



## Mental Capacity Law Newsletter

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### Introduction

Welcome to the August issue of our newsletter. This issue is a significant one in three ways. First, it marks three years of the newsletter in its current guise, during which time our readership has risen to well over a thousand direct recipients (and very many more who receive it through more indirect routes). Thank you to all of you for your feedback, comments, and pointers to important developments, all of which, we hope, have made this a useful resource.

Second, as time has gone on we have covered an ever-increasing range of matters related to mental capacity, and our self-imposed remit now extends far beyond the Court of Protection. To that end, we have renamed this newsletter the Mental Capacity Law newsletter more accurately to reflect its contents.

Finally, this is a significant issue because we have moved across to a new format so as better to match our baby sibling, the [Community Care Newsletter](#). Whilst we know that the double-columned format does not suit everyone, it is, we have found, the best way to convey as much information as possible as efficiently as possible. So that you can navigate quickly to those cases which are of interest, we have also introduced a table of contents. As always, we welcome comments on this or any other aspect of the newsletter.

With this issue, and as a special bonus, we include an article that the Official Solicitor, Alastair Pitblado, has kindly contributed, commenting upon the recent Court of Appeal decision in [PC and NC v City of York Council](#) [2013] EWCA Civ 478.

### Contents

Deprivation of P's liberty justified on the basis of preventing offending .....	2
P's best interests dictated that no steps be taken to annul voidable marriage .....	3
Solicitor negligent in failing to prepare will where concerned about testamentary capacity .....	5
Neuropsychological evidence as to capacity not per se to be preferred .....	6
Lack of capacity irrelevant to liability to charge upon property to pay for care home fees .....	7
The Official Solicitor is on the move .....	8
Litigant in person fails to overturn mother's will .....	8
Update on House of Lords Select Committee on the Mental Capacity Act 2005 .....	9
EU Fundamental Rights Agency Report on Capacity .....	9
Draft Guidance on Publication of Judgments .....	11
Law Commission Discussion Paper on Insanity and Automatism in criminal law .....	12
Restrictions imposed by Northern Irish guardian did not amount to deprivation of liberty .....	13
Irish Assisted Decision-Making (Capacity) Bill .....	15
Mark Neary's blog .....	16
Coming next month .....	16
Jordans COP Conference .....	16
Recording out of hours applications .....	17

Where transcripts are publicly accessible, a hyperlink is included. As a general rule, those which are not so accessible will be in short order at [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk). We include a QR code at the end which can be scanned to take you directly to our previous case comments on the CoP Cases Online section of our website.

## Deprivation of P's liberty justified on the basis of preventing offending

**Y County Council v ZZ** ([no neutral citation](#), 25 July 2012)

*Article 5 – deprivation of liberty*

### Summary

This case, a transcript of which has only recently become available on the MHLO website, concerned a man with mild learning disabilities who also had what was described as a 'strong interest in deviant sexual activity with children'. He was under guardianship, and was required to live at the J placement. There were extremely severe restrictions on his freedom at the placement, which were authorised by way of a standard authorisation. As the judge noted, explaining his decision that ZZ was deprived of his liberty there: (a) the J is a locked environment; (b) he is checked hourly throughout the day; (c) he is not allowed to leave the property, save as agreed by the staff, and then only on the basis of being accompanied by a one-to-one escort who must either walk alongside him or closely behind him at all times; (d) he consistently expresses his objections to residing there; (e) he consistently objects in writing to the restrictions upon him; (f) his use of his mobile telephone is restricted to 1 hour per day; (g) he is not at present allowed unsupervised access to the garden because of the children living in the adjacent property; (h) the purpose of the restrictions is, in significant part, designed to protect others in the community and, in particular, children as well as to protect ZZ.

The judge held that although the court had no jurisdiction to determine where it was in ZZ's best interests to live, by virtue of the guardianship order being in place, it could determine whether

his deprivation of liberty was lawful. Moor J held that the measures were in ZZ's best interests, notwithstanding his objections, because *"they are designed to keep him out of mischief, to keep him safe and healthy, to keep others safe, to prevent the sort of situation where the relative of a child wanted to do him serious harm, which I have no doubt was very frightening for him, and they are there to prevent him from getting into serious trouble with the police."*

### Comment

One point that does not appear with perhaps sufficient clarity from the transcript, and which caused the editors to pause on first reading, is the apparent acceptance by the Official Solicitor of the restrictions on behalf of ZZ. We understand, however, that the Official Solicitor sought to test the local authority's evidence and, in particular, the proposition that the proposals advanced represented the least restrictive option, and actively advanced ZZ's own wishes (supported, insofar as possible, by the evidence). We would have been concerned had the Official Solicitor adopted any other course of action on the particular facts of this case.

The decision is, however, curious in two other respects.

First, there was no analysis of any evidence that ZZ lacked capacity to consent to his care arrangements. ZZ apparently had capacity in other areas of his life – notably, he was married. There was some discussion of his capacity to litigate, which accepted expert evidence that one might think fell into the trap identified in [PC and NC v CYC](#) [2013] EWCA Civ 478 of conflating unwise decisions with an inability to make a decision because of a mental impairment. The expert evidence accepted by the court regarding litigation capacity was that *"[o]n balance, given ZZ's learning disabilities, his memory problems and his problems with social interaction and considering the complexity of the current court proceedings, I conclude that he does not have capacity to litigate and he, therefore, requires assistance from the Official Solicitor"* and that ZZ was *"not able to give due consideration to all the relevant information required for the decision-making process, specifically, that he is over-estimating his abilities to manage his risks and under-estimating the importance of staff support."*

which led the judge to say “[i]n other words, he cannot weigh the relevant information in the balance.” The reliance on P not being able to give ‘due’ consideration, and having a different view of the care he requires from the professionals, should perhaps have caused a red flag to be waved and some further careful consideration given to whether P did in fact lack capacity to consent to his care arrangements and his deprivation of liberty.

Second, given that ZZ was at obvious risk of causing harm and being harmed by others as a result of his sexual proclivities the protection imperative could not have been stronger. It is not remotely surprising that the court approved arrangements for his care that kept him safe, but it is not clear that the requirements of the MCA 2005 as regards his lacking capacity in relevant respects were actually fulfilled. It is no doubt in the ‘best interests’ (broadly defined) of any potential sex offender to be kept under such close supervision that no opportunities for offending behaviour arise, but that is not how society functions in respect of those without learning disabilities. The court adopted a ‘no risk’ approach to ZZ’s care, with no mention of the principle of least restriction, and on its face little consideration of the effect on ZZ of the continued imposition on him of restrictions to which he strongly objected.

## **P’s best interests dictated that no steps be taken to annul voidable marriage**

***Sandwell Metropolitan Borough Council v RG & Ors***  
**[\[2013\] EWHC 2373 \(COP\)](#)**

*Mental capacity – marriage*

### **Summary**

This case concerned two brothers, GG (aged 39) and RG (aged 38), with moderate learning difficulties. By the end of the final hearing all parties accepted the expert evidence before the court that GG and RG lacked capacity to make decisions about their residence, care and contact, as well as capacity to marry and consent to sexual relations. Both brothers had been living in

separate accommodation with a package of care arranged by the local authority for some time and in the end there was no challenge to them continuing to reside away from their mother, SKG, and other brothers, with provision for regular contact with their family. Their father, MSG, had passed away some time ago and was a very prominent figure in the Sikh community.

The only issue upon which the court was required to adjudicate related to the status and continuation of the marriage of RG and SK. Their marriage was arranged by MSG and the father of SK and took place in India in March 2009. RG returned to England approximately ten days after the marriage and SK came to England in March 2010.

SK’s case was that she did not know of the extent of RG’s difficulties at the time of their marriage but felt committed to him and does now love him. She claimed that it would be impossible in her culture and religion for her ever to marry anyone else, and that if she were divorced, or her marriage was annulled, she would be ostracised in her community. Mr Justice Holman noted that she is currently allowed to remain in the UK but is not allowed any recourse to public funds, and works very long hours, for low wages, as a fruit picker and in similar rural labouring tasks. He described her position as a tragic one. SK herself said her life had been ruined by those who had arranged the marriage but implored the court not to take any steps to bring it to an end.

At the outset of the hearing SK sought permission to have a sexual relationship with RG but her counsel conceded, on the basis of the expert evidence, that RG lacked capacity to choose whether to agree to sexual touching. As such, under section 30 of the Sexual Offences Act 2003, she would commit a serious criminal offence if sexual relations took place. Holman J declared that it was in RG’s best interests for contact between SK and RG to be supervised to the extent necessary to ensure that there is no sexual touching between them.

In relation to RG’s capacity to marry, there was expert evidence before the court that RG lacked any understanding as to what marriage is, or what it involves, and that it was highly likely that he lacked capacity at the time of the marriage in March 2009. This was uncontested and Mr Justice Holman made declarations accordingly.

The local authority sought an order that it was in RG's best interests for the court to grant the Official Solicitor permission to issue a petition of nullity on his behalf and to seek to obtain a decree of nullity. They argued that the marriage should be annulled both in RG's best interests and also for reasons of public policy, recognising that RG could not have been lawfully married within this jurisdiction at the time the marriage took place. A number of incapacitated adults had been the subject of arranged or forced marriages within the area of the local authority and there was felt to be a need to send a strong signal to the Muslim and Sikh communities that arranged marriages, where one party is mentally incapacitated, will not be tolerated, and that the marriages will be annulled.

Holman J held that there was no scope within the applicable statutory framework for a policy based decision. The Matrimonial Causes Act 1973 places issues of capacity to consent to marriage in section 12, rather than section 11, with the consequence that such a marriage is voidable rather than void. As such, parties to the marriage have discretion as to whether to bring the marriage to an end. As RG lacked capacity to make that decision, it fell to the Court of Protection to make that decision in his best interests, pursuant to s 1(5) of the MCA 2005.

In considering the best interests of RG, Holman J took into account RG's wishes, insofar as they were ascertainable, to remain married to SK and not to petition for a decree of nullity. Under s 4(6)(b) and (c) of the MCA 2005, Holman J also took into account RG's beliefs and values: *"Since RG has had lifelong learning difficulties, it is difficult to ascertain or discern his beliefs and values. He has, however, some awareness of his being a Sikh, and does, in a simple way, participate in some of the practices and observances of that culture. If he had had the capacity to contract the marriage it does not seem likely that he would have wished to bring shame and ostracism on his wife by 'divorcing' her or seeking to annul their marriage. To that very limited extent only do I take into account at all the position of Mrs SK."*

The local authority were able to identify few positive benefits from annulling the marriage or dis-benefits from permitting it to continue. Holman J accepted that there was animosity between SK and RG's mother, but did not consider that was a sufficient reason to annul the marriage

and exclude SK from his life, when he gained at least as much pleasure from his relationship with his wife as from that with his mother. Equally, although certain legal consequences may flow from the continued status of SK as RG's wife, including inheritance rights, and a right to be consulted, as nearest relative, under the Mental Health Act, Holman J noted that these rights can be displaced if it is appropriate to do so.

The position of the Official Solicitor changed shortly before the hearing and he submitted on behalf of RG that there was no benefit to him in annulling the marriage. Holman J agreed with this and stated that he was not persuaded that RG's best interests require or justify that his marriage is annulled.

The judgment deals briefly with whether it would be appropriate for the Court to declare that the marriage of RG and SK is not recognised in England and Wales, following the judgment given by the Court of Appeal in *KC & Anor v Westminster City Council* [2009] 2 WLR 185. The local authority in this case did not ultimately pursue the declaration of non-recognition at the hearing as no formal application had been made under the inherent jurisdiction at that time and it was accepted that there was a need for further evidence on the question of RG's domicile before the Court would be in a position to decide this issue.

In the course of his judgment Holman J referred to the recent case of [XCC v AA & Ors](#) [2012] EWHC 2183 (COP), in which Mrs Justice Parker directed that the Official Solicitor should issue a petition for nullity and declared that the marriage in question was not recognised in England and Wales. He distinguished that case on the grounds that there was no contact of any kind between the incapacitated person and her husband and there did not appear to have been any issue as to domicile or the relevant law as to capacity.

### Comment

Holman J stressed that this case is highly fact specific and that he did not intend to indicate any "policy", precedent or guidance as to any other case. Nonetheless, the judgment will be read closely by those with an interest in the marriage of incapacitated adults, particularly given the small number of reported cases on this issue.



The case (as with *XCC*) underscores the importance of local authorities acting swiftly to prevent marriages of incapacitated adults taking place abroad, whether by application for a forced marriage protection order or to the Court of Protection. Where a marriage has taken place, there is clearly a duty on local authorities to bring cases such as this before the Court of Protection and careful consideration will need to be given to the best interest questions that arise.

## **Solicitor negligent in failing to prepare will where concerned about testamentary capacity**

***Lorraine Studholm Feltham v Freer Bouskell*** [2013] EWHC 1952 (Ch)

*Practice and procedure – other*

### **Summary**

This professional negligence case warrants short mention because of the approach adopted by the Judge to the (not uncommon) situation where a solicitor has doubts as to the testamentary capacity of the person who seeks to instruct them to execute a will. Freer Bouskell were instructed by the Claimant's step-grandmother to prepare and execute a new will for her; they did not do in a timely fashion. In consequence, her step-grandmother asked the Claimant herself to make a new will for her. This will was challenged by two persons who would have benefited under the old will; the Claimant settled the challenge by making additional payments to them, and she brought a claim in negligence against the solicitors on the basis that, had they been instructed to do it, it was most unlikely that it would have been challenged.

For present purposes, the two aspects of the judgment that are of significance are those dealing with the duties upon solicitors instructed to prepare and execute wills, and the consideration of the actions/omissions of the solicitor in question in light of those duties.

Charles Hollander QC emphasised (at para 51) the uncontroversial proposition that a solicitor instructed to prepare and execute a new will has an obligation to carry out those instructions within

a reasonable period of time, and that where the testator is very elderly, there is a particular obligation to carry out those instructions with expedition as it is foreseeable that the testator may not continue to live long. If a solicitor has concerns as to the client's mental capacity, he must either refuse the instructions and make the position clear to the client, or take steps to satisfy himself as to the client's mental capacity promptly (para 53). In the instant case, the judge found that the solicitor had accepted his instructions subject to satisfying himself that his client had capacity, such that it was his obligation to resolve the issue with reasonable expedition.

Charles Hollander QC had a degree of sympathy with the position that the solicitor found himself in: he had known his client for a number of years. He knew the contents of her will; suddenly her step-grandniece comes onto the scene and within days his client wanted to change her will to leave the majority of it to her. At paragraph 66, the judge noted that he considered the solicitor to be an honest and meticulous witness who "*on the evidence available to him [...] must have had a genuine concern that Ms Feltham, having come on the scene at the last minute, was now seeking to take advantage of a vulnerable old lady by securing a change in the will in her own favour.*" The problem was that, for reasons that need not detain us here, the judgment was made by the solicitor based on the picture seen by himself and it was only a partial picture which was, in fact, entirely inaccurate.

In consequence of his (inaccurate) understanding of the position, the solicitor decided that he would take no action about making a will unless it was specifically raised again by his client. It was, however, "*entirely inadequate for a solicitor instructed by a 90 year old client to alter her will to take the view that, because he was concerned that she might be being taken advantage of by the potential beneficiary under the new will, and because she did not mention the will to him when they spoke on the phone, he would take the matter no further until she raised it again. He had three opportunities on the telephone on 14 and 15 February to raise the matter himself but decided not to mention the subject. He simply never raised the subject. I can understand that Mr Ward was genuinely motivated by his desire to protect his client. But it was not a decision for him to take as to whether it was a good idea for Ms Charlton to*

*change her will and, as I have explained, the erroneous view he reached as to what was happening as between Ms Charlton and Ms Feltham was based on the limited information available to him” (para 72).*

The judge also found that the solicitor had failed to act promptly in terms of obtaining a medical report: he instructed the doctor on 26 January, but did not take any further steps prior to receiving the report on 4 March, some five weeks later. This was, in the view of the judge, *“far too long given the instruction to alter the will of a 90 year old lady, and that this was only the first step which needed to be taken before the will could be altered. Mr Ward should have chased Dr Staunton for his report shortly after the conversation on 2 February [when he was chased by the Claimant for news] and if Dr Staunton was not able to produce his report expeditiously, he should have arranged for another doctor to be instructed. He was negligent to do so”* (para 76). He continued, *“[i]n reaching the view that Mr Ward failed to act promptly, I take into account (i) the fact that he was instructed by a 90 year old lady who was in a nursing home having just lost her long term partner a matter of days previously (ii) the fact he could not reasonably fulfil his instructions until he had satisfied himself through a medical report of her capacity, and thus in any event be some delay (iii) the fact that he would need to visit her in person after obtaining the medical report, so there would be some further delay”* (para 77).

The judge agreed with the solicitor that the right course upon receiving the medical report was to visit the client in person. *“He was entitled, as a family solicitor, to discuss the proposed changes to her will, the consequences, and to satisfy himself that that was she wanted. But the decision was hers”* (para 79).

There were detailed arguments as to causation which are not relevant for present purposes, but the judge was satisfied that (a) it would have been clear that Ms Charlton had at the time the requisite mental capacity to make a will; and (b) that her instructions could have been fulfilled by the solicitor in a timely fashion. Substantial damages were therefore awarded the Claimant to reflect the sums paid by way of settlement of the claims subsequently brought against the will made by her for her mother and for her legal costs

incurred in that settlement.

## Comment

This case stands as a cautionary tale in a number of respects, but perhaps above all for its emphasis upon the fact that solicitors must be very astute to take prompt steps to inform themselves of all relevant information before taking any decision that on its face goes against the instructions given them by their clients, even where that decision is motivated by proper concern for their client’s well-being. As such, it should be read alongside the Law Society’s recent [Practice Note](#) on financial abuse.

## Neuropsychological evidence as to capacity not per se to be preferred

*Ali v Caton & Anor* [\[2013\] EWHC 1730 \(QB\)](#)

*Mental capacity - finance*

## Summary

The court was required to decide the capacity of A to manage his property and affairs in the context of personal injury proceedings. A suffered a very severe brain injury and significant orthopaedic injuries when he was struck by a car driven by C. He brought a claim for damages and the trial on liability was settled. As C was uninsured the Motor Insurers Bureau (MIB) stood in his shoes; it also conducted the defence of the claim. The MIB alleged at the damages stage that A was malingering and that his on-going cognitive defects were mild. The MIB argued that A’s demonstrated cognitive performance and motivation undermined his claim that he would be unable to lead an independent life. The MIB also argued that the results of psychometric tests suggested that A was deliberately exaggerating his difficulties. In support of its case the MIB cited the fact that A had passed the UK Citizenship Test.

One of the issues in the case was whether A would have capacity to manage his property and affairs. Stuart-Smith J set out the test for capacity contained in the MCA 2005 and concluded on the balance of probabilities that A would lack capacity in this regard, as asserted by his litigation friend (paras 296-298), after receiving a substantial award of damages. The judgment summarises the expert evidence from

a number of medical professionals on this issue (see paras 287-295). Stuart-Smith J acknowledged that the other medical experts tended to defer to the neuropsychologists, but did not accept that the other experts were unable to provide assistance on this issue. He went on to find that the conclusion that J lacked capacity to manage his property and affairs on the basis of the expert evidence was also supported by *“a Banstead assessment that he is impulsive and very suggestible; and that, while his mental arithmetic was adequate for small numbers he became confused with larger numbers; and by the recommendation that he required support with managing all personal finances including large amounts of personal money, complex finances, bills and benefits”* (para 297).

### Comment

It is of interest that the MIB sought to argue that the expert evidence was inadequate to overturn the presumption of capacity and, furthermore, appears to have asserted that the experts other than the neuropsychologists were unable to provide assistance on this issue (see paras 286 and 296). It was clearly appropriate for Stuart-Smith J to take into account all relevant evidence in reaching his conclusion that A lacked capacity. It may be noted that in doing so, he adopted a decision-specific approach, examining A's capacity to manage his property and affairs after receiving a substantial sum of damages, a conceptually different matter to the management of much smaller sums of money.

## Lack of capacity irrelevant to liability to charge upon property to pay for care home fees

***Harrison v South Tyneside Council*** HM Land Registry Adjudicator Decision [Ref/2012/886](#)

*Mental capacity – residence*

### Summary and comment

We would not usually cover decisions of Her Majesty's Land Registry Adjudicators but this one is of interest, not least because it demonstrates how broad ranging the MCA 2005 can be. It involved a

common dispute. The late Mr David Jackson had dementia, lacked residential capacity and was placed by the council in residential accommodation until his passing. The administrator of his estate pursued a range of arguments in respect of the fees. For example, he contended that the costs should have been borne by the NHS; indeed, that Mr Jackson ought to have been sectioned under the Mental Health Act 1983 because he lacked capacity to consent to be admitted to the care home and did not require it because he had his own home.

Unsurprisingly, the arguments were rejected. The Deputy Adjudicator held:

*“4. In my judgment, Mr. Jackson did avail himself of the accommodation despite his lack of capacity. It was accommodation which he required to receive the necessary care and attention not otherwise available to him and the fact that he lacked capacity to understand that does not mean that he did not avail himself of it within the meaning of the [National Assistance Act 1948]. I would add that if that were not the case, then the provision of the accommodation would in the circumstances have been a necessary either at common law or under section 7 of the Mental Capacity Act 2005, and he would have been obliged to pay a reasonable price for it, which would have been recoverable from his estate (Wychavon District Council v EM [2012] UKUT 12 (AAC)).”*

The fact that he had his own home was irrelevant if he needed care and attention which was not available to him there (para 6). Thus, the local authority was able to declare a charge on the property pursuant to section 22 of the Health and Social Services and Social Security Act 1983 which provides:

*Subject to subsection (2) below, where a person who avails himself of Part III accommodation provided by a local authority in England, Wales or Scotland-*

*(a) fails to pay any sum assessed as due to*

*be paid by him for the accommodation;  
and*

*(b) has a beneficial interest in land in  
England and Wales,*

*the local authority may create a charge  
in their favour on his interest in the  
land.*

If an assessment of the accommodation costs has been properly made, and the only reason the person accommodated does not know of the amount due is because they lack the necessary mental capacity, they are still liable. Otherwise it would be impossible for a local authority to protect itself in the way intended under section 22 without there being a lasting power of attorney or the intervention of the Court of Protection (para 13).

## Litigant in person fails to overturn mother's will

**Jeffery & Anor v Jeffery** [\[2013\] EWHC 1942 \(Ch\)](#)

*Testamentary capacity*

### Summary

The claimants in this case sought an order decreeing probate of a will made by D in 2007. D died in 2010 at the age of 76 (having been divorced from her husband ten days earlier). She was survived by her two sons, N and A. A filed a defence asserting that all wills and codicils executed by D since 1980 were invalid on the grounds of lack of testamentary capacity, and that D therefore died intestate. He also alleged that D's wills were written under undue influence from N. N was one of the main beneficiaries of the will D made in 2007, along with A's three children.

## The Official Solicitor is on the move

As of 23 August 2013 the offices of the Official Solicitor and Public Trustee will move to:  
Victory House,  
30-34 Kingsway,  
London WC2B 6EX;  
DX 141423 Bloomsbury 7.

The telephone numbers will be as follows:

### From 12 August

+44 (0)20 3681 2752	for Corporate Services
+44 (0)20 3681 2753	for Child Trust Funds
+44 (0)20 3681 2756	for ICACU
+44 (0)20 3681 2757	for REMO
+44 (0)20 3681 2759	for Trusts and Deputy Services

### From 27 August 2013:

+44 (0)20 3681 2750	for Civil Litigation
+44 (0)20 3681 2751	for Healthcare and Welfare
+44 (0)20 3681 2754	for Divorce
+44 (0)20 3681 2755	for Family Litigation
+44 (0)20 3681 2758	for Property and Affairs



On the facts of the case, Vos J had no difficulty finding that D had testamentary capacity in 2007. Applying the tests in *Banks v Goodfellow* (1870) LR 5 QB 549 he had no doubt on the evidence that D fully understood that she was making a will, the extent of her property, and the claims on her property to which she ought to give effect (paragraph 236). Vos J noted that the evidence of the solicitors, barristers, and doctors, and of the family members all pointed in one direction. He rejected A's argument that D was rendered incapacitous by her mental state and medication and stated that "[D] *never suffered from any mentally incapacitating complaint, even if she did experience occasional anxiety and mild depression. If people suffering from such complaints were unable to make wills, a large percentage of the population would be so inhibited.*" Vos J similarly rejected A's claim that N had subjected his mother to undue influence, describing this as simply false and wholly unsupported by any evidence (paragraph 248). The 2007 will was regularly executed under sound legal advice, and D plainly and obviously, on the evidence, knew of and approved its contents. Vos J considered that A was unable to accept that D had voluntarily and intentionally decided to disinherit him, as she clearly had. He directed that N and his wife be at liberty to take the grant of probate.

### Comment

This case highlights the obvious hurdles confronting a party seeking to challenge testamentary capacity without objective evidence to support their case. It also demonstrates the difficulties that face judges hearing complex cases where parties are unrepresented, as A was in this case. Although Vos J ultimately concluded that A's claims were entirely without foundation, he anxiously scrutinised each and every argument he raised in the course of his detailed judgment.

### EU Fundamental Rights Agency Report on Capacity

The EU FRA have just [published](#) the result of an extensive research project analysing the current standards and safeguards in a number of EU countries relating to the legal capacity of persons with intellectual disabilities and persons with mental health problems. It is of particular interest for its analysis of the CRPD.

## Update on House of Lords Select Committee on the Mental Capacity Act 2005

Since our July newsletter, there have been three further oral hearings before the House of Lords Select Committee on the Mental Capacity Act. The uncorrected oral evidence is available [online](#). This is a summary of the key themes addressed in the evidence at those hearings.

On 2 July 2013 the Committee heard evidence from:

- Toby Williamson, Head of Development and Later Life, Mental Health Foundation
- Sue Brown, Head of Public Policy Sense
- Dr Pauline Heslop, Team Manager of the Confidential Inquiry into premature deaths of people with learning disabilities (CIPOLD), Bristol University
- Dr Margaret Flynn, Independent Consultant and former Chair of the serious case review into Winterbourne View

On 16 July 2013, the Committee heard evidence from:

- Vanda Ridley, Communications Manager, Down's Syndrome Association
- Beverley Dawkins OBE, National Officer for Profound and Multiple Learning Disabilities, Mencap
- Hannah Barnett, Head of Operations, National Autistic Society
- George McNamara, Head of Policy and Public Affairs, Alzheimer's Society;
- Peter McCabe, Chief Executive, Headway
- Paul Farmer, Chief Executive Officer, Mind

On 23 July 2013 the Committee heard evidence from:

- Steve Gray, Director of Operations, Asist
- Elyzabeth Hawkes, Regional Manager, POHWER
- Jonathan Senker, Chief Executive, VoiceAbility

**The extent to which the Act has been embedded:** The majority of the witnesses considered that there remains work to be done in ensuring that the Act is properly understood across all sectors that need to apply it and by the professionals involved. Toby Williamson expressed the opinion that it is better understood by specialist services. It was also noted that in big decisions (such as medical treatment), the Act is better applied than where the decisions at issue are 'every day decisions'. A recurrent theme was that medical professionals are, generally, less well-informed than front line staff such as social workers. A number of witnesses commented on failings by GPs in particular. Dr Heslop identified that whether there is good or bad practice in a given hospital is patchy – it often depends on the individual rather than the institution.

**Training:** A recurrent theme was that additional and better training in how to apply the Act is required and that an advice line could assist professionals confronting difficulties in applying the Act to a specific case. A further point raised in the session on 16 July 2013 was the confusion that can arise where local authorities and/or NHS Trusts have their own guidance in addition to the Code of Practice. A number of witnesses highlighted that family members are often not aware of the rights under the Act. Hannah Barnett noted that there should be better training in terms of allowing people to make bad decisions rather than opting for premature intervention.

**Reform and review:** There were varying views as to the extent to which the Act requires reform as opposed to better implementation, on balance many witnesses felt that the framework is solid and the issue is with it being applied. Dr Heslop identified one specific recommendation for reform arising from the confidential inquiry into premature deaths of people with learning disabilities, namely a clarification of the definition of serious medical treatment. This was echoed by Beverley Dawkins. Elyzabeth Hawkes expressed the view that stronger language could be used in the Act in terms of when referrals are to be made – i.e. 'must' rather than 'should'. A number of witnesses felt that the Code could be revised to

provide greater clarity.

**Fluctuating Capacity:** The Committee directed questions to a number of the witnesses on how those with marginal and/or fluctuating capacity have fared under the Act. Toby Williamson noted again that in settings where the Act is less well understood (such as care homes and General Hospitals) there has been more difficulty in addressing fluctuating capacity. Beverley Dawkins noted that there can also be issues where there is an assumption of capacity which may not have fully considered the individual's ability to weigh up information (e.g. where there is a decision as to medical treatment). Those with borderline capacity were felt generally to be particularly vulnerable.

**Use of IMCA's:** The general consensus among the witnesses is that an increased use of IMCAs would be positive, as could an on-going role after the specific-decision has been taken. Toby Williamson noted that even where there are family members, an IMCA should be made available as those family and friends may be very unfamiliar with complex health and social care systems. Both he and Sue Brown noted the role IMCAs can play in facilitating communication more generally and in assisting care professionals as well as the patient. Beverley Dawkins reiterated that the differential use of IMCAs across the UK is a matter of concern.

The evidence session on 23 July looked closely at the role of IMCAs (from the perspective of providers). Elyzabeth Hawkes noted that there is currently no regulation as to qualifications and as a result, there are differences between IMCA services across the country. The broad consensus arising from the resulting discussion was that there need to be national standards rather than a national qualification. The potential benefits of joint training (with DOLS Assessors, BIA assessors and supervisory bodies) were canvassed. There was further evidence as to the challenges associated with commissioning and the increasingly restrictive arrangements in place.

**DOLS:** Toby Williamson expressed the view that the DOLS regime is complex, quite bureaucratic and difficult to understand. The difficulties in understanding the regime were also highlighted by

a number of the witnesses from the charity sector who also emphasised the extent to which family members do not understand the provisions. An issue in practice that was identified by Hannah Barnett is that safeguarding is often led by the provider until a problem has occurred. She felt that there should be greater clarity as to what is an acceptable standard (although the difficulties with fixing a benchmark were acknowledged).

The IMCA witnesses identified the difficulties associated with the rules being determined by case law and the need for clearer and better information, potentially through a revised Code. Jonathan Senker noted that the protections are high where they are engaged with but DOLS can be used as a 'sticking plaster' for poor community care planning.

**Lessons from high profile cases:** The Committee questioned the extent to which lessons about the injudicious use of restraint have been learned. Sue Brown noted that there are instances where the use of restraint is not subject to the review processes to which it should be.

Dr Heslop and Dr Flynn gave evidence in relation to the major reports which they had respectively been involved in. Dr Heslop identified one concern as being confusion as to who was taking the lead in best-interest decision making – a concern shared by a number of other witnesses.

Dr Flynn commented that the work of the CQC has not given any confidence that the hospitals are safe of that people's physical healthcare is given the priority it requires. She expressed the view that there needed to be more ruthless regulation by the CQC which enabled time to be spent with and observing patients. She expressed the opinion that we should not lose impetus from Winterborne view to implement better practices than the schemes currently being piloted by the CQC.

## Draft Guidance on Publication of Judgments

Accompanying his most recent "View from the President's Chamber," the President of the Family Division and Court of Protection has [published](#) a draft of proposed Guidance on the Publication of Judgment. The Guidance is intended to apply both to family proceedings and those in the Court of Protection, the President noting in the introduction to the proposed Guidance that:

*4. Very similar issues arise in both the Family Court (as it will be from April 2014) and the Court of Protection in relation to the need to protect the personal privacy of children and vulnerable adults. The applicable rules differ, however, and this is something that needs attention. My starting point is that so far as possible the same rules and principles should apply in both the family courts (in due course the Family Court) and the Court of Protection.*

*5. I propose to adopt an incremental approach. Initially I am issuing this Guidance. This will be followed by further Guidance and in due course more formal Practice Directions and changes to the Rules (the Court of Protection Rules 2007 and the Family Procedure Rules 2010). Changes to primary legislation are unlikely in the near future.*

In outline, the material proposals relating to the Court of Protection are that:

- in cases involving the personal welfare jurisdiction of either the High Court or the Court of Protection, where the judgment relates to the making or refusal of any order authorising a change of the placement of an adult from one with a family member to a home; any order arguably involving a deprivation of liberty; any order involving the giving or withholding of significant medical treatment; or any order involving a restraint

on publication of information relating to the proceedings, the starting point should be that the judgment should be published (and put on Bailii) unless there are compelling reasons why it should not;

- in all other cases heard in the Court of Protection by Circuit Judges, High Court judges and persons sitting as judges of the High Court, the starting point from now on is that a judgment (where available) may be published whenever a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that the judgment may be published taking account of the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression);
- A judgment should in any event be published whenever the court considers that publication is in the public interest, whether or not a request is made by a party or the media;
- In all cases where a judge authorises publication of a judgment: (i) public authorities and expert witnesses should be named in the judgment as published, unless there are compelling reasons not to; and (ii) anonymity in the judgment as published should not extend beyond protecting the privacy of the families involved, unless there are good reasons to do so.

The President has expressly stated that the draft of the proposed Guidance is intended for comment and discussion: views should be forwarded to his Legal Secretary, [Penelope Langdon](#).

## **Law Commission Discussion Paper on Insanity and Automatism in criminal law**

In July 2012, the Law Commission published a Scoping Paper to find out how the criminal

defences of insanity and automatism operate in practice. The responses to that paper have informed a Discussion Paper that has just been [published](#). The paper is of particular interest for its suggestion there should be a move to a defence of lack of criminal capacity, and for the discussion of how such a lack of criminal capacity overlaps with/differs from a lack of capacity as understood for purposes of the MCA 2005.

As the Law Commission puts it in their summary:

*We think that people should be exempted from criminal responsibility for an offence if they lacked all criminal capacity, which means that they could not have avoided committing the crime they are charged with because of a mental disorder or a physical disorder. In other words, people who totally lacked capacity not to commit the crime charged, because of a medical condition and through no fault of their own, should have a defence.*

This defence would extend to cover not solely those who would satisfy the diagnostic criteria for purposes of the MCA 2005, but also those suffering from physical disorder. A lack of criminal capacity would arise where a person lacked the capacity (1) to make a judgment rationally; (2) to understand that what they are doing is wrong; or (3) to control their bodily actions, and in each case would require that the incapacity be the result of a qualifying recognized medical condition. That capacity would (in similar fashion to the definition under the MCA 2005) be issue and time specific. Successfully establishing this defence would not lead to acquittal, but rather to a special verdict and disposal, for instance, by way of a hospital order.

Consistent with the scope of the new proposed defence, there is also a proposal that the defence of automatism should only be available where there is a total loss of capacity to control one's actions which is not caused by a recognised medical condition and for which the accused was not culpably responsible. A person who successfully pleaded automatism would be simply acquitted.



## Restrictions imposed by Northern Irish guardian did not amount to deprivation of liberty

*JMcA's Application* [2013] NIQB 77

*Guardianship – deprivation of liberty*

### Summary

This is a decision of the High Court in Northern Ireland but is of significant interest. Mr J McA had been under the guardianship of Belfast Health and Social Care Trust since 2004. He had a learning disability, diabetes, and a history of serious aggression and sexual risk. Using its powers analogous to those in England and Wales, the guardian required him to reside in supported accommodation which he shared with two other men. He was happy living there; participated in the running of the household; had complete freedom of movement inside; attended a day centre every week day; was a member of a garden centre group and drama group; had social and sporting interests, attending events across the United Kingdom; and attended a college course.

His supervision and support plan enabled him to walk to local shop without supervision twice per week, to go to the local shopping centre for around 30 minutes unsupervised once per week, and to go to the shops from the day centre unsupervised once a week if he needed to make a purchase. Aside from this, he could not leave the place of residence or the day centre unless accompanied by someone approved by his guardian. He could be brought back if he went absent without leave. He received one to one support for all community outings, sports trips and holidays and was isolated from his family.

Amongst the issues considered were whether the guardian's restrictions on him leaving the property at any time of his choosing and unaccompanied were beyond its powers, and whether his rights under Articles 5 and 8 ECHR were violated. These were determined on the basis that Mr McA had legal capacity to participate in the proceedings.

The High Court held that guardianship did not

provide authority to deprive a patient of their liberty. Parliament intended for guardianship not to restrict liberty but to create a flexible vehicle to maximise their freedom (para 27). A deprivation of liberty had to be distinguished 'from appropriate supervision and in cases of adults of impaired mental ability the distinction between these two things may be harder than expected to pin down accurately' (para 19). The court found [\*Cheshire West and Chester Council v P\*](#) [2011] EWCA Civ 1257 to be helpful in this regard (para 20).

The Court went on to rule that the power to return a person under guardianship to their required place of residence where they are absent without leave meant that there was an implicit power 'that the guardian can impose a reasonable and lawful condition on the grant of leave of absence, including a condition that leave, express or implied, must be obtained in advance of the person absents himself from the place at which he is required to reside'. The rationale was that otherwise the guardian would not know who was still 'residing' there. Thus 'The failure to have the requisite leave gives rise to the discretionary power to retake and return'. Thus, there was no reason 'why a condition cannot be imposed requiring a person to seek leave of absence before he/she departs the place of residence'; indeed such a condition was 'a de facto necessity' if the power to return was to have any meaning in practice (para 28).

The court went on to state:

*"[29] It seems to me that a Guardianship system which envisages use of coercive powers in relation to residents who are 'absent without leave' presupposes knowledge of /control by the Guardian of when leave is given and when it is not: i.e. the Guardian must make this decision in relation to the movements of every resident within his/her Guardianship. In exercising this discretion the Guardian should take account of the purposes of Guardianship which include supervision of the person subject to Guardianship in a manner which maximizes his/her freedoms whilst also protecting*

him/her from harm and protecting the interests of the wider community. Given this entire context it seems to me to be quite appropriate for the Guardian to impose such conditions on the grant of leave as are necessary to achieve all the purposes of the Guardianship arrangement. Such conditions may well include the imposition of a requirement that the person be supervised by a person appointed by the Guardian during periods of agreed absence. Of course all such conditions must be required by the individual circumstances of each case and must be proportionate and reasonable in light of those prevailing circumstances.

[30] Where a person subject to Guardianship feels that a condition or restriction is not warranted in his/her case he/she should have the opportunity to raise these concerns in an effective way and should be facilitated to explain why they say the disputed conditions/limitations are inappropriate. In the present case I am satisfied that the applicant did have such opportunities and they were rendered effective especially by the provision of an independent advocate to support the applicant at planning/review meetings.

[31] If a person subject to Guardianship flouted reasonable, proportionate and lawful conditions proposed by a Guardian then the Guardianship arrangement may cease to be appropriate since it is based upon consensus and co-operation. In such circumstances the guardian must take whatever steps are necessary to ensure that the person receives appropriate supervision and support via some other legal channel.

[32] Parents or those in loco-parentis will frequently impose restrictions on, for example, children who want to stay out later than is appropriate for them, or to associate with persons who their parents consider it would be better for them to avoid. Restrictions on time out and/or rights to associate with others do not result in a deprivation of liberty for these children: on the contrary, they are often the means whereby they are facilitated to enjoy their freedom to the fullest extent possible given the age, life experience and understanding of the children in question. Similarly, in the case of vulnerable adults the impositions of restrictions designed to protect them and those around them, are rarely likely to amount to 'deprivations of liberty'.

[33] Guardians who impose restrictions/supervision to protect those whom they are guarding are discharging their functions appropriately and are maximizing rather than limiting the freedoms of those subject to their care. It appears to me on the evidence that this is what happened in the present case and that, despite some complaints by the applicant about the level of restriction to which he was subject, the reality was that he generally accepted the conditions judged necessary by his support team and used the space within them to live as full and varied a life as would be available to most individuals with cognitive and other limitations comparable to his own. It appears to me on the evidence that this applicant is comparable to an older teenager who, whilst he may complain about some restrictions imposed by his parents, nevertheless generally complies and does not find the limitations sufficiently burdensome to wish to change his living arrangements entirely. Far from that being this case

*the applicant, who as we have seen, has a learning disability and a history of serious aggression, is a capable person co-operating with the day to day working of his care plan and he has never departed from the supervision in place. The fact that he may wish that some of the restriction on his freedom could be removed does not convert his position from one of compliance into one where he suffers deprivation of liberty."*

It followed that the measures used by the guardian were not unlawful.

### Comment

It has long been thought that the curious feature of guardianship is that the guardian can require the person to reside somewhere, can return them if they abscond, but cannot prevent them from leaving. According to this decision, which is not legally binding in English law but of persuasive authority, there is such a power, albeit implicit. The whole tenor of decision seems to envisage a heavily regulated regime of guardianship, with the person every movement being determined and monitored by the guardian. Whether potential local authority guardians would find this attractive or not remains to be seen.

Some will find surprising the Court's conclusion that these circumstances did not amount to a deprivation of liberty. Comparing the patient's circumstances with parental restrictions imposed on a stropky teenager is novel, perhaps even wayward. And the broad-sweeping statement that restrictions imposed to protect vulnerable adults and those around them are rarely likely to amount to a deprivation of liberty is a matter of deep concern. No doubt the relevance of purpose will be considered by the Supreme Court this October. The Strasbourg Court appears to be talking semantics. Previously purpose was relevant (*HM v Switzerland*). Then it was not (*Austin v UK*) but regard could be had "*to the specific context and circumstances surrounding types of restriction.*" But then, five months later, purpose was relevant (*Munjaz v UK*). No doubt all will become clear.

## Irish Assisted Decision-Making (Capacity) Bill

For a fascinating perspective on our MCA 2005, we would urge you to read the Assisted Decision-Making (Capacity) Bill that has just been [published](#) in Ireland. It is the fruit of some extremely extensive debates, particularly as regards the creation of a regime that properly complies with the UN Convention on the Rights of Persons with Disabilities. It is of particular interest in that:

- It follows the Scottish model of requiring interventions to be justified on the basis of necessity rather than the MCA 2005 model of decision-making in the best interests of the incapacitated;
- It provides express and detailed provision for assisted- and co-decision-making, to cater for gradations on the spectrum from full decision-making incapacity in respect of a particular matter to total incapacity;
- It seeks to place the authorisation of the deprivation of liberty within the scope of the Irish Mental Health legislation, rather than making provisions akin to those in Schedule A1 (it is, though, not clear from the Bill itself how deprivations of liberty in settings other than hospital settings are to be authorised);
- (for the nerdy), it gives express statutory authority to the Explanatory Report upon the 2000 Hague Convention for purposes of interpretation of the cross-border provisions contained in the Bill (and includes the entirety of the Convention as a Schedule).

It will be very interesting to see both how the Bill fares in debate during its legislative passage, and the supporting materials that are produced in due course. We would commend, though, the Bill to all those who are interested in thinking about what our legislation could look like, and it therefore comes at a timely point given the current scrutiny of the MCA 2005 by the House of Lords.

## Mark Neary's blog

We would urge you all to read the recent [article](#) published on the BBC News website by Stephen Neary's father, giving 10 jargon phrases used for his son. It is, we would respectfully suggest, a powerful reminder of the people behind the phrases used in the delivery of care to the vulnerable.

## Coming next month

Two cases that unfortunately arrived in our inboxes too late for us to include in this newsletter, but will be covered next time are:

- *Re Joan Treadwell*: another significant decision of Senior Judge Lush on the giving of gifts by deputies.
- *Re HS (Costs)*: a decision of District Judge Eldergill upon costs which will repay very careful reading by local authorities as a cautionary tale of the consequences of a failure adequately to grapple early with the forensic differences between safeguarding alerts and the requirements of COP proceedings.

We do not anticipate that the decision of the Supreme Court in *James v Aintree University Hospitals NHS Foundation Trust* will be out but if it is, we will be covering it in detail because it will be of considerable significance in its examination of the application of s.4 MCA 2005 to end of life treatment (and also because two of your editors, Tor and Alex, were involved!).

## Jordans COP Conference

Finally, and by way of shameless plug, Tor and Alex will be amongst the speakers at Jordans' annual Court of Protection Practice and Procedure Conference on 14 October 2013, a 10% early bird discount for which is available for booking by 9 August. The keynote speech will be by the President, Sir James Munby. Full details of the conference are available [here](#).





## Recording out of hours applications

A recent meeting of the High Court Users Group has flagged up a reminder of the importance of paragraph 12 of Practice Direction 10B (Urgent and Interim Applications), which provides that:

*"When a hearing is to take place by telephone, if practical it should be conducted by tape-recorded conference call and arranged (and paid for in the first instance) by the applicant. All parties and the judge should be informed that the call is being recorded by the service provider. The applicant should order a transcript of the hearing from the service provider."*

The view of the Group was that recording should happen in all cases: it is both good practice and also ensures that there can be no subsequent doubt as to what evidence/submissions were made to the judge. The Court does not at present have facilities to arrange conference calls with recording out of hours; it is therefore up to the Applicant's Counsel/solicitors to set up recording. If the worst comes to the worst and it is not possible to arrange a formal conference call by a commercial service provider, a fall-back (which should be noted expressly with the judge) is for the advocate to record the telephone call by way of recording facilities available on most smartphones.

Our next Newsletter will be out in September. 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](mailto:marketing@39essex.com).

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