

# Mental Health Law Online

## Monthly Update, September 2012

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### Introduction

In addition to being available on the Mental Health Law Online website, each month's legal update is available in PDF format for printing, and in Kindle format for e-book reading. This update is based on the content at [http://www.mentalhealthlaw.co.uk/September\\_2012\\_update](http://www.mentalhealthlaw.co.uk/September_2012_update) It is a snapshot of the online page – the online page will be automatically updated when case and legislation pages are updated.

### Cases

- **UT case.** [CNWL NHS Foundation Trust v HJ-H \(2012\) UKUT 210 \(AAC\), \(2012\) MHLO 88](#) — *The tribunal granted discharge from a CTO, deferred for 3 months, expressing the hope that in the meantime the RC would consider reducing the level of the patient's medication. The Trust appealed. (1) The challenge to the decision to discharge was essentially an attempt to re-argue the tribunal's assessment of the evidence, and was therefore unsuccessful. In deciding on whether there is an error of law, the UT must respect the FTT's assessment of the evidence and fact-finding role (provided this was carried out rationally and explained): (a) the UT's statutory jurisdiction is limited to points of law; (b) the expert composition of the FTT means its fact-finding is worthy of such respect. (2) The challenge to the deferral also failed, as there was no evidence that the tribunal had misdirected itself by granting the deferral with the intention that that the patient's medication could be reduced in order to make*

*her ready for discharge on a future date. (3) If the FTT's reasons for the deferral had not been set out adequately (ironically, the judge said the reasoning was 'not pellucid') then its decision would still not have been set aside; if anyone had cause to complain about the deferral it was the patient rather than the Trust. (4) If a CTO patient's condition deteriorates after a deferred discharge decision: (a) before the discharge date, he can be recalled under the CTO which still remains in force, and/or have his medication changed; (b) after the discharge date, he can be detained under s2 or s3, if there is information which was not known to the tribunal which puts a significantly different complexion on the case as compared with that which was before the tribunal.*

- **Capacity case.** [Re KK; CC v KK \(2012\) EWHC 2136 \(COP\), \(2012\) MHLO 89](#) — *KK was moved to a care home against her wishes, subject to a DOLS standard authorisation, and appealed under MCA 2005 s21A. (1) Having heard her oral evidence, the judge disagreed with the unanimous expert evidence that she lacked capacity to make decisions about her residence and care. (2) In light of the case law and the facts of the case, she had not been deprived of her liberty.*
- **Capacity case.** [Re SK \(2012\) EWHC 1990 \(COP\), \(2012\) MHLO 98](#) — "This is an application by the parties to certain Queen's Bench personal injury proceedings who seek in effect to be joined in these Court of Protection proceedings. The subject of both sets of proceedings is SK, a mentally incapacitated adult aged 55. The issue which arises one way or another in both sets of proceedings is as to his care, accommodation and rehabilitation. The two applicants for joinder to these proceedings are (a) CK, aged 52, brother of SK and (b) GA Group PLC, a bus company whose bus struck SK in November 2008, causing him severe lasting brain and physical injuries. That company is the defendant in the Queen's Bench proceedings." [Summary required.]
- **Best interests (medical) case.** [NHS Trust v Baby X \(2012\) EWHC 2188 \(Fam\), \(2012\) MHLO 99](#) — "The question in this case is whether a baby known as X should be removed from a ventilator and made the subject only of palliative care. As the evidence is that he will almost certainly die within minutes, or at best hours, of such removal, it will be readily apparent that this case is both tragic and difficult. Given the nature of the question, I have thought it right to deliver this judgment in open court but nothing of course may be reported which might reasonably lead to the identification of X or his parents. An issue has arisen over the reporting restrictions order in this case; I intend to deal with this matter quite separately to this judgment." [Detailed summary available on case page.]
- **Costs case.** [Re T \(Children\) \(2012\) UKSC 36, \(2012\) MHLO 100](#) — *A local authority should not be liable for the costs of interveners against whom allegations have been reasonably made that are held unfounded; the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings. (This case related to care proceedings.)* [Detailed summary available on case page.]

- **LPA case.** [Re Gunn \(2012\) MHLO 97 \(LPA\)](#) — *The donor made LPAs for property and financial affairs and for health and welfare. The donor's signature was witnessed in both LPAs, but in the health and welfare instrument the witness failed to state his address and registration of this LPA was refused by the Office of the Public Guardian. On the attorney's application for an order that the instrument should be treated as if it were in the prescribed form, the court exercised its discretion under paragraph 3(2) of Schedule 1 of the MCA and declared that the instrument was to be treated as if it were an LPA for health and welfare. The court considered it relevant that the witness had stated his full address in the LPA for property and financial affairs which was executed on the same day. [OPG summary - LPA case.]*
- **LPA case.** [Re Burdock \(2012\) MHLO 96 \(LPA\)](#) — *The donor made an LPA for property and financial affairs and included the following guidance: "(1) If the house is sold I intend to pay off Z's student loan completely. (2) I also intend to give my three daughters, or their issue, as follows: X £30,000, Y £30,000, Z £50,000. (3) The remainder to be used for my care and needs." On the application of the Public Guardian the provision was severed as it gave the attorneys greater gift making powers than are permitted under section 12 of the MCA 2005. [OPG summary - LPA case.]*
- **LPA case.** [Re Krajicek \(2012\) MHLO 95 \(LPA\)](#) — *The donor made two LPAs appointing two attorneys, A and B, and two replacement attorneys, C and D, and directed them to act jointly for some decisions and jointly and severally for other decisions. She provided that "If either of the original attorneys is unable to act then C should step in. D is to step in if the second attorney is unable to act." On the application of the Public Guardian the provision was severed because it appeared to provide for the replacement attorney to act jointly with the survivor of the original attorneys, which was incompatible with the appointment of the attorneys to act jointly for some decisions. [OPG summary - LPA case.]*
- **LPA case.** [Re Dowden \(2012\) MHLO 94 \(LPA\)](#) — *The donor made two LPAs in which she appointed a professional attorney and a lay attorney to act jointly and severally. She directed that the professional attorney should be paid fees "in keeping with the charging rate in force at the time the work is undertaken". She then directed that the lay attorney should be paid a reasonable hourly fee and stated that any sum paid "must be with the approval of my Solicitor/Attorney" and "will be at such rate as he feels is appropriate". On the application of the Public Guardian the provision relating to the lay attorney's fees being approved and set by the professional attorney was severed as being incompatible with a joint and several appointment. The judge added that, to have achieved the desired objective, the donor should have appointed the attorneys to act jointly for some decisions (in this case on agreeing an appropriate level of remuneration for the lay attorney) and jointly and severally for other decisions. [OPG summary - LPA case.]*
- **LPA case.** [Re Sheppard \(2012\) MHLO 93 \(LPA\)](#) — *The donor of a health and welfare LPA included the following guidance: "My attorneys are to maintain the health and welfare needs of X." On the application of the Public Guardian the provision was severed as it is not open to a donor to require attorneys to make health and welfare decisions on behalf of a third party. [OPG summary - LPA case.]*

- **LPA case.** [Re Kerron \(2012\) MHLO 92 \(LPA\)](#) — *The donor made an LPA for health and welfare, and imposed the following restriction: "If assessed as requiring nursing/residential care I would like to move promptly to a home jointly chosen by myself and my attorneys." On the application of the Public Guardian the words "jointly" and "myself and" were severed on the ground that a health and welfare LPA can only be used when the donor lacks capacity, and if the donor lacked capacity she would not be able to choose a nursing or residential care home. [OPG summary - LPA case.]*
- **LPA case.** [Re Darlison \(2012\) MHLO 91 \(LPA\)](#) — *The donor made an LPA for property and financial affairs. In the guidance section she stated: "Oversee X's financial welfare. X is [my] daughter." On the application of the Public Guardian the guidance was severed on the ground that the donor of an LPA cannot authorise the attorneys to act in relation to the financial affairs of another person. [OPG summary - LPA case.]*
- **LPA case.** [Re Norris \(2012\) MHLO 90 \(LPA\)](#) — *The donor made LPAs for property and financial affairs and for health and welfare and included the following guidance in both LPAs: "At all times to make decisions in the best interests of [my wife] during her lifetime." On the application of the Public Guardian the provision was severed as being potentially inconsistent with the requirement in section 1(5) of the MCA that any act done or decision made must be done or made in the donor's best interests. [OPG summary - LPA case.]*
- **LGO decision.** [LGO decision: Kent County Council 10 012 742 \(2012\) MHLO 102](#) — *"In her report concerning services for a young woman with learning disabilities, the Ombudsman says: 'The Council's failure to complete an assessment before the young woman was 18 caused her the injustice of losing services she was assessed as needing. The support plan that was eventually produced did not include services to meet these needs.' In addition, the Council's poor communication led to uncertainty, confusion and frustration for the young woman and her family, and she was denied a direct payment and the choice to arrange her own respite care." [Detailed summary available on case page.]*
- **LGO decision.** [LGO decision: Kent County Council 11 001 504 \(2012\) MHLO 101](#) — *"In her report concerning the elderly woman's residential care payment, the Ombudsman says: 'The Council's internal guidance said that staff could only use the Council's own homes, or places it had 'pre-purchased', or community hospitals. The requirement to offer service users a genuine choice of placement when they are assessed as needing residential care is enshrined in law. The guidance did not adhere to these principles.'" [Detailed summary available on case page.]*

## Articles, blogs and newsletters

- **39 Essex Street, 'Court of Protection Newsletter' (issue 24, August 2012).** The cases mentioned in this issue are: *Munjaz v UK 2913/06 [2012] MHLO 79 (ECHR)* — *XCC v AA [2012] EWHC 2183 (COP)*, [2012] MHLO 80 — *Re SK [2012] EWHC 1990 (COP)*, [2012] MHLO 98 — *NHS Trust v Baby X [2012] EWHC 2188 (Fam)*, [2012] MHLO 99 — *Re T (Children) [2012] UKSC 36*, [2012] MHLO 100 — *LGO decision: Kent County Council 11 001 504 [2012] MHLO 101* — *LGO*

decision: Kent County Council 10 012 742 [2012] MHLO 102 — Re Steven Neary; LB Hillingdon v Steven Neary [2012] MHLO 71 (COP). See [39 Essex Street COP Newsletter](#)

- **Martin Beckford, 'Judge says religious couple's brain-damaged baby can be allowed to die'** (Telegraph, 31/7/12). See [NHS Trust v Baby X \(2012\) EWHC 2188 \(Fam\), \(2012\) MHLO 99](#)
- **Moira Sofaer, 'Can the Court Protect Vulnerable Adults who have Capacity?'** (Family Law Week, 27/9/12. See [DL v A Local Authority \(2012\) EWCA Civ 253, \(2012\) MHLO 32](#)
- **Jerome Taylor, 'Huge spike in use of controversial new 'deprivation of liberty' orders despite critics arguing they are not fit for purpose'** (Independent, 18/7/12). See [DOLS#Other links](#)
- **Mark Neary, 'Pay Back Time?'** (Love, Belief and Balls Blog, 12/9/12). In this blog post, Mark Neary states that the effect of the London Borough of Hillingdon's decision to cease paying Housing Benefit will be that from 16/10/12 he and his son Stephen will no longer be able to live together in the borough. See [Re Steven Neary; LB Hillingdon v Steven Neary \(2012\) MHLO 71 \(COP\)](#)
- **Nina Lakhani, 'NHS watchdog claimed that whistleblower Kay Sheldon was "mentally ill"'** (Independent, 15/8/12). See [Care Quality Commission](#)
- **Andy McNicoll, 'CQC chief "sorry" for "very personal" comments on whistleblower's mental health'** (Community Care, 12/9/12). See [Care Quality Commission](#)

## Legal Aid

- **Legal Aid forms.** The following Legal Aid forms relevant to mental health law are being updated from 1/10/12: CLSAPP1 (application for Legal Aid certificate), CLSMEANS1 (financial assessment form), MEANS1P (supplementary means assessment form for completion by prisoners), CLSMEANS2 (financial assessment form). All forms signed and dated on or after 1/10/12 must be new versions. Old forms signed before that date will be accepted until 30/10/12. New means assessment forms may be used immediately. See LSC, 'Masterpack Forms Change Guide October 2012' (28/9/12). See [Legal Aid forms](#)
- **Legal Services Commission, 'Guidance on the use of agents' (10/10/11).** This document sets out the LSC's interpretation of the Standard Civil Contract 2010 that a firm with a high secure hospital contract may do the following, either separately or in combination: (1) use agents to allow firms without HSH contracts to represent HSH patients, or (2) use 30% of their own HSH matter starts at HSHs for which they do not have a contract. See [Legal Aid](#)



## Academic

- **Mental Health Foundation, 'Mental Capacity and the Mental Capacity Act 2005 - A literature review' (August 2012).** Their summary: 'This literature review was carried out to collate academic literature relating to mental capacity issues and to the implementation of the Mental Capacity Act 2005. Mental capacity is the ability to make one's own decisions. The Mental Capacity Act (MCA), which came into force in 2007 and covers England and Wales, provides a statutory framework for supporting people to make decisions for themselves wherever possible as well as processes and safeguards for decision-making involving people who lack capacity to make their own decisions because of illness, injury or disability. This review has collated a broad range of literature investigating various issues relating to mental capacity and the implementation of the MCA with the aim of identifying consistent themes, problem areas and any gaps in the existing literature. The largest proportion of literature relating to the MCA in England and Wales relates more specifically to issues with older people and people who have dementia.' See [Mental Capacity Act 2005 Overview#Other external links](#)

## Statistics

- **Ministry of Justice, 'Annual Tribunals Statistics, 2011-12: 1 April 2011 to 31 March 2012' (28/6/12).** The following paragraphs, together with their associated tables, are relevant to mental health: (1) 23. The adjournment and postponement rates for Mental Health have remained at the same levels as 2010-11 (but had previously fallen probably as a result of improved case management processes). In 2011-12, the adjournment rate was 7%, whilst that for postponements was 13%. (2) 25. Of the 222,900 total jurisdictional sitting days, 72% were for fee-paid judiciary and 28% were for salaried judiciary. The ratio of fee-paid to salaried judiciary varies by jurisdiction. In 2011-12, 97% of judicial sitting days for Mental Health were for fee-paid judiciary, whilst this was 15% for the Asylum Support tribunal. (3) 40. For the Mental Health jurisdiction, the time from receipt to disposal has been examined for the three main case types. Unfortunately, the reporting system is not able to produce analysis by single week of age, thus there is some inaccuracy regarding the median and lower and upper quartiles. 41. Given the statutory requirement for Section 2 cases to be listed within 7 days of receipt, it is not surprising that this type of case has the shortest clearance times. The waiting times have reduced when compared with previous periods due to improvements made in administrative processes. See [Statistics#Annual Tribunal Statistics](#)
- **NHSIC, 'Guardianship under the Mental Health Act 1983 - England 2012' (18/9/12).** Key facts: (1) The number of new Guardianship cases fell by 5 per cent between 2010/11 and 2011/12 from 347 to 331 cases. This is a much smaller reduction than between the previous two reporting years, which saw a notable fall of 21 per cent, possibly attributable to the introduction of new Mental Capacity Act Deprivation of Liberty Safeguards and Community Treatment Order legislation. The number of new cases in 2011/12 was 31 per cent lower than in 2002/03 when 477 new cases were reported. (2) This is the seventh consecutive decrease in the numbers of continuing cases. The number of cases continuing at the end of the year decreased by 26 per cent (from 923 in 2002/03 to 682 in 2011/12). The number of cases closed

during the reporting year was 357; a decrease of 33 per cent since 2002/03 from 534. See [Statistics](#)

- **NHSIC, 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards assessments - England, 2011-12, Third report on annual data' (17/7/12).** Key facts: (1) There has been a year-on-year increase in the number of applications completed for Deprivation of Liberty Safeguards (DoLS) since the safeguards were first introduced in 2009/10. There were 11,393 applications in 2011/12, which represents a 27 per cent increase on the 8,982 in 2010/11 and a 59 per cent increase on the 7,157 applications in 2009/10 (the first year of the new safeguards). (2) The number of people subject to a standard authorisation at the end of the quarter had increased each quarter since the safeguards were introduced, from 536 at the end of June 2009 to 1,976 at the end of December 2011. However, between the end of December 2011 and March 2012 the numbers decreased by 16 per cent, the first fall in numbers seen. (3) Dementia accounted for 53 per cent of all applications and this is reflected in the age profile of people who are the subject of DoLS applications. (4) Fifty-eight per cent of applications relate to people over 74 and the population-based rate of applications is much higher for over 74s and over 84s. For the over 84s the application rate is 25 in 10,000. This compares to 12 in 10,000 for 75-84 year olds, 3 in 10,000 for 65-74 year olds and just 1 in 10,000 for 18-64 year olds (working-age adults). (5) There are wide variations in population-based application rates by region. The East Midlands has the highest rate of applications at 51 per 100,000, whilst London had the lowest rate at just 17 per 100,000. These compare to a rate for England as a whole of 28 per 100,000.
- **NHSIC, 'Bi-annual analysis of Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments (England) - October 2011 - March 2012' (12/6/12).** Key facts: The figures show that between 01 October 2011 and 31 March 2012: (1) 5,933 authorisation requests were completed. 4,255 (71.7 per cent) were received by LAs and 1,678 (28.3 per cent) were received by PCTs. (2) 3,277 (55.2 per cent) of the completed requests resulted in an authorisation. - 2,400 (56.4 per cent) of the assessments received by a LA resulted in an authorisation. - 877 (52.2 per cent) of the assessments received by a PCT resulted in an authorisation. (3) Of the total assessments completed, a slightly higher proportion was for females 3,190 (53.8 per cent) than males 2,743 (46.2 per cent). (4) At the end of the reporting period, 31 March 2012, 1,667 people were subject to a current standard authorisation. 1,421 (85.2 per cent) followed a granted LA authorisation and 246 (14.8 per cent) followed a granted PCT authorisation. See [Statistics](#)

## Scotland

- **Scottish Law Commission, 'Discussion Paper on Adults with Incapacity' (discussion paper 156, 31/7/12).** Consultation from 31/7/12 to 31/10/12. Extract from news release: 'The main questions raised by the Discussion Paper are: (1) Is Scots law as it currently stands adequate to meet the requirements of the European Convention in this area? and (2) If not, how should it be changed? In particular, there is a need to decide if there should be a new procedure for authorising deprivation of liberty in residential care for adults with incapacity. If there should, what should that process be? And, very importantly, what sorts of care and what type of facilities should be

regarded as involving deprivation of liberty for those who live there?' See [Consultations#Scotland](#)

## Wales

- **MHRT Wales application form uploaded.** See [Tribunal forms](#)

## Southern Ireland

- **Harry Kennedy, "'Libertarian' groupthink not helping mentally ill' (Irish Times, 12/9/12).** See [Southern Ireland](#)

## Website/CPD

- **CPD scheme.** The July 2012 and August 2012 CPD questionnaires are now available. Obtain 12 accredited CPD points online for £60. See [CPD scheme](#)
- **Discussion list.** Please subscribe to Mental Health Law Online's new discussion list. This is separate from the email updates list, which remains unchanged. The discussion list covers all aspects of mental health law in England and Wales, from the Mental Health Act 1983 and the Mental Health Tribunal, to the Mental Capacity Act 2005 and the Court of Protection. See [Discussion](#)
- **Kindle.** You can now receive monthly updates delivered automatically to your Kindle e-reader. See [Kindle updates](#)
- **Cases.** On 30/9/12 Mental Health Law Online contained [1237 categorised cases](#)
- See [September 2012 chronology](#) for this month's changes to the website in date order