



Welcome to the March 2023 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity and emotional dysregulation;
- (2) In the Property and Affairs Report: the Court of Protection divorce, refreshed deputy standards and relevant legislative developments;
- (3) In the Practice and Procedure Report: 'closed hearings' guidance and Forced Marriage Protection Orders;
- (4) In the Wider Context Report: covert medication guidance, an updated litigation capacity certificate, the malign influence of Andrew Wakefield, and changes afoot in Ireland;
- (5) In the Scotland Report: a Scottish perspective on the Powers of Attorney Bill and implementation of the Scott Report.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

This report also marks an important transition, Hayden J having served his term as Vice-President of the Court of Protection and being replaced by Theis J. We hope that our readers will join us in thanking Hayden J for his tireless service during undoubtedly the most tumultuous and difficult years of the Court's life; Alex will certainly never forget some of the meetings of the HIVE group that Hayden J convened in the early months of the pandemic, nor the speed with which Hayden J (together, we know he would want it to be emphasised, with the other members of the judiciary and the court staff), managed to recast the court and its practices to keep it going against all the odds.

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The picture at the top, "Colourful," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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Short note: the Court of Protection and divorce

In *D v S* [2023] EWCOP 8,¹ Hayden J confirmed (albeit in perhaps rather compressed form) that the Court of Protection has jurisdiction to determine whether it is in a person’s best interests to continue (and hence, logically) to bring proceedings for divorce. Sitting as a judge of the Family Court, he then proceeded to grant a decree nisi on the basis of that application. The confirmation of the Court of Protection’s jurisdiction here is important, as it has not previously been the subject of any reported modern decision. Both because of the timing of the judgment appearing, as this Report went to press, and because of its quite compressed nature, we will have further coverage of this next month unpacking the background and consequences.

[...] the guiding principles of the refreshed standards remain the same and continue to be aligned with the Mental Capacity Act.

The standards are now more focused, built around eight core areas which reflect the duties and responsibilities of all deputies. Much of the material in the original standards has now been re-shaped and included within the supporting guidance.

What does this mean?

All deputies, including lay deputies, will now be supervised against these refreshed standards. The standards can be used as a checklist to help deputies make sure they are thinking about all the relevant areas of their role."

Refreshed deputy standards published

The Office of the Public Guardian published [refreshed deputy standards](#) on 13 February 2023. As the accompanying [blog post](#) makes clear:

To this end, there are now four sets of standards (and accompanying guidance): (1) for all deputies; (2) for lay deputies; (3) for public authority deputies; and (4) for professional deputies.

¹ Neil having acted in the Court of Protection proceedings, he has not contributed to this note.

Powers of Attorney Bill update

Continuing its rapid progress through Parliament (see our [February report](#)), Stephen Metcalfe's Bill passed [Committee stage](#) in a single day on 1 March. No amendments were proposed. Adrian Ward addresses a number of Scotland-specific points that arise in the Scotland section of the Report. It is perhaps worth flagging here that, despite the impression that Mike Freer MP (the Parliamentary Under-Secretary of State for Justice) seems to have had, it appears from the Hansard report that the real thrust of the point being made Patrick Grady (SNP) was not so much about the impact of the Bill in Scotland, but about whether it would be possible to use this Bill as a vehicle to enable easier mutual recognition of powers of attorney throughout the United Kingdom (as to which, see also Alex's walkthrough of the Bill [here](#)).

Small payments scheme consultation: response now published

The Ministry of Justice consulted in 2021-22 on a potential mechanism to enable families seeking access to small funds belonging to loved ones who lack mental capacity. A new streamlined process would allow withdrawals and payments from cash-based accounts – up to a total value of £2,500 – without the need to get permission from the Court of Protection.

The impetus for this consultation came about in large part because of issues relating to accessing Child Trust Funds held by banks in the name of individuals who have now turned 18 and lack the capacity to make decisions about managing their property and affairs. Alex discusses this issue – and the legal complexities to which it gives rise – [here](#).

The consultation response has now been [published](#). In headline terms, the proposal for a new statutory scheme is not being taken

forward, but (a) the reasons why this is the case; and (b) what Government intends to instead are both important. Both are set out in the Executive Summary, which in material part reads as follows:

8. While respondents felt there was a need to make improvements to the current CoP application process, there was little consensus on proposals for the design of the small payments scheme, the safeguards required, and withdrawal limits. Some respondents suggested adding features into the scheme that would have led to a very similar process to the existing CoP one.

[...]

MCA principles

10. Through the consultation responses, it became clear that the lack of access to small payments has arisen due to issues with operational requirements in the current CoP application process and a lack of awareness of the MCA, rather than objections to the principles of the MCA. Respondents were concerned about the length, number and complexity of CoP application forms, the perceived costs of making the application, and the time taken to receive the court order. Adding to this, the worry and misapprehension that they will have to physically attend court and the feeling of being 'judged' may lead to people deciding not to apply for the legal authority they need. There was also a lack of awareness of fee remissions and exemptions that applicants could be eligible for.

Awareness of the MCA

11. Some respondents pointed out that a lack of awareness of the MCA has made it difficult for people to understand the need to have legal

authority to access funds for the people they care for. For example, carers of children or young adults who lack capacity will need to have authority to make decisions on their behalf once they turn 18. But it's become apparent that some parents and caregivers may not be adequately informed about the steps they must take to make decisions on their child's behalf when they reach adulthood. Government recognises that this may be an issue particularly for families who are used to making decisions on behalf of their child who, by the nature of their vulnerability, may not encounter the usual milestones of the transition to adulthood, such as starting work or leaving home for university. This has left many parents feeling shocked and frustrated that they cannot access their children's accounts once they reach 18.

12. Government considers that this lack of awareness – firstly of the need to obtain legal authority to access the funds of another adult, and secondly of the MCA more generally – is the root cause preventing people from accessing funds on behalf of another individual.

Operational barriers

13. Responses revealed that the causes of people not being able to access small-value assets are operational barriers in the current court application process. As explained, respondents commonly cited concerns about the length, number and complexity of CoP application forms, the perceived costs of making the application, and the time taken to receive the court order. Government considers that the best way to address these is to work with the CoP to improve the process in property and affairs applications.

The way forward

14. Court forms and processes are the responsibility of the judiciary, and improving service delivery and addressing concerns about the accessibility of the forms is a priority. This is exemplified by the steps that the CoP has taken with the changes in the application process for property and affairs deputyship orders. Over the past year, the CoP has been piloting the use of a new digital process and revised their notification requirements which has significantly reduced processing times (from 24 to 8 weeks). The digital process was rolled out to professional court users in January 2023 and the general public in February 2023. Part of this change involves allowing users to complete some of their court forms electronically and digitally submit remaining paperwork. To facilitate the changes, both digital and paper versions of the court forms are being reviewed to streamline and simplify content and remove duplication wherever possible. This is an iterative process, and forms will be tested and continuously reviewed to make improvements based on feedback received.

15. These changes should make the forms more accessible and easier to complete, while also reducing application processing times. Government will obtain regular reports from the chief executive of HM Courts and Tribunals Service to keep the progress of these improvements under review.

16. To address the lack of awareness of the MCA, the Ministry of Justice will embark on a programme of awareness raising. We will engage with other government departments, financial service providers and charities so that the general public is aware of the need to obtain legal authority for adults

lacking capacity, and in the case of 16/17 year olds who lack capacity, to do so in good time before they reach 18. Parents and carers of individuals who lack capacity interact with many different services and agencies, such as the Department for Work and Pensions, special educational needs and disabilities schools, banks and social workers. Engagement and joint working with these groups will be important to ensure that parents and carers have access to the support and information they need to assist the person lacking capacity.

Conclusion

17. The Ministry of Justice believes that the CoP digital application process and raising awareness of the MCA will address the root cause of the problem (operational barriers and lack of awareness) and resolve many of the challenges raised by respondents to the consultation. As a result, the Ministry of Justice will focus on addressing the key barriers to accessing payments, and not seek to develop a small payments scheme. Taking these measures will ensure that we protect the legal principle that an adult must have proper legal authority to access or deal with property belonging to another adult, while ensuring that those who need to obtain that legal authority can do so in a straightforward and timely way.

Comment

As discussed here, Alex (and before him the Law Commission back in the 1990s) had significant reservations about the small payments scheme being proposed, and it is not surprising that the outcome of the consultation produced a choice: (1) recreate (in effect) a mini-Court of Protection; or (2) dispense with the core principles of the MCA 2005. In the face of this choice, to recommit to the principles of the MCA 2005 –

and, also to commit to (much needed) public education appears to us to be by far the best course of action, so long as it is also combined with giving the resources to the Court of Protection that it requires in order to discharge its vital functions in a timely fashion.

In the interim, the following may be of assistance:

1. The [myth-buster](#) produced by the National Mental Capacity Forum entitled “My child has reached 18 and can’t make their own decision: What should I do?”
2. A sample [COP1A](#) which illustrates the sort of supporting information required to make an application for deputyship in the case of person with the benefit of a Child Trust Fund.

Separately, and noted almost in passing in the consultation response, it is clear that some banks / financial institutions have operated ‘informal’ or ‘exceptional’ policies to release CTF monies held on behalf of (now) adults to family members. Given the ringing (and accurate) endorsement in the consultation response of the “*well-established legal principle that an adult must obtain proper legal authority to access or deal with the property belonging to another adult,*” we hope and anticipate that those institutions will consider carefully the basis upon which they are releasing such monies, and the advice that they are giving to the family members to whom they releasing it.

Capacity – the need to engage one’s professional brain

Two recent cases have emphasised the need for professional curiosity.

In *Boult v Rees (Re Estate of Tilly Clarke)* [2023] EWHC 147 (Ch), and in the context of a doubts about the testamentary capacity of a testatrix identified in the judgment as “Tilly,” Zacaroli J

held as follows:

72. The evidence of an independent lawyer, who is aware of the relevant surrounding circumstances, has taken instructions for the will, produced a draft, and met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity: *Hughes v Pritchard* [2022] EWCA Civ 386, at 79.

73. That is not the case here. Mr Greenway's evidence, given some nine years after the event, that he had "no doubt" as to Tilly's capacity, is given in circumstances where, contrary to the "golden rule" (see *Re Simpson* (1977) 121 Sol Jo 224, per Templeman J) he took no steps to satisfy himself as to Tilly's mental capacity at all. There is no evidence that he was aware of any of the surrounding circumstances, including Tilly's diagnosis of cognitive impairment.

74. In the absence of any attendance note, or any other aid to memory other than the 2013 Will itself, and in circumstances where he met Tilly only once and her will was one of many thousands he drafted over his career, he says that he nevertheless recalls the meeting with Tilly because she was adamant that in the event of Roger's death her estate should go to both Danny and Monica. I accept that this was evidence honestly given, but this appears to be the only thing he remembers about the meeting. He did not give any details as to Tilly's demeanour, or any aspect of her behaviour that might bear on her ability to understand what she was doing, the extent of her assets or the extent of claims upon her.

75. The most that can be said is that nothing alerted Mr Greenway to the need to take steps to satisfy himself of Tilly's mental capacity. That is at least some evidence in support of the conclusion that Tilly had testamentary capacity, but in the absence of any evidence as to his observations of Tilly on the day, it provides only limited support.

On the facts of the case, and perhaps somewhat unusually, Zacaroli J found that, whilst there were doubts as to whether Tilly had had capacity to make a will at the relevant time, they were not, in fact, sufficient to shift the evidential burden on the propounder of the will to establish that it was valid.

In *SRA v Hunjan* (5 December 2022), the Solicitors Disciplinary Tribunal ("SDT") took steps to discipline a solicitor who acted in a number of problematic property transactions, including one in which she failed to take reasonable steps to ascertain the mental capacity of the vendor. This action, in addition to the sale of a property in circumstances which intentionally thwarted a former co-owner's will amounting to "manifest incompetence", and the sale of a third property in circumstances where Ms Hunjan acted for both a client and a lender – i.e. both sides of the transaction – led to a finding of professional misconduct resulting in a fine of £15,000 plus costs of £23,650.

In an agreed outcome – i.e. a judgment agreed by the parties, rather than following a contested tribunal hearing – the SDT recorded that in the summer of 2017, solicitor Ms Sonia Hunjan acted for an elderly client, Client A in the sale of her property.

Client A having attended Ms Hunjan's offices in the company of her two sons in June 2017, Ms Hunjan recorded her as stating that she shared a bank account with one of her sons and wished the proceeds of the sale of her property to be paid into

their joint account. Client A signed a form of authority to that effect.

Three weeks later on 4 July 2017, Slough Borough Council wrote to Ms Hunjan, advising her that Client A was considered as *“lacking capacity to enter into a formal agreement”* regarding care home charges; that these were outstanding and were subject to *“Court of Protection involvement”*. Ms Hunjan was also notified by Slough Borough Council that *“the Council is putting an application in to the Court of Protection possibility (sic) this week if not already presented by our legal team”* (paragraph 11(c)).

These facts and clear indications notwithstanding, two days later on 6 July 2017 Ms Hunjan facilitated the simultaneous exchange and completion on the property which finally completed on 12 July 2017.

The following month, Slough Borough Council wrote again to Ms Hunjan asking whether or not she had had cause at the time of sale to believe that Client A may not have had mental capacity to make a decision in relation to the sale of her property and asking what steps she had taken to ensure that she *“understood the significance of the decision made”* (paragraph 16). The council noted that Client A had been upset on learning her property had been sold and could not recall having advised Ms Hunjan to sell it.

In response to the questions asked, Ms Hunjan advised (as recorded at paragraph 17):

“[Client A] came to us with her two sons and said that her property was being repossessed and that she needed to sell it.

3. We did not believe that there was any issue with her mental capacity.

4. We were not aware that she was in long term care. She did not inform us that she was in care and we found out when you wrote to use.

5. We do not understand how [Client A] can say this as she did not inform us

that she had any mental problems and we were not aware of any...”

The SDT noted that the emails sent to Ms Hunjan by the council put her *“on notice of the possibility that Client A lacked the capacity to make decisions about her property and affairs, including decisions about the sale of her home”* (paragraph 12) and that *“if the Respondent lacked such capacity then (i) decisions about whether to sell her home could only be taken in her best interests and by an appropriately authorised decision-maker: s.4 Mental Capacity Act 2005; and (ii) there may have been consequential impacts upon the validity of the sale.”* The SDT observed that *“before proceeding further with the sale, the Respondent ought to have made enquiries regarding Client A’s mental capacity, which she could have done (for example) by contacting Client A, Client A’s sons, SBC, or the care home”* (paragraph 12).

The case is an interesting illustration of the perils of relying on the presumption of capacity to the detriment of a vulnerable client. Solicitors acting for clients who they suspect may lack capacity must be aware of their obligations to act appropriately and the need to satisfy themselves that potential clients retain the requisite capacity to instruct them. They should be aware of both the Law Society and SRA guidance to this effect. The presumption of capacity is not an assumption to be followed blindly: it cannot be hidden behind in order to avoid carrying out necessary and important assessments and safeguards that apply to vulnerable clients.

Court of Protection Court Users Group (Property and Affairs)

The minutes from the Court of Protection Court User Group (Property and Affairs) meeting of 18 January 2023 are now available, and can be found [here](#).

Short note – clearing up a ‘common confusion’ about the Trustee Act

By publishing an order with a substantial number of recitals, Senior Judge Hilder in *Re SG* [2022] EWCOP 55 (an order made on 23 December 2022 which has only recently appeared on Bailii) sought to resolve a common confusion as to the meaning and effect of a court-approved trust deed relating to land administered by a deputy.

The key recital (10) reads as follows:

Both HM Land Registry and the Public Guardian agree that:

a. the Trustee Act gives trustees authority to sell property which is distinct from any authority given in a deputyship appointment;

b. the process of considering a Trustee Act application to the Court of Protection is sufficient to ensure scrutiny by the Court of arrangements which may lead to sale of property in which a protected person has a beneficial interest;

c. an order made pursuant to the Trustee Act is sufficiently clear "further authority" for trustees to sell property even when the deputy is prohibited from selling the property;

d. in circumstances where there is error or lack of clarity in a trust deed, HMLR may seek further clarification.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).



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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



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

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

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

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in 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 Report in the future please contact: marketing@39essex.com.

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