether a prospective deputy is able to satisfy the court that he has the ability to make best interest decisions for property and financial affairs, understands what acting as a deputy entails, and that he has suitable arrangements in place enabling the fulfilment of a deputy's obligations in terms of interfacing with third parties, record keeping and reporting to the Public Guardian."*

In addition in relation to question 1:

*"The Public Guardian would have concerns about the impact on P's funds if a deputy seeks to use a professional interpreter. The Public Guardian would also have concerns about the use of a non-professional interpreter, such as a friend or family member, in case they had their own agenda or had a lack of understanding about what they were being asked to translate."*

In answer to question 6:

*"The Public Guardian is unable to comment on this in a general sense and is of the opinion that, if the court appoints a person suitable to be appointed as deputy, for either property and affairs or personal welfare, the Public Guardian will provide support to enable that deputy to perform the deputyship functions.*

*The Public Guardian's position is that if, after a deputy's appointment, the Public Guardian is of the opinion that, despite support being provided, the deputy is not able to fulfil the deputyship functions, the Public Guardian will consider referring to the court a decision on the future of the deputyship."*

In answer to question 7:

*"Although the Court of Protection General Visitor advised that Abdul's command of the English language is limited, the evidence shows that he has managed to put strategies in place to help him, and has managed to look after Fahmida's affairs for a number of years now.*

*Abdul's niece confirmed that she provides the support he needs to manage Fahmida's affairs. The Court of Protection General Visitor made Abdul's niece aware of what being a deputy involves and the niece confirmed that she is prepared to continue supporting Abdul and would also continue to do so is he was appointed Fahmida's deputy.*

*Fahmida and Abdul receive support from a social worker for the Mental Health Team at the London Borough of Redbridge and their social worker advised he has no concerns about Abdul managing Fahmida's affairs and thinks Abdul is the obvious choice.*

*Whilst the Public Guardian might have concerns about a family member being used as an interpreter for a deputy in this case, there is no evidence to support any concerns in respect of Adeela and the support she has provided interpreting for Abdul to date.*

*The Public Guardian's position is that he has no objection to Abdul being appointed as Fahmida's deputy for property and affairs or personal welfare."*

In answer to question 8:

*"The Court of Protection General Visitor advised on 3 December 2015 that Fahmida is not capable of expressing any wishes or feelings in respect of this application. Her lack of capacity has also been confirmed by her social worker from the Mental Health Team at the London Borough of Redbridge."*

The Senior Judge identified the central question as follows:

*48. The question I have to decide is whether Abdul's functional illiteracy is of such a degree as to make it impossible for him to manage Fahmida's property and affairs effectively and in her best interests.*

*49. I am loath to underestimate and undermine the importance of basic literacy and numeracy skills, which are generally expected of any candidate who is applying to be appointed as a deputy for property and affairs.*

*50. However, I am not convinced that Abdul's limited ability to speak English, and his inability to read and write English (particularly in his encounters with officialdom) is so great as to warrant not appointing him as his wife's deputy."*

It was significant that he had managed well, with his niece's assistance, for some time and that P's affairs were relatively straight forward especially as the order would exclude any power to deal with P's property, see paragraph 53.

The Senior Judge, therefore, appointed P's husband her property and affairs deputy with this ringing endorsement:

*"54. The court's function is, wherever possible, to empower rather than disenfranchise and, in my view, it would be preferable to allow Abdul to receive support in carrying out his functions as deputy in a way that is proportionate to his needs, rather than refuse to appoint him. In this case, it is unlikely that someone with first-rate literacy skills would prove to be a better deputy than Fahmida's devoted husband.*

*55. I am satisfied, therefore, that it would be in Fahmida's best interests to appoint Abdul to be her deputy for property and affairs, and that this course of action is less restrictive than any alternative."*

### Comment

This decision is an important one in terms of recognising that the duties to support and empower the individual concerned extend to being suitably creative and flexible as regards those who might be appointed by the court as their proxy decision-makers. It would have been all too easy to take an approach which in the name of securing Fahmida's rights ended up depriving her of the support of her devoted husband, who knows her better than any professional could ever do.

## Calibration and testamentary capacity

*Re the estate of Eva Burns, Burns and Gramauskas v Burns* [2016] EWCA Civ 37 (Court of Appeal (Longmore, Treacy and McCombe LJJ)

*Mental capacity – Testamentary capacity*

### Summary

In this case the Court of Appeal dismissed an appeal against a district judge's finding that the deceased had testamentary capacity and knew and approved of the contents of her last will.

The dispute was between two brothers, the children of the deceased. The deceased had made a will in 2003 that gave her half share in her home to brother A, brother B being already by an earlier transaction the owner of the other half share. The value of the dispute was £26,000.

In 2005 with brother B's assistance (he accompanied her to the solicitor) the deceased made a new will that devised her half share equally between the two brothers.

In the context of care needs, the deceased had had two mini mental state examinations, one shortly before she made the 2005 will, together with a Cape Assessment by an occupational therapist. Evidence from a consultant geriatrician stated that the results from these tests showed that the deceased was poorly orientated as to where she was in time and place, had poor recall (short term memory) and that she had problems with analysis and simple task planning. Furthermore the deficits identified had persisted for a period of 3 months.

The district judge also heard from the solicitor who drafted the will. He gave evidence that he had interviewed the deceased alone, that he read the will over to her and that she understood it.

The Court of Appeal was clearly in some doubt that the result was right (see paragraph 57). Ultimately, however, the Court of Appeal held that the judge had applied the right tests, both as to capacity and knowledge and approval and come to a decision that was open to him.

What perhaps was critical was the fact that the will was a simple one in respect of which she had given instructions and the contents of which she had approved some months earlier (see paragraph 51).

### Comment

The Court of Appeal was evidently concerned about the circumstances of the making of the will, not least because the solicitor involved had no knowledge of the *Golden Rule* as to what a solicitor should do when there are circumstances that give rise to a concern about a testator's capacity. Namely that a solicitor who has such concerns must:

> *"... have prior knowledge of the testator, should consider whether the will should be witnessed by an approved medical practitioner, examine any earlier will, discuss proposed departures from any earlier will with the testator, ask non-leading questions and ensure that the reading through of the will is not 'an idle ceremony': Buckenham v Dickenson [2000] WTLR 1083."*

Critically, there appears to have been no discussion of the 2003 will and the reasons why that will had been made in that way and the reasons for the departure. That would give rise to the possibility that the deceased was not aware of the nature and extent of the claims on her (the third *Banks v Goodfellow* requirement).

## New Deputy Report Forms from the Office of the Public Guardian

The OPG has issued new deputy report forms to improve safeguards for at risk adults from 1 March 2016. The new forms are: property and financial decisions form (OPG102); and health and welfare decisions form (OPG104). These will replace the existing combined form. OPG103 – a shorter version of the OPG102 – has also been created for existing property and finance deputies when they report for the first time. The forms are all available on the .gov.uk website here. After Thursday 1 September 2016, the OPG will no longer accept the old version of the form.

## New Guidance for Deputies

The OPG has also published new guidance for deputies (both in relation to property and affairs and welfare deputies. There is also new guidance for people wanting to manage a bank account for someone else. The guidance can be found on the .gov.uk website here.

## Practice Note Regarding Solicitors' Client Accounts

The OPG has published a practice note clarifying its approach to the use of client accounts to manage deputyship funds, and how the deputy acts under the MCA 2005, the Solicitors Regulation Authority Accounts Rules 2011 ('SARs') and the MCA Code of Practice.

The note clarifies that the OPG has no objection in principle to use of general client accounts as a temporary or holding position prior to deputies setting up segregated client accounts or separate bank accounts as expected, to manage ongoing transactions. Solicitor deputies are reminded that there are factors other than the SARs that they may wish to consider.

The first is that in addition to SRA requirements, the OPG will need to be satisfied that deputies have proper safeguards in place to protect deputyship funds. Deputies act under the authority of the court on behalf of vulnerable people, and extra care may need to be taken around who can authorise payments from deputyship funds. The OPG advises that setting up a separate bank account for a deputyship with named signatories may be simpler in practice. The second is that a deputy has a general duty to act in the incapacitated person's best interests, which can include managing their funds to gain the best return. There will be cases where large balances in a client account will not represent the best investment strategy for a

client. In these cases OPG will question the appropriateness of keeping significant excess funds in this way.

The OPG reminds professional deputies of their standards, and in particular Standard 1a (9), which states:

> *"Open a deputyship account in the client's name with the deputy named as such on the account. Ensure that all funds held for the client are held in accounts and/or investments in their name and kept separate from the funds of the deputy or other parties."*

The note also reminds solicitor deputies that their management of funds should be organised with the best interests of their client in mind.

## Case Management Pilot published

The Case Management Pilot has now been published.[12] It is in draft form at present, and the intention is that it will come into effect in June. Although it has not formally been published for consultation, practitioners are strongly urged to read and review it carefully, and to send any comments upon it to Joanna Furlong at the Ministry of Justice so any glitches can be ironed out so far as possible before it goes live.

The Case Management Pilot will introduce three distinct pathways for COP proceedings: 1) a Property and Affairs pathway, 2) a Health and Welfare pathway, and 3) a hybrid pathway for cases that have elements of both. The expectations of practitioners will be different depending upon which pathway is engaged. Common to each, though, is an expectation of much greater 'front-loading' and cooperation to narrow the issues.

The Case Management Pilot is accompanied by a revised set of Rules which foreshadow a re-numbering of the Rules that is anticipated as part of the second tranche of rules changes (moving to the same model as in the CPR and FPR). For ease of reference, all the Rules that will apply for purposes of the Pilot are set out in an annex – with suitably highlighted amendments – to the Pilot practice direction. The intention is that practitioners (and the judiciary) will have to do the minimum of cross-referencing to the current iteration of the Rules during the life of the Pilot.

Before highlighting the key points of each, it is important to note the types of applications which the Pilot will not affect, which include: uncontested applications, applications for statutory wills and gifts, applications relating to serious medical treatment and deprivation of liberty applications (both *Re X* applications and s.21A applications).

It should also be noted that the intention is that the Case Management Pilot sits alongside and does not displace the Transparency Pilot for so long as they are both in operation (which will include at least part of June and all of July 2016), so the expectation will be that all of the hearings noted below, with the express exception of the Dispute Resolution Hearing provided for in the property and affairs pathway, will be listed according to the Transparency Pilot rules as regards public/media attendance.

*Personal welfare pathway*

The personal welfare pathway starts pre-issue, with a set of requirements designed to ensure that only those applications which actually require resolution by court proceedings come to court, and those which do, do so in circumstances where the issues are clearly delineated from the outset. The Pilot Practice Direction then specifies in some detail what must be included with or accompany the application upon issue including – importantly – a statement as to how it is proposed P will be involved in the case.

[12] Alex as a member of the ad hoc Rules Committee has been involved in developing this. This note does not, however, represent an official comment upon behalf of the Rules Committee.

The next stage is for matters to be considered by a judge on the papers both for gatekeeping purposes (i.e. allocating to the correct level of judiciary) and the making of initial directions including, importantly, listing a Case Management Conference within 28 days (unless the matter is urgent). The judge can also direct that there be an advocates' meeting before the CMC.

The CMC will be the first attended hearing and a vital step in the proceedings because of the obligations placed upon the court (not just the parties) to ensure that the issues are narrowed and directions set for the proportionate resolution of those that are in dispute. Importantly, one of the matters that the court will do is to allocate a judge to the matter – judicial continuity being recognised as crucial to the success of the pilot. It is also important to note that this Pilot is running alongside the s.49 pilot discussed further below, and also includes a tightening of the rules in relation to experts (where the Pilot applies) so as to limit permission to circumstances where their evidence (1) is necessary to assist the court to resolve the issues in the proceedings; and (2) cannot otherwise be provided.

The intention is that in the ordinary run of the events there would then only be (at most) two more hearings, a Final Management Hearing and the Final Hearing. Ahead of the Final Management Hearing, whose purpose is to determine whether the case can be resolved by consent and, if not to ensure proper preparation for trial, an advocates' meeting is to be listed at least 5 days in advance for purposes of – inter alia – preparing a draft order for the court to consider at the FMH. Matters that are likely to be covered at the FMH will include such things as the trial timetable and a witness template, as well as the contents of the trial bundle: in line with the injunction given by the Court of Appeal in *Re MN*, the expectation is that the trial bundle for the Final Hearing will not generally exceed 350 pages, and must not include more than one copy of the same document.

It is important to note that, unlike the Public Law Outline, there is no fixed timeframe within which proceedings must be concluded, the only fixed date being the listing of the Case Management Conference. The intention, however, is that the process set down in the Pilot is will mean dramatically shorter resolution of welfare applications.

*Property and Affairs pathway*

The property and affairs pathway does not start pre-issue because it is recognised that it is often only upon issue that it becomes clear that a property and affairs application is contentious. It therefore compromises four stages.

The first stage is when the application becomes contested, i.e. when the court is notified in the COP5 that the application is contested or a respondent wishes to seek a different order.

The case management stage takes place on the papers, and includes either: (1) listing for a Dispute Resolution Hearing; or (2) transfer to a suitable regional court for listing of the DRH and future case management. If the respondent has not given sufficiently clear reasons for opposing/seeking a different order, the judge will also at that stage require such reasons to be given.

The Dispute Resolution Hearing is a major innovation, and represents – in essence – judicial mediation in a form familiar to family practitioners. A DRH, which will normally take place before a District Judge, is to enable the court to determine whether the case can be resolved and avoid unnecessary litigation, and to that end the content of the hearing is not to be disclosed and everything said therein is not admissible (save in relation to a trial for contempt). The court is expressly required to give its view as to the likely outcome of the proceedings as part of the DRH. The aim is for the court to be able to endorse a consent order at the end of the DRH; if not, the court will list for directions of the management of the hearing and a Final Hearing.

The last stage – the Final Hearing – will take place in accordance with directions made at the DRH (there being no Final Management Hearing as with the welfare pathway).

As with the welfare pathway, there is no fixed timeframe for the determination of the application. Nor, in this instance, is there a specific timeframe for listing of the first attended hearing – the DRH. This recognises that there is merit to flexibility because there will be some cases in which allowing longer for a DRH is more likely to bring about a quicker resolution overall; conversely, in some cases, the sooner that judicial banging of heads takes place the better.

*Mixed welfare pathway*

If an application comprises elements of both welfare and property and affairs, prospective parties are directed at the pre-issue stage to identify which pathway is most effective and to comply with the requirements of that pathway so far as possible. At point of issue, they must file a list of issues to allow the court to identify which pathway or mixture of elements is most appropriate.

The court will then, on the papers, either allocate the case to one of the two pathways set out above, or give directions as to the elements of each pathway are to apply and the particular procedure the case will follows.

*Urgent applications*

In all cases there is express provision for urgent applications, requiring the parties in particular to specify why the matter is urgent and any particular deadline by which the issue(s) need to be resolved as well, as well as directing compliance (insofar as possible) with any necessary pre-issue steps.

## Section 49 pilot

Also now published[13] and to come into effect in June 2016 (but unlike the Case Management Pilot Practice Direction, published for information only) is a s.49 Pilot Practice Direction. The Practice Direction applies

[13] Alex as a member of the ad hoc Rules Committee has been involved in developing this. This note does not, however, represent an official comment upon behalf of the Rules Committee.

both to orders made under s.49 MCA by the COP of its own motion and – more importantly – to orders sought by parties. The Practice Direction is accompanied by a draft order. It recognises, in essence, that s.49 reports are an extremely important part of the COP's armoury when it comes to information gathering, but that they must be deployed:

(1) Carefully, so as to ensure that they are targeted to public bodies actually able to provide useful information;

(2) With suitable thought and preparation on the basis that, to be effective, they are best approached as if they were expert reports.

An important innovation is the requirement, where possible, for a party seeking a s.49 report from a NHS body or local authority to have made contact prior to the application being heard by the court to identify an appropriate person ("a senior officer") able to receive the order, and to have discussed with the body the reasonableness and time scales for providing the report. Although it does not prescribe when a court will and will not order one, the Practice Direction set out (at paragraph 3) common factors that the court may consider when deciding whether to order a s.49 report, including:

- where P objects to the substantive application or wishes to be heard by the court and does not qualify for legal aid;

- where it has not been possible to appoint a litigation friend or [under the new numbering] rule 1.2 representative, including where the court has made a direction under rule 1.2(5);

- where a party is a litigant in person and does not qualify for legal aid;
- where the public body has recent knowledge of P; or it is reasonably expected that they have recent knowledge of P; or should have knowledge due to their statutory responsibilities under housing, social and/or health care legislation;

- the role of the public body is likely to be relevant to the decisions which the court will be asked to make;

- the application relates to an attorney or deputy and involves the exercise of the functions of the Public Guardian; and

- evidence before the court does not adequately confirm the position regarding P's capacity or where it is borderline; or if information is required to inform any best interests decision to be made in relation to P by the court.

An unofficial draft version of the template s.49 order in Word form is to be found here.

## Transparency corner

Guidance to accompany the pilot was published on 29 February for the benefit of HMCTS and the judiciary – but it is of equal relevance to practitioners. Amongst other matters, it deals with the anonmyisation of local authorities, which had been flagged up as causing confusion. In brief, the default position is that public bodies shall be named, but the names of care homes shall not be used.

If further issues such as these are identified, the guidance accompanying the pilot will no doubt be subject to further amendment in due course as all those involved continue to find their feet.

Other relevant documents including details of the standard wording for listing public cases and the Practice Direction are available here. Tor has also prepared an unofficial version of the order with annotations in plain English which can be used for explaining the effect of the order to litigants in person, available here.

## Consultation on McKenzie Friends

The Judicial Executive Board (JEB) has issued a consultation paper proposing reforms to the existing guidance for 'McKenzie Friends.' The Consultation Paper summarises the current position in law, subsequent developments and poses questions in a number of areas, the key points being reproduced below.

- Terminology – the paper asks whether the term McKenzie Friends – should be updated to something that is more readily understood – such as 'Court Supporter'. The original term stems from a divorce case in the 1970s in which an Australian barrister, without rights of audience in England Wales, sought to represent a party.

- Developing rules of court – the paper discusses whether the existing Practice Guidance should be replaced with formal rules of court. The courts' approach to this issue is grounded in case law, and codification into rules would enable reforms to be made, and allow differences for different types of proceedings (for example, between civil and family cases). Codification would also provide greater clarity and consistency in the approach courts take to McKenzie Friends.

- Providing notice – the paper suggests reforms to help litigant in person ('LiPs') LiPs understand what roles McKenzie Friends can play and any limitations on what they can do. LiPs would need to inform courts in advance if they intended to use a McKenzie Friend, and would give the courts information on that lay supporter.

- Code of Conduct – the paper proposes that the standard notice process includes a Code of Conduct for McKenzie Friends that they would be required to agree to comply with. This would ensure that, as with legal representatives, they would acknowledge a duty to the court, and a duty of confidentiality in relation to the litigation.

- Plain language – the JEB believes that whatever reforms take, a plain language guide for both LiPs and McKenzie Friends should be produced, and it raises the question whether should a guide should be drafted by a non-judicial body with expertise in drafting court user materials is commissioned for this work.

- Prohibition on fee recovery – the paper proposes that there should be a prohibition on fee recovery by paid McKenzie Friends in line with the practice adopted in Scotland, where lay supporters may only provide assistance, representation or the conduct of litigation if they are not in direct or indirect receipt of remuneration. The JEB's intention is to protect the public interest and vulnerable litigants from unregulated and uninsured individuals seeking to carry out reserved legal activities. This approach is also in line with Parliament's intention that rights of audience (the ability to appear and present a case in court) and to conduct litigation should be strictly regulated.

- General – Views are welcomed on other points that should be considered or taken into account in making reforms on this topic.

The JEB has invited comments to be submitted by 19 May 2016. Comments can be sent to mckenzie.friends@judiciary.gsi.gov.uk.

The paper suggests that the broad approach to be adopted will also be applied to the Court of Protection.

One immediate comment we have is that there is no consideration of the specific factors that may apply in relation to those who do not have capacity to conduct proceedings (whether in the Court of Protection or otherwise). For our part, we think that it is necessary that any legislation or guidance that is introduced makes clear that a McKenzie Friend (or their replacement) can only assist a person who has the capacity to conduct the proceedings as a LiP. We would also have thought that it should be made clear that the court should be very cautious indeed before allowing a McKenzie Friend to assist a litigation friend who is – themselves – a LiP (as is now allowed for post *Re NRA*).

## Short Note: Immigration Detention and the MCA

In *R (VC) v SSHD* [2016] EWHC 273 (Admin) a brave (the harsh would say misguided) attempt was made to rely upon the MCA in the context of a challenge to immigration detention to an individual with mental health difficulties. The claimant argued that: (1) pursuant to the public law duty of enquiry and in order to facilitate compliance with the MCA 2005, the SSHD was under an obligation to arrange for a detainee to have a capacity assessment where there is a reasonable suspicion that the detainee may lack capacity; (ii) where a detainee is assessed as lacking capacity in relation to areas of decision making that are the sole responsibility of the SSDH the SSDH is obliged to make those decisions compliantly with section 4 MCA 2005, namely in the detainee's best interests; and (iii) in order to make best interests decisions the SSHD must ensure that the incapacitated detainee's wishes and feelings are put forward, and that the detainee is supported to participate so far as is possible and that the detainee's interests are represented.

Unsurprisingly, perhaps, these arguments ran up against the immovable barrier of construction (clearly identified in *Re MN*) that the MCA is solely concerned with decisions done for or on behalf of a person. As HHJ Seys Llewellyn QC noted "*if the Act thereby required any decision "affecting" a person without capacity to be made in his best interests it would lead to remarkable results: for instance, on his conviction in an ordinary criminal case his individual best interests would trump other interests when considering whether or for how long he should be imprisoned*." He therefore agreed with the submission of the SSHD that "*the MCA 2005 is concerned with decisions which would usually be made by an individual as part of their personal autonomy and so reflect their wishes and feelings and does not purport to extend to any other type of decision such as those made under immigration powers tax powers or criminal justice powers and it cannot do so*."

## Time for a Change: the Challenge Ahead

Sir Stephen Bubb, the Chief Executive of ACEVO (Association of Chief executives of Voluntary Organisations), published his final report Time for a Change: The Challenge Ahead on 22 February 2016, almost 5 years after the showing of a Panorama programme that exposed the abuse and neglect of residents at Winterbourne View. In the aftermath of the programme the Government made a promise to move everyone with learning disabilities and/ or autism inappropriately housed in a hospital out of those settings by June 2014.

Despite Government's promise the deadline was missed and almost three and a half years later there had been barely any change. As a result of the ensuing criticism Sir Stephen was asked by the National Health Service England (NHSE) to chair a steering group to examine services for people with learning disabilities and/or autism.

His first report, Winterbourne View – Time for Change was delivered in November 2014. In that report he made a number of recommendations, the key priorities being:

1. The closure of inappropriate institutions and the ramping up of community provision; and that

2. Government legislate for a Charter of Rights for people with learning disabilities and their families.

Both of these were accepted by NHS England and by the Government.

In his final report Sir Stephen considers the steps that have been taken by the Government since his last report and concludes that progress has been made in the last year. He reports that the NHSE has announced a major programme to move people with learning disabilities out of hospital and into their communities and that in October 2015 the Transforming Care Programme published a national plan for services for people with learning disabilities and/or autism entitled 'Building the Right Support'. By 2019 the Transforming Care Programme intends to reduce the number of inpatient beds by up to 50% nationally and develop community–based services to prevent people from being admitted to hospital and to ensure that there are meaningful alternatives to hospital-based care across the country.

Sir Stephen is nevertheless critical of the progress. He believes that the scale of the problem has been underestimated, pointing to research suggesting that 3,500 people are currently in hospital-based settings; which is 900 more than stated by the government programme. In his view 10,000 extra members of trained staff will be needed to support people in their own community.

The report makes two key recommendations.

1. An independent evaluation of this programme. He suggested that a real-time, independent evaluation commissioned by the Department of Health with the commitment to publish all interim and final evaluation reports;

2. A Learning Disabilities Commissioner be appointed who would have a statutory duty to promote and protect the rights of all people with learning disabilities and/or autism in England'.

Specifically Sir Stephen questions whether the amount of £15 million that has been made available by NHSE to Transforming Care Partnerships for capital projects will be sufficient. The review calls on NHSE and DH to explain publically how this fund will be administered and, given £15 million is unlikely to be adequate, how it will ensure that sufficient continuing investment is available as the rate of people being discharged increases over the next 3 years.

In recommending that a learning Disabilities Commissioner be appointed he points out that the Government has yet to introduce the recommended legislation on rights. He refers to the Government's response to the Green Paper 'No voice unheard, no right ignored' which does not commit to legislative change to enshrine in law rights for people with a learning disability. He comments that "*nearly five years after the scandal at Winterbourne View Hospital we are still waiting to see any changes – it is time that someone is given the job that needs doing, which is making life better for all children and adults with learning disabilities and ensuring their rights are respected and enhanced, and their views taken seriously*."

The report also calls on the Transforming Care Programme to consider the accreditation of training in Positive Behavioural Support with a view to establishing an appropriate body to manage the design of a PBS Standard and tiered accreditation systems for individuals and organisations delivering and receiving PBS.

It highlights the risk to those with learning disabilities and/or autism of the capping of housing benefits to Local Housing Allowance Rates that is to start in April 2016. He recommends that the Government makes an explicit exemption for supported housing.

The findings in Sir Stephen's report are supported by a report published on the same day by the Royal College of Nursing (RCN) which says that many people with learning disabilities are still unable to receive the care and support they need because of issues with staffing services and strategy.

Sir Stephen accepts that "t*here is a commitment to closures and to developing community care* [on the part of the Government] *and that there is a step change in the attitudes of the national partners responsible for setting the agenda*." He believes however that "*failing to deliver this new programme is simply not an option*" and that "*success will be recognised only when the closure of hospitals is made possible by the development of community based services, with people who have learning disabilities, their families and carers at the centre of the design*." He believes that the Transforming Care Programme can achieve changes on the ground but cautions that the challenge has been underestimated before.

*Beverley Taylor*

## Mental Health Taskforce Report published

A report from the independent Mental Health Taskforce to the NHS in England has been published, containing numerous recommendations aimed at improving mental health services, including expanding provision, more thorough monitoring and regulation, and the inevitable recommendation for the appointment of a "new equalities champion for mental health." For present purposes most relevantly, the report notes that:

> "*The Mental Capacity Act 2005 makes no distinction between the mental and physical with regard to decisions about care. But the 2005 Act's provisions about having the mental capacity to consent to care can be over-ridden in the case of mental health care by the 1983 Act. We heard that this can act as a barrier to making parity of esteem a reality because it enshrines differences in the treatment of people with mental and physical health problems and frames care as a method of social control rather than a therapeutic intervention. The 1983 Act should therefore be reviewed as part of the continuing drive for greater parity with physical healthcare.*"

The report therefore recommends that "*The Department of Health should work with a wide range of stakeholders to review whether the Mental Health Act (and relevant Code of Practice) in its current form should be revised in parts, to ensure stronger protection of people's autonomy, and greater scrutiny and protection where the views of a individuals with mental capacity to make healthcare decisions may be overridden to enforce treatment against their will.*"

## Rapporteur on Mental Health and Human Rights

The Joint Committee on Human Rights has taken the novel step of appointing a rapporteur, and, importantly, has appointed one on mental health and human rights. Amanda Sollaway MP has been appointed with a remit of exploring, through informal meetings, contacts and visits, issues of concern in relation to mental health when approached through a human rights framework. Amanda will report back on each issue to the full Committee, which may then choose to seek written or oral evidence, and possibly produce a report on that subject. She will be starting her new role by looking, through a human rights lens, at preventable deaths of people suffering mental health problems, including those in detention, in the light of recent reports such as the Harris Review of self-inflicted deaths in custody and the Report of the Equality and Human Rights Commission on preventing deaths in detention of adults with mental health conditions.

The Rapporteur invites suggestions for other topics of investigation in this field to take forward in the future. All suggestions should be sent to JCHR@parliament.uk.

## IPCC report on use of force by police

The Independent Police Complaints Commission published on 8 March a report *Police use of force: evidence from complaints, investigations and public perception*. The section on the use of force in relation to those with mental health difficulties makes particularly sobering reading. As the report notes:

> "*The IPCC has frequently expressed concern about the relationship between mental illness, restraint and death. One in five of those involved in our investigations into use of force were known to have mental health concerns. They were four times more likely to die after force had been used than those not known to be mentally ill. They were much more likely to be restrained, to experience multiple uses of force, and to be subject to force in a custody environment. People with mental health concerns are clearly vulnerable, but in many cases, they were also likely to present challenges to the police officers dealing with them. They were much more likely to be under the influence of drugs or alcohol and to be in possession of some kind of weapon, with risks to themselves or others. This underlines the findings in other reports: not only do police need training in recognising and communicating with those in mental health crisis, but there is an urgent need to invest in appropriate mental health services that can prevent such crises or support people through them.*"

## Shortage of mental health officers (again!)

Last month we reported the decision of Sheriff D A Brown at Hamilton Sheriff Court in the case SS and MM, Applicants, addressing a situation on which we have repeatedly reported, namely the widespread failure of local authorities to comply with section 57(4) of the Adults with Incapacity (Scotland) Act 2000. The section requires that a Mental Health Officer's Report (where one is required) for an application under part 6 of the 2000 Act be produced within 21 days of notice of intention to bring the application. In SS and MM notice of intention had been given on 29th May 2015, but by the time of the hearing before Sheriff Brown on 25th September 2015 no Report had been prepared. He ordered North Lanarkshire Council, the relevant local authority, to prepare the Report within 14 days. The local authority appealed to the Sheriff Principal. We reported the decision at first instance upon being advised that the local authority had abandoned our appeal.

On 19th February 2016 Sheriff Brown refused to make a similar order, upon substantially similar facts. The difference on that occasion would appear to be that the local authority provided to the Sheriff figures for the number of Mental Health Officers employed by the Council, the number of requests for Reports received year on year, how such Reports are allocated and what are the various competing demands for the services of Mental Health Officers. It was submitted that as the problem was one of resources the court should only exercise its discretion to make such an order in the clearest and most exceptional circumstances, such as where an adult was in danger of abuse or neglect., or likely to lose an offer of accommodation, if no powers were put in place. The Sheriff took the view that there was nothing about the case before him which warranted it being given any special priority. Surprisingly, no assurances appear to have been given to the court as to the steps being taken by that particular Council – or for that matter nationally – to resolve the shortage of Mental Health Officers and thus allow Councils to perform their statutory obligations in the matter.

In the case of *Stork*, *pursuer* 2004 SCLR 513, a Mental Health Officer's Report had not been prepared within the 21 day period and in consequence the medical reports were, by the time that the application was lodged in court, older than the 30 days required in terms of section 57 (3) of the 2000 Act. Sheriff Vanett rejected a submission that he had discretion under section 3(1) to allow the application to be received notwithstanding these deficiencies. Instead, he interpreted "shall" in section 57 (3) as being "directory rather than mandatory". He suggested that his interpretation was "in harmony with the purpose and principles of the [2000] Act". He referred to the benefit principle and commented that if the provisions of section 57(3) and (4) were strictly enforced, then the pursuers would have to go to the trouble and expense of instructing fresh examinations and assessments, and would have to raise a new application. That decision was prior to the amendments to section 57 made by the Adult Support and Protection (Scotland) Act 2007, introducing (in sub sections (3)A and (3)B) discretion to allow the medical reports where they are more than 30 days old. The amendments in effect gave statutory authority to the course followed by Sheriff Vanett in *Stork*.

It would appear that the question, now, is whether on the one hand Sheriff Vanett's view that "shall" in section 57(4) is still "directory rather than mandatory"; or alternatively whether the Parliament, having

chosen to legislate expressly to create a discretion where medical reports are late, would have created similar express discretion if it had intended that there be similar flexibility regarding Mental Health Officer's report and, having not done so, clearly intended the 21 day limit to be mandatory and not within the discretion of Sheriffs to extend. These arguments do not appear to have been explored in the latest case. On the other hand, as we have previously asserted, the only effective solution – under the legislation as it stands – is for urgent steps to be taken to improve the recruitment, training and retention of Mental Health Officers so that Part 6 applications may be processed as intended by the Parliament.

It is worth recalling that the 21 day limit did not appear in the draft Bill annexed to the Scottish Law Commission "Report on incapable adults" (report number 151, September 1995). In subsequent consideration, there was significant concern that Part 6 applications should not be delayed through delays in producing required reports. The options canvased were either to impose a statutory time limit, or alternatively to "open up" the requirements to other sources of reports. For as long as there are too few Mental Health Officers to meet requirements, any intervention by the courts will only cause individual applications to be processed ahead of others. An alternative solution would be to remove the Mental Health Officer's "monopoly" and open up to other sources of reports.

*Adrian D Ward*

## "Total or complete incapacity?"

*W v Stirling Council* [2015] CSOH162; 2016 SLT 35, was a petition for judicial review brought by a lady identified as LW, and heard (confusingly) by Lady Wolffe. On 4th February 2015 Stirling Council decided that LW was intentionally homeless. LW sought judicial review of that decision. On 1st August 2103 she had become a tenant of private rental property in Stirling under a Short Assured Tenancy. It continued by tacit relocation on 31st January 2014, but on 17th February 2014 the landlord served a Notice to Quit. Following upon that, Decree of Recovery of Possession was granted in September 2014. She thereupon become homeless. The question was whether her homelessness was intentional.

Prior to taking the tenancy, LW had been advised that there would be a shortfall of about £10.80 per week between her housing benefit and the rent due. The Notice to Quit resulted from failure to pay that difference.

LW had a history of mental health issues. She had been known to psychiatric services since 2006, after referral by her GP for depression, anxiety and agoraphobia. She was assessed as also experiencing psychotic symptoms.

In about March or April 2014 (that is to say, very shortly after the events giving rise to the Notice to Quit) she was admitted to hospital and detained under the Mental Health (Care and Treatment)(Scotland) Act 2003. She was discharged, then detained again. In November 2014 she was still subject to a Community Treatment Order. A letter from a community psychiatrist nurse (wrongly identified in the decision as "community practice nurse") on 19th December 2014 concluded that the nature of her illnesses

"significantly affected her ability to function and reduced her level of being responsible" and that, at that time, LW "had no apparent insight to how unwell she was and unaware of her day-to-day responsibilities".

LW's three grounds for seeking reduction of the decision were all unsuccessful. They were, firstly, "that there was no proper basis in fact to support the determination that the petitioner had made herself intentionally homeless without having secured alternative accommodation"; (secondly) "that the decision letter failed to take into account properly and reasonably the significant psychiatric history and ongoing treatment of the petitioner" and (thirdly) "that the decision was *Wednesbury* unreasonable". The first ground was rejected on the basis that "the petitioner's case was not one of total or complete incapacity". It is remarkable that such black and white concepts of capacity should still be current, and should influence decisions. It is also notable that the decision makes no reference to the United Nations Convention on the Rights of Persons with Disabilities, and in particular the obligation upon states parties under article 12.3 of the Convention to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". There are references in the decision to LW having been assessed for support, but it is difficult to identify that there was any clear evidence as to any disabling effects of her psychiatric troubles in this specific matter of fulfilling her responsibilities under her tenancy; and although it is narrated that in August 2013 the Council had assessed her as requiring support in "understanding of tenancy and tenancy management", and also in relation to housing benefit, council tax and rent, the decision does not record whether she received support, and if so what support, in relation to those matters.

## Carers (Scotland) Act 2016

The Carers (Scotland) Act was passed by the Scottish Parliament on 5th February 2016. Royal assent is awaited. We have frequently reported on issues of ordinary residence, differences in the approach to ordinary residence as between England and Wales on the one hand and Scotland on the other, and differences between ordinary residences and other concepts, such as habitual residence. See most recently our commentary on *Milton Keynes Council v Scottish Ministers* in the December 2015 newsletter.

It was a matter of criticism of the Carers (Scotland) Bill as introduced that it was proposed that assessments of carer's needs should be carried out by the local authority of the carer's ordinary residence, even when that was different from the ordinary residence of the person cared for. We are pleased to report that under the Act as passed the "responsible local authority", that is to say the authority responsible for preparing and Adult Carer Support Plan, means "the local authority for the area in which the cared for person resides."

*Adrian D Ward*

## Scottish Government Consultation of the Adults with Incapacity (Scotland) 2000

We reported last month on the current Scottish Government consultation. We remind readers that the consultation period will end on 31st March 2016. Key players and interest groups are evidently taking a

wide view of the extent to which the 2000 Act, and also the Mental Care and treatment (Scotland) Act 2003 and the Adults Support and Protection Act 2007, should be subject to review. We have previously recorded disappointment that even since the Courts Reform (Scotland) Act 2014 the adult incapacity jurisdiction has not seen implementation of the recommendation by the Scottish Law Commission (in its Report on Incapable Adults, 1995) that adult incapacity cases should be dealt with by specialist designated Sheriffs. The debate now appears to be moving towards examination of the merits of transferring that jurisdiction to the tribunal system, envisaging the possibility even that the same tribunals might handle matters under all three Acts, with the objective of bringing specialist competence to all three, and also bridging perceived lack of coordination between the three jurisdictions.

*Adrian D Ward*

## Mental Welfare Commission – Advance statements campaign launch

The Mental Welfare Commission for Scotland (the Commission) will be holding an advance statements campaign launch event on 17th March 2016 at the Royal College of Surgeons of Edinburgh[14].

Advance statements, or advance directives as they are alternatively known, are widely acknowledged as a means of enhancing respect for individual patient autonomy and choice. Studies have reportedly found that the making of advance statements/directives has numerous therapeutic benefits including empowering the individual, enhancing capacity, improving the patient/clinician relationship and, most significantly, reducing the need for involuntary detention.

The Mental Health (Care and Treatment)(Scotland) Act 2003 (the 2003 Act)[15] requires that medical staff and the Mental Health Tribunal for Scotland must have regard to a patient's wishes expressed in a psychiatric advance statement or, alternatively, record the reasons for overriding such wishes and inform a number of people and bodies (including the Mental Welfare Commission for Scotland (the Commission)). Indeed, unwarranted overriding of such wishes may constitute human rights violations[16]. Moreover, it is also hoped that confidence in psychiatric advance statements will be increased when amendments to the 2003 Act (made by the Mental Health (Scotland) Act 2015) come into force. These will require health boards to ensure that psychiatric advance statements are placed in patient records and notified to the Commission (which will maintain a central register) and require health boards to account for steps, monitored by the Commission, that they take to promote advance statements.

The UN Committee on the Rights of Persons with Disabilities in its General Comment No 1 on Article 12 UN Convention on the Rights of Persons with Disabilities (the right to equal recognition before the law)[17] refers

[14] See also Mental Welfare Commission for Scotland (2014), *Advance Statements: Good Practice Guide*
[15] Ss 275-276.
[16] J Stavert, "Added value: using human rights to support psychiatric advance statements" (2013) 17(2) *Edinburgh Law Review* 210.
[17] UN Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) *Article 12: Equal Recognition before the Law*, CRPD/C/GC/1, adopted 11 April 2014, para 17

to advance planning – which includes advance statements - as an important form of support in the exercise of legal capacity. Whilst psychiatric advance statements as recognised by the 2003 Act may not pass muster with the committee, in that they become relevant when the patient lacks mental capacity and relate to those with mental disorder only, their ability to keep the will and preferences of a patient at the centre of care and treatment decisions should not be underestimated.

The Commission launch campaign therefore comes at an opportune time.

Advance statements concerning physical health cannot be used to force certain treatment to be provided and aside from psychiatric advance statements there is no case law or legislation that recognises advance refusals relating to physical health. However, it is likely that the Scottish courts will follow the English courts and uphold wishes expressed in such advance refusals[18]. The English and Welsh Mental Capacity Act 2005[19] also recognizes advance refusals. It is suggested that a similar provision be legislatively adopted in Scotland.

*Jill Stavert*

## Mental Welfare Commission for Scotland: *No through Road: People with Learning Disabilities in Hospital*

The Mental Welfare Commission for Scotland has published a visit and monitoring report on people on people with learning disabilities in hospital in Scotland. It notes some improvements since its last report in 2011 such as, for example, fewer people with learning disabilities being in hospital units. It does, however, highlight with concern the fact that almost 32%[20] of patients in hospital units for persons with learning disabilities who have been identified as being ready for discharge face delays of months, or even years, for such discharge. The reasons for this may be complex but the fact remains that it raises questions of compatibility with ECHR, notably Article 5 (the right to liberty) and 8 (the right to respect for private an family life), and UNCRPD rights as well as whether the principles of the Adults with Incapacity (Scotland) Act 2000 and/or Mental Health (Care and Treatment)(Scotland) Act 2003 are being implemented.

It should also be noted that during the passage of what became the Mental Health (Scotland) Act 2015 through the Scottish Parliament the Scottish Government confirmed that it will conduct a review – originally recommended in the Millan Report[21] and reiterated in the McManus Review Report[22] - of whether or not persons with learning disabilities should continue to be included within the definition of 'mental disorder' in the Mental Health (Care and Treatment)(Scotland) Act 2003.

*Jill Stavert*

[18] Scottish Law Commission, *Report on Incapable Adults 1995*(No 151), para 5.46.
[19] Ss 24-26.
[20] 58 out of a total of 180 patients with learning disabilities.
[21] Scottish Government (2001), *New Directions: Review of the Mental Health (Scotland) Act 1984*, paras 30-62 and Recommendation 4.6
[22] Scottish Government (2009), *Limited Review of the Mental Health (Care and Treatment)(Scotland) Act 2003*, pp 74-75

## Mental Welfare Commission for Scotland local visit reports

From March 2016, the Commission has started publishing its local visit reports on its website. At the time of writing eight such reports have been posted.

*Jill Stavert*

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## Conferences at which editors/contributors are speaking

### Palliative Care Conference

Alex will be speaking on the practicalities and realities of DOLS within palliative care practice at the 11th Palliative Care Congress in Glasgow on 11 March. For details, and to book see here.

### Safeguarding Adults in Residential Settings

Tor will be speaking about why capacity matters at this conference at the ORT House Conference Centre London on Tuesday 15 March 2016. For further details, see here.

### Edge DOLS Assessors conference

Alex will be speaking at Edge Training's annual DOLS Assessors conference in London on 18 March. Other speakers include Mr Justice Peter Jackson. For details, and to book, see here.

### Centre for Mental Health and Incapacity Law, Rights and Policy: Deprivation of Liberty seminar

Jill's Centre is holding a seminar to consider deprivation of liberty and achieving ECHR compatibility from a UK-wide perspective on 23 March, the speakers being Laura Dunlop QC, Colin McKay and Michelle Pratley. For details, and to book, contact Rebecca McGregor of the Centre.

### CoPPA London seminar

Alex will be speaking at the CoPPA London seminar on 20 April on the recent (and prospective) changes to the COP rules. The seminar will also cover the transparency pilot. The seminar will take place at 39 Essex Chambers at 5pm and will be followed by drinks. Free to COPPA members, or £10 to non-members. To book a place or to join COPPA, or the COPPA London mailing list, please email jackie.vanhinsbergh@nqpltd.com.



### 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.

### ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The theme for the seminars in the first year of this three years series is 'Making Law'. The second and third seminars in the series will be on "New" categories of abuse and neglect' (20 May) and 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

## Other events of interest

### Jordan Publishing's Court of Protection Practice and Procedure Evening Seminars 2016

District Judge Marc Marin will update practitioners on the new rules within the Court of Protection and help them to understand how this will affect their day-to-day practice. For further information and to book your place (London – 7 April/Manchester – 19 April) click here.

# Chambers Details

Our next Newsletter will be out in early April. 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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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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

Alex is recommended as a 'star junior' in Chambers & Partners 2016 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 and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. To view full CV click here.

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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. 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.

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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: 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.

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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.

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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 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.

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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.