Journal of Elder Law and Capacity

2020 | ISSUE 1

THE LAW SOCIETY OF NORTHERN IRELAND

Journal of Elder Law and Capacity

Contents

The **Journal of Elder Law and Capacity** is a source of information for a range of practitioners dealing in all aspects of elder law and capacity. Published by the Law Society of Northern Ireland, it aims to have UK and international appeal with coverage on legal issues relevant to elder clients, clients with capacity issues, their families and carers.

Subscriptions and subscription cost
2020 annual subscription costs £90. The annual subscription period runs from January to December (2 issues per annum.)

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ISSN 2632-3923

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Published by the Law Society of Northern Ireland, 96 Victoria Street, Belfast BT1 3GN

Estate planning for digital assets on incapacity and death

Andrew Kirkpatrick, TEP, Solicitor
Head of Non-Contentious Business,
Law Society of Northern Ireland

The vast majority of people now have a digital aspect to their lives, whether it is on-line banking, social media or shopping accounts and it is important that these assets are dealt with appropriately either upon incapacity or death. The purpose of this article is to identify areas for consideration for practitioners.

Introduction

The answer to the question of what to do with digital assets upon incapacity or death[1] raises a whole host of legal issues around ownership, privacy, access to usernames and passwords and the duties of personal representatives when administering estates, particularly when those duties may not fit neatly in to the traditional succession law or property law boxes. The situation is also complicated by the fact that jurisdictional issues are not always clear cut and there is no joined up coherent international law on the subject.

Research by YouGov published in November 2019[2] found that 7% of those surveyed want their social media profiles to remain online forever. Views were split between those who want their information deleted from social media entirely (25%) and those who want it to be downloaded, taken off-line and given to family and friends (26%).

The potential impact of not dealing with your digital estate was highlighted in Canada in December 2018 when the CEO of Canada's biggest cryptocurrency exchange, Quadriga CX, died suddenly at the age of 30. The problem was that he was the only person who held the passwords required to gain access to the company's digital wallets. These wallets held around

[1] I refer in this article to assets on death for ease of reference. The issues are generally the same for incapacity and should be read accordingly. There are some specific issues for incapacity but these are highlighted separately.

[2] https://yougov.co.uk/topics/lifestyle/articles-reports/2019/11/01/what-do-brits-want-happen-their-data-and-social-me

USD 190 million of clients' assets which were on encrypted hard drives so that, without the passwords, they could not be accessed and therefore all the assets were lost. Since then other issues have emerged with the running of the company but the principles remain in relation to planning for the worst-case scenario.

Definition

The logical place to start is with a definition. Unfortunately in the UK there is no statutory definition of a digital asset nor, to date, is there any case law that assists in the definition. There is also no legislative mechanism to specifically deal with accessing or managing digital assets. The international position is inconsistent in terms of its legislative treatment of digital assets and there can also be inconsistency in the terms and conditions of use by the individual service providers. The United States enacted the Uniform Fiduciary Access to Digital Assets Act in 2014 and in 2016 the Uniform Law Conference of Canada published its model legislation "The Uniform Access to Digital Assets by Fiduciaries Act" but both jurisdictions are ahead of the UK in doing this.

Very simply though, a digital asset can be defined as any asset accessed or held on-line. It can include files stored on digital devices such as laptops, tablets and smartphones as well as files stored in the cloud. Examples of digital assets are;

- e-mail accounts,
- digital music accounts such as I-Tunes,
- digital photographs and videos,
- software licences,
- blogs,
- social media accounts such as Facebook, Twitter or LinkedIn,
- on-line bank accounts,
- business information lists such as client details, on-line share dealing and investment accounts,
- domain name registrations,
- on-line shopping and auction accounts such as Paypal and eBay,
- on-line loyalty cards such as Airmiles and Nectar points,
- bitcoin,
- computer games where a person's avatar can be sold for money,
- on-line gambling accounts; and
- YouTube accounts.

There are many other examples but this gives an indication of the variety of assets that are included within the definition.

In the absence of any specific legislation on the issue, we must therefore fall back on first principles. Under Article 35 of the Administration of Estates (NI) Order 1979 it is the responsibility of the personal representative to collect and get in the estate of the deceased and administer it according to law. The personal representative is under an obligation to make due enquiries as to the extent of the estate and this must include on-line assets. There is no magic to this simply because the assets are on-line. The challenge for the solicitor and the executor is that the method of administering the estate is changing with the majority of information now only being held on-line.

The difficulty with digital assets is whether they constitute property that can be passed upon death or whether they are only rights which die with the owner. Some are obvious such as on-line bank accounts but others such as email accounts will depend upon the terms and conditions of the individual internet service providers. Some will terminate immediately on death and some can be accessed by executors.

The risk of identity theft and fraud is a real problem given the number of on-line scams circulating. Deceased or incapacitated clients' accounts are particularly vulnerable to this type of activity.

One other complicating factor here is Brexit, as the current data protection regime is based upon the UK being in the EU. When the UK fully leaves the EU there may be issues with client data then being held under a different regulatory regime which may make it more difficult to access.

Types of Asset and Potential Value

The Law Society of England and Wales have produced a helpful Practice Note on the issue in which they analyse the types of digital assets in to three categories. These are:

1. Financial.
2. Social.
3. Sentimental.

1. Financial assets

Financial assets would include bank accounts, credit cards, on-line share dealing and investment accounts, on-line shopping and auction accounts such as Paypal and eBay, domain names, websites particularly with advertising revenue, gambling accounts and cryptocurrencies such as bitcoin.

Cryptocurrencies are a new digital currency and payment system. Bitcoin is the most recognised brand but there are others. Transactions take place between users directly without an intermediary such as a bank. These transactions are verified by the bitcoin network and recorded in a publicly visible decentralised electronic register using technology known as blockchain. Transactions are verified through consensus amongst users and means that it can be very difficult to defraud.

Bitcoin can be used and exchanged for other currencies, products and services in both legal and black markets. One problem with using it as a currency is that it is not particularly good as a store of value as its valuation has been very volatile and so it has been used more as an investment tool than a currency for the most part to date.

Bitcoin and other cryptocurrencies do have their controversies but practitioners do need to be aware of their existence as it will become an increasing issue in the administration of estates in the coming years.

2. Social assets

Social assets include sources such as Twitter, Facebook, Instagram, LinkedIn, blogs and journals.

Social assets are generally considered to be assets which you can bequeath by will or which your attorney will have the right to access. The legal status of what is put on social media sites in particular is not entirely clear. If you upload a picture, you may well retain the intellectual property rights for that picture but the social media provider may have certain controls over the use of that image on their site.

There can unquestionably be value in photographs, blogs, journals and books which are held on-line. There can also be income streams from sources such as YouTube channel advertising which may continue after death and which may be transferrable to beneficiaries.

3. Sentimental assets

Sentimental assets would include assets such as family photos, an I-Tunes account and a Flickr account.

Generally the position with these assets is that they do not fall within the estate. They are operated under a personal licence which cannot be passed to any other person. Apple and Amazon restrict access to music or files in their accounts to the specific user and the terms and conditions of the individual sites should be considered to ascertain what the executor or

attorney can or cannot do with the asset. There are also some grey areas such as the Family Share feature within the Apple products. Family Share means that a user can give nominated people access to music or games that they have downloaded from Apple without having to pay for it again. Given that I have 4 children in my house who each want what the other 3 have, this feature does save me a considerable amount of money! Legally though, there is a question mark over the status of anything that is shared. Does the licence then attach to the other parties or does it die with the user?

Sentimental assets are sometimes described as digital records rather than digital assets to distinguish them as generally not being within a deceased's estate.

There may not be any particular financial value to the estate but there can be emotional value to the client with, for example, valuable family photos. If the solicitor can deal with these assets in a knowledgeable and pro-active way then this is excellent client care even though there is no value in the asset that could be returned on the IHT return.

Pre-Death or Pre-Lack of Capacity Considerations

So now the range of digital assets has been identified, next I will consider the mechanics of how to advise a client at the pre-death or pre-incapacity stages.

The Law Society of Northern Ireland has produced a Personal Asset Log[3] which deals with all assets, not just on-line assets, but it is a good starting point for taking instructions. It is not intended to be a definitive list of all assets but to give prompts on the types of asset. It was published with two purposes in mind, first for use as an aide to a solicitor taking instructions and secondly to give the client to hold with their own papers and to update themselves regularly. It was considered that the solicitor can, if they wish, hold a list of assets but that they should not hold a list of passwords as the risk of holding these was too great. The client should be advised, therefore, to hold a list of passwords in a safe place and that the list should be reviewed and if necessary updated regularly. The client will also want to consider whether their executor can access this list before death or only after death.

It is possible for a client to appoint a separate digital asset executor if they feel that the executor for the remainder of their estate would not be technologically minded enough to deal with their digital assets. This is very much a developing area.

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[3] https://www.lawsoc-ni.org/personal-asset-log

The increasing number of digital assets within estates also leads to the possibility of a wider pool of potential executors than was previously the case. Previously, clients may have been reluctant to appoint family members who lived overseas, however with increasing digitisation, there are not the same practical barriers to that type of appointment.

Another issue that may arise when completing the Personal Asset Log is that if, for example, the solicitor taking instructions for the wills of a married couple, one of the parties may not want to divulge to their spouse either that they have accounts with on-line gambling companies or the amount of their debt to those companies.

If the client has a business, the solicitor will want to take instructions on how to split the business and personal on-line assets upon death. For example, if the client receives both work and personal emails to their phone then they will need to be clear on who can access that phone after their death as there may be issues arising under the General Data Protection Regulations ("GDPR)[4] if confidential client details are viewed by unauthorised third parties. The solicitor will also want to ensure that the client links in with their business' disaster recovery plan in the event of a sudden loss of a key staff member or an IT disaster. The client will have a view on how they would want their business run in the event of their death or incapacity and the solicitor will need to move quickly as any business interruption could severely prejudice the value of the business.

In relation to social digital assets, the solicitor may want to take instructions on what the client wants done with their social media accounts after death. The terms and conditions of all the digital account providers should be checked as some will allow the account holder to nominate a third party to have access to their account in the case of an emergency. For example, Facebook has a Legacy Contact feature which allows the nomination of a third party who will not get full control of the deceased's account but they will be able to change their profile picture, approve new friends and write a final status update. Facebook also have a Memorialisation feature and clients may wish to give instructions on how they want this to be dealt with. This is perhaps the 21st century version of families arguing over the inscription on the headstone! The nominated third party may also wish to turn off the automatic birthday reminders for the deceased person as this can be upsetting for other family members. Facebook announced in April 2019 that it is now using its technology to try to prevent these types of notifications being sent to a deceased person's friends and family.

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[4] EU 2016/679

The case of *Sabados v Facebook Ireland*[5] in the English High Court highlights some of the difficulties this area. Ms Sabados obtained an Order against Facebook for it to disclose who had instructed it to delete the account of her late partner. The couple had been in a long-distance relationship for a number of years and they had frequently communicated through Facebook Messenger. After his sudden death, someone unknown to Ms Sabados contacted Facebook and asked it to delete his account, which it did.

In relation to sentimental digital assets, the solicitor may wish to discuss with the client that they do not actually own the content and it may be prudent to back up or take a hard copy of anything that is particularly valuable to them.

Post-Death or Post-Loss of Capacity Considerations

After death or after the client loses capacity, the ability of the executor or attorney to access the assets is perhaps where the main difference lies between digital assets and the more traditional types of asset.

The first question to ask is whether the deceased or the patient has a Personal Asset Log or other inventory of their assets and if so, whether it is up to date.

The second question to ask, and there is an urgency to this, is who has the physical control of the hardware? Where is the phone, the laptop or the tablet and who has access to them? Are they locked with a pin number or does someone else have thumb or finger-print recognition access? Are there any steps necessary to protect assets from being deleted or changed by third parties which have unauthorised access? There can be immense difficulties in recovering information which has been deleted and there could be a situation where a disgruntled family member could cause a lot of problems if they were to get hold of any of the deceased's devices. The executor may wish to consider changing passwords as soon as possible after death to guard against any third parties getting access.

The increased threat of cybercrime, identity theft and various scams needs to be considered by executor. These threats can come from unknown third parties such as international criminal gangs but can also come from family members who are accessing the deceased's accounts unlawfully. This is the on-line version of the family member who has access to the elderly person's bank cards and uses them to lift cash at an ATM. The executor should

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[5] [2018] EWHC 2369 (QB)

consider what safeguards they can put in place to stop this happening but this needs to be done urgently after death.

There is also an urgency if the deceased was running a business at the time of their death. There can be a major impact on the business if emails cannot be accessed, orders not processed and payments not sent or received. Care should be taken with this however to ensure that there is no breach of GDPR when dealing with the clients of the business.

One issue that does arise is the question of how to obtain a probate valuation of the digital assets within the estate. Things such as bank accounts are straight-forward however how does the executor value the deceased's interest in, for example, website domain names, blogs which perhaps have advertising revenue and computer game avatars? Obtaining a professional valuation may prove particularly difficult for these assets. The solicitor will also need to consider whether all of the digital assets are actually chargeable to tax and if so, to which tax. At the moment the law is not entirely clear on what is chargeable and what is not.

In December 2019, HMRC published guidance on the tax treatment of cryptoassets[6]. Their view was that they did not consider cryptoassets to be currency or money but described them as different types of token. If the holder of those tokens was conducting a trade then income tax would be chargeable on their trading profits in essentially the same way that share trading is taxed. If however the holder was not conducting a trade but rather holding it as a personal investment then they would be liable to pay capital gains tax when they dispose of their cryptoassets. From an IHT perspective, the HMRC guidance states that cryptoassets will be property for the purposes of IHT and therefore chargeable.

This is a new area of law and will not become entirely settled until the various guidance documents have been challenged and there is some jurisprudence to rely upon.

Jurisdictional issues as to where the data for the asset is held also need to be considered. This is a particular problem if any of the information is held in the cloud by a service provider which is outside the European Economic Area. GDPR prohibits the transfer of personal data to countries outside the EEA that do not offer adequate protections. There may be difficulty accessing that data and there may be concerns that the necessary support and maintenance facilities are not in place to enable the retrieval of the data

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[6] https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals

by the executor in a timely manner. Clearly this position will be made even more complicated by Brexit.

The current international position is inconsistent and causes considerable difficulties in this area. There was a reported case in January 2018 in *Massachusetts of Ajemian v Yahoo*[7]. The siblings of the deceased had been appointed executors and wanted access to the deceased's Yahoo email account. The court held that the Statute in that jurisdiction did not prevent disclosure and indicated that, although it did not rule on whether the terms of use may prevent disclosure, it commented that if they had been asked to consider it, the result would have been the same.

A similar US case was reported in February 2019, the case of *re Scandalios*[8]. The deceased's husband sued Apple for access to the deceased's Apple account and in particular to access the photographs. The Court divided digital assets in to what it considered electronic communications and non-electronic communications. In their view electronic communication would only be legally passed to the executor by will but held that photographs were non-electronic communications and were therefore released by the Court to the deceased's husband.

If full access is not given by service providers then it could be envisaged that a family would want to take an action to get that full access if, for example, a family member had committed suicide but not left a suicide note. There may be messages or posts on the deceased's social media that may help to explain what happened and which the family will want to read.

There was a case in *Germany*[9] where the parents of a deceased 15 year-old girl had asked Facebook to allow them to access her account to see if she was being bullied. The girl had died after falling in front of a train and the parents wanted to find out whether her death was suicide as a result of any such bullying. Facebook had refused their request on the basis that the telecommunications secrecy law precludes heirs from viewing the communications of a deceased relative with a third party and that if the conversations were revealed then this would breach the privacy of the other person involved in the chat. The case went all the way to the German Federal Court which ruled that under German law there was no reason to treat digital content differently to paper documents, like a diary, and that the parents could inherit the contract between their child and the social media platform.

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[7] *Ajemian v Yahoo* 84 N.E.3d 766 (Mass. 2017)
[8] *re Scandalios* (2017-2976/A N.Y. Surr. Ct. 2019)
[9] *The German Federal Court of Justice (Case no III ZR 183/17)*

In conclusion, this is a developing area of law and one in which clients will require a careful steer. It will only increase over time and solicitors should be alert to the issues involved.

Determining capacity – are three heads better than one?

Carina Schacherl, MSc[1]
and
Alex Ruck Keene, Barrister[2]

In this article the writers test whether there is a better approach than the model which places the ultimate legal determination of decision-making capacity in the hands of one judge as happens in England and Wales (as well as Scotland, the Republic of Ireland and, in some circumstances, Northern Ireland).

Introduction

In many legal systems, including those in the United Kingdom, mental capacity is the touchstone of legal capacity. In other words, a person who lacks mental capacity to make a specific decision will not be recognised as having the legal capacity to make it. That model is challenged on the international plane by the Committee on the Rights of Persons with Disabilities. Although the mental capacity model is likely to remain dominant for the foreseeable future absent a convincing substitute[3], the challenge from the CRPD Committee means that there has been an increasing – and proper – focus on the mechanisms for assessing and determining mental capacity. Using the Court of Protection in England & Wales as our example, we ask whether, in fact, asking one person to act as judge of this intensely important issue is to ask the impossible. We propose and examine the potential for a tripartite model, including a medical and an ethical member alongside the legal member. And we examine the natural – and important – experiment under way in Northern Ireland now that the Mental Capacity Act (Northern Ireland) 2016 is partially in force, providing a route of challenge to deprivation of liberty authorisations to a Tribunal which includes three members and is required, amongst its other tasks, to consider the individual's decision-making capacity in specific domains.

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[1] MSc. Mental Health, Ethics and Law, King's College London; Research Associate, The Boston Consulting Group

[2] Wellcome Research Fellow and Visiting Lecturer at the Dickson Poon School of Law, King's College London; Visiting Senior Lecturer, Institute of Psychiatry, Psychology & Neuroscience, King's College London; Research Affiliate, Essex Autonomy Project, University of Essex

[3] For a discussion see Alex Ruck Keene, 'Is mental capacity in the eye of the beholder?' [2017] Advances in Mental Health and Intellectual Disabilities 11, 2.

Mental capacity and the Court of Protection

In England and Wales, most decisions about whether a person has or lacks mental capacity in specific regards are governed by the Mental Capacity Act 2005 ("MCA"). While the majority of these decisions are made without the involvement of any judicial body, the most complex cases come in front of the Court of Protection ("CoP") and are decided by a single judge. Cases coming before the CoP are heard by three tiers of judges, depending on the case's complexity. The tasks of this specialist court can vary broadly, a rough estimate depicts that merely 5% of all cases coming before the CoP are contentious cases regarding mental capacity and best interests.[4]

Once a case comes before the CoP, it is the judge's responsibility to determine 'whether an adult [lacks] capacity, and if so, [to make] decisions (…) that are in his best interests.'[5] To do so, the CoP applies the mental capacity test set out in the MCA. The court will require evidence that the person (known as "P") lacks capacity, which can be provided by a wide range of individuals: a medical practitioner, psychiatrist; an Approved Mental Health Professional (a specialist professional, usually a social worker); a social worker; a psychologist; a nurse, or an occupational therapist. The court can direct the provision of expert evidence, and, usually, expert evidence as to capacity will be given by a psychiatrist.[6] Interestingly, P is not automatically a party to the proceedings. However, the relevant court rules require that the judge has to determine whether and how P should participate before the proceedings. In practice, P is joined to the proceedings in more than 90% of the cases, however their direct participation only occurrs in an estimated 33% of reported cases,[7] which suggest obvious potential for improvement.

When determining P's mental capacity, the CoP judge has full discretion within the statute, allowing them to deal fairly and justly with each case. Discretion is the tool required to allow the court to deal with each case appropriately, but this can come at the cost of the uncertainty of outcome of each case and the uncertainty concerning the balance the judge will strike between potentially competing values.[8]

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[4] A more in-depth analysis of the CoP's caseload is provided in Alex Ruck Keene et al., 'Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection' [2019] IntJ LP 56.

[5] *Cheshire West and Chester Council v P and M* [2011] EWHC 1330 (COP) at para 52, per Baker J.

[6] The categories of individuals who can complete the COP3 form required to accompany an application to the Court of Protection.

[7] Alex Ruck Keene et al., 'Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection' [2019] IntJ LP 56, 64.

[8] For a very thoughtful discussion of the issues, see Sir Mark Hedley, The Modern Judge: Power, Responsibility and Society's Expectations (LexisNexis 2016).

On the face of it, the CoP seems to provide an appropriate set-up to deal fairly and justly with contentious cases concerning mental capacity. CoP judges are commonly seen as the appropriate decision-makers because they offer the 'skills to appropriately evaluate expert evidence' and the 'ability to evenly take others' opinions into account and giving weight to the social component of a seemingly technical decision'.[9]

But can one person alone really live up to these expectations?

We can certainly challenge the court's practices when it comes to considering capacity,[10] one particular area of concern being the way in which the judges approach expert psychiatric evidence. A study by Paula Case highlighted the deference that many judges pay to psychiatric evidence, and that at least some judges had a tendency to smooth out discrepancies in disagreeing expert evidence instead of unpacking unclear or conflicting facts.[11] This tendency is, however, not universal, and there are examples of cases in which the CoP has rejected even unanimous psychiatric evidence.[12]

But unpacking judicial reluctance to 'take on' psychiatric evidence suggests that it might derive from the predominant beliefs deeming expert evidence 'objective',[13] the medical assessment process free from pitfalls, and clinicians providing 'sufficient protection against a lack of integrity'.[14] Alternatively, this reluctance to scrutinise may partially derive from the judges' general lack of medical knowledge. Not being educated on how impairments of the mind or brain can affect P's capacity and the degree of uncertainty that is attached to establishing the causative nexus, the judge's lack of knowledge may have an impeding effect on their ability to scrutinise and evaluate expert evidence. Although we suggest that the answer to this is not to require judges to undertake clinical training, the point has to be made that the inaccessibility of medical knowledge may prevent a judge from *knowing* where and to what extent expert evidence can be scrutinised and may ultimately cause their unsuccessful attempt to evaluate expert evidence appropriately.

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[9] Sir Mark Hedley, The Modern Judge: Power, Responsibility and Society's Expectations (LexisNexis 2016), 14

[10] See, for instance, the critical analysis in Alex Ruck Keene et al., 'Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection' [2019] IntJ LP 56.

[11] Paula Case, 'Negotiating the domain of mental capacity: Clinical judgement or judicial diagnosis?' [2016] MLI 174

[12] See for example *CC v KK v STCC* [2012] EWCOP 2136; *Re SB (A Patient: Capacity to consent to Termination*) [2013] EWHC 1417 (COP); *King's College Hospital NHS Foundation Trust v C and V* [2015] EWCOP 80.

[13] *Winterwerp v Netherlands* [1997] 2 EHRR 387, para 39.

[14] Law Commission Consultation on Mental Capacity and Deprivation of Liberty 2015, 7.174 http://www.lawcom.gov.uk/app/uploads/2015/07/cp222_mental_capacity.pdf, accessed 10 January 2020.

More fundamentally, the very idea that judicial decision-making is a process in which the judge can objectively and evenly attribute attention to all evidence presented may itself be an illusion. The determination of mental capacity is not an objective process, but consists of a descriptive and a normative component,[15] i.e. both whether P lacks capacity, and whether P ought (morally) to be found to lack capacity. This inherent normative component derives from the moral obligations that the decision-maker has to protect P from harmful choices or those that put P or others at risk.[16] Since the contentious cases coming before the CoP inherently concern a conflicting matter carrying severe consequences, the judgement's inherent normative component and the judge's moral obligation are crucial to its resolution. Any decision made in this inherently value-laden area will inevitably be comprised of a value judgement made by the judge and is, therefore, inherently more susceptible to their personal bias than purely descriptive ones.[17] The simple fact of who will judge a case might, therefore, already predetermine the outcome of its final determination, irrespective of the case's particularities.

A possible alternative?

This article proposes a different kind of multidisciplinary mental capacity tribunal ("MCT").[18] The MCT is a three-person tribunal that, like other legal tribunals[19] comprises a legal member ("LM"). The key role of the LM consists of not only ensuring the compliance with the statute and that all legal issues are addressed adequately but also warranting compliance with procedural rules.

As the second MCT-member, we propose a medical member ("MM"). In many cases this would be a psychiatrist, but we would not limit ourselves

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[15] Louis C Charland, 'Mental Competence and Value: The Problem of Normativity in the Assessment of Decision-Making Capacity' [2001] PPL 135. See also for the interaction of ethics and the law in the MCA 2005, Alex Ruck Keene and Camillia Kong, Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues (Jessica Kingsley Publishers, 2018).

[16] Natalie Banner, 'Unreasonable reasons: normative judgements in the assessment of mental capacity' [2012] JECP 1038.

[17] For more on this, see the work of the Judging Values and Participation in Mental Capacity Law project.

[18] This idea was initially expressed in the first author's unpublished dissertation. Carina Schacherl, Would a multidisciplinary tribunal be more appropriate in drawing the line between protecting P's autonomy and interests in contentious cases concerning mental capacity?, 2019, King's College London. We focus here primarily upon determination of mental capacity; although we are alive to the issues that would then flow if its conclusion was that the person **lacked** mental capacity, the issue of mental capacity is of foundational jurisdictional importance and therefore merits specific attention.

[19] E.g. Mental Health Review Tribunal (Jersey), Tribunal under Mental Capacity Act 2016 (Northern Ireland), Tribunal under Lasting Powers of Attorney and Capacity Act 2018 (Gibraltar).

necessarily to this discipline. The role of the MM would not include an assessment of P's capacity since the gathering of evidence regarding P's capacity on behalf of a tribunal member is highly problematic.[20] Instead, the role of the MM would be the one of a 'gatekeeper' to make expert evidence more accessible for the other tribunal members by utilising their medical knowledge to scrutinise the evidence. The MM's skills are essential to enable the breakdown of judicial resistance to scrutinise expert evidence and help prevent non-medical professionals from seeing medical evidence as unimpeachable and factually certain. It is not intended to doubt the existence of certainties in the field of medicine, but rather to allow expert evidence to be seen as more challengeable and 'normalised' evidence that does not inherently have more weight than other evidence and would allow for non-pathological evidence to meaningfully come into play.

As the MCT's third member, we propose the inclusion of an ethical member ("EM") due to the multi-facetedness of the concept of mental capacity and the often highly moral dilemmas underlying contentious cases. Having acquired the ability to ask essential questions and critically analyse arguments, as well as to discover invalid inferences, and being skilled in dissecting moral dilemmas,[21] the EM would be prepared to take on normative challenges and to look at all the relevant facts from a different angle, targeting issues that may be of little importance from a legal or medical perspective but essential to complete the picture of P's mental capacity fully.[22] The EM would assist as much with the **process** as with the **outcome**.

Decisions previously noted, regarding contentious mental capacity cases are commonly referred to as 'human' ones with an essential normative component that is highly susceptible to human bias. Having acquired the skill to comprehend and reflect on complex moral theories and concepts and by doing so to continually reflect on one's own opinions and biases, the EM would potentially be able to ensure both self-reflection and the identification of potential biases of the other members.

Despite not offering any abilities that are recognised by the statute to be of express relevance to the determination of mental capacity, the inclusion of

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[20] Acquiring evidence by a tribunal member renders an evaluation of the evidence on the same basis as expert evidence impossible due to its increased value coming from the tribunal itself and the tribunal would find itself in a highly biased position potentially resulting in a conflation of the tribunal's impartiality and the overall deliberation process, ultimately producing a problematic situation regarding the incompatibility with P's Article 6 right to a fair trial.

[21] Peter Singer, 'Moral Expert' [1972] Analysis, 115.

[22] Hallvard Lillehammer, 'Who needs bioethicists?' [2003] Studies in History and Philosophy of Science, Biology and Biomedical Sciences, 131.

an EM and their skills could offer valuable insights to the matter at hand and cover the statute's 'blind spots'. By having expertise in a field that stands at one step removed from the professional disciplines in play (clinical, social work, legal), the EM might be less biased when taking all the presented information into account, enabling the reaching of a more neutral account of a human decision.

Furthermore, we might suggest that an EM could assist in ensuring a more deliberate attribution of weight to all evidence since they could probe the underlying purpose of, for instance, medical professionals' reasoning and draw out their underlying purposes.[23] This, in turn, would allow for non-expert evidence to come meaningfully into play. The reason why ethicists are involved in fields such as medical law or mental health law in the first place is precisely their skill to analyse and disclose why things are done a certain way, and what their purpose is. In the context of legal principles which allow for much discretion, and in which the decision-maker is required to reach an 'objective' decision about an inherently subjective matter, ethical input provides a valuable added dimension.

Importantly, the EM is not to be confused with an advocate for P. The EM would represent a safeguard for both the tribunal and P, that actively ensures appropriate deliberation amongst all tribunal members by, for instance, indicating if the presumption of capacity is too hastily or for the wrong reasons rebutted (or, conversely, is being 'hidden behind' to avoid taking responsibility); initiating a conversation about assumed links between diagnosis and decision-making difficulty; probing whether there is a shared understanding of what steps to support decision-making capacity might be considered practicable in a given case; and facilitating the appropriate consideration of all relevant factors. The express integration of ethics into judicial decision-making provides an opportunity to resolve a case when the application of the law alone does not provide enough guidance as to the case's resolution, and it is risked that these gaps are filled by the decision-maker's personal and professional biases.

However, to think that the mere inclusion of multiple persons from various disciplines will automatically result in a better resolution of the case and a more just procedure for P verges on naiveté.[24] To ensure a successful collaboration, a multidisciplinary tribunal requires a surrounding organisational and procedural structure allowing for the meaningful

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[23] Peter Singer, 'Moral Expert' [1972] Analysis, 115.

[24] Paul Sayani et al., 'Perceptions of key stakeholders on procedural justice in the Consent and Capacity Board of Ontario's hearings' [2020] International Journal of Law and Psychiatry, https://doi.org/10.1016/j.ijlp.2019.101515.

contribution of each member and discipline to the resolution of the matter.[25]

However, discussion of this structural framework in detail is beyond the scope of this article, which is designed primarily to serve as a stimulus to discussion.

Lastly, as cases that are positioned at the borderline between capacity and incapacity seemingly float in the grey area of the statutory principles, professional duty, and normative difficulty, none of the disciplines currently involved has the seemingly clear expertise-based precedence to make a decision. These cases may, therefore, be best resolved when processed collaboratively. The inclusion of multiple disciplines in the judicial decision-making process may open a new path to the determinations of the multifaceted concept of mental capacity. Through the purposeful and meaningful collaboration of law, medicine and ethics, it may be possible to tackle the concerns expressed in this article as well as potentially enable taking the assessment of mental capacity beyond its present limitations.

The natural experiment

As of 2 December 2019, a natural experiment is currently underway in Northern Ireland in terms of capacity determination. Under the relevant provisions of the Mental Capacity Act (Northern Ireland) 2016 ('MCA 2016')[26], an administrative regime has been brought into force to allow the authorisation of the deprivation of liberty of those aged 16 and above in a particular place in which appropriate care or treatment is available for them. In England & Wales, the route of challenge to administratively authorised deprivation of liberty in this context is to the CoP; in Northern Ireland,[27] the route is to a three person Tribunal (a reconstituted Mental Health Review Tribunal).

Amongst the Tribunal's tasks are to consider whether the person in question ('P') "lacks capacity in relation to whether he or she should be detained in the place in question."[28] The wording of the MCA 2016 makes it clear that the Tribunal is required to consider that question as at the time that the person's

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[25] See examples in the healthcare context: Doris Fay et al, 'Getting the most out of multidisciplinary teams: A multi-sample study of team innovation in health care' [2006] JOOP 553; Alison E Powell, and Huw TO Davies, 'The struggle to improve patient care in the face of professional boundaries' [2012] SSM 807.

[26] Described more fully in Colin Harper et al, 'No longer 'anomalous, confusing and unjust': the Mental Capacity Act (Northern Ireland) 2016.' [2016] International Journal of Mental Health and Capacity Law 2016, no. 22: 57-70.

[27] The same also applies in Jersey, under the Capacity and Self-Determination Law 2016 and Gibraltar, under its Lasting Powers of Attorney and Capacity Act 2018.

case is before them, rather than at the time that the relevant administrative steps were taken to authorise the deprivation of liberty. Whilst the Tribunal is the successor to the Mental Health Review Tribunal, with long experience of sitting as a panel of three to consider whether individuals met the criteria for detention under the Mental Health Order, for it to have to consider decision-making capacity specifically is a new task. The Tribunal sits as a panel of three, with a legal member, a medical member and a member who is neither (frequently with a background in social care).[29] Rule 23(1) of the procedural rules (the Mental Health Review Tribunal (Northern Ireland) Rules 1986 (as amended)) provides that "[t]he decision of the majority of the members of the tribunal shall be the decision of the tribunal and, in the event of an equality of votes, the president of the tribunal [i.e. the legal member] shall have a second or casting vote. " Neither the governing statute nor the procedural rules set out **how** the Tribunal is to consider the question of capacity. Rule 11(2) of the amended Rules provides that the medical member may examine the person "and take such steps as he or she considers necessary to form an opinion of that person's medical condition," but it is not immediately obvious that a person's "medical condition" is to be equated with their decision-making capacity.

The Tribunal went 'live' with the ability to hear challenges in December 2019, so we are at the time of writing in the early stages of seeing how it goes about its task together with the added difficulties of grappling with the Covid-19 pandemic. We note that there would be nothing to stop the Tribunal adopting the approach set out in the body of this article both as to the role of the medical member and as to the role of the third member, i.e. repurposing the latter specifically as an ethical member.

Unfortunately, for those wishing to study it, it sits in private and does not publish the reasons for its decisions (although these are communicated to those to the parties[30]). It is to be hoped, though, that the Tribunal will find ways in which to make public more generally the approaches that it is adopting; it is also likely that there will be judicial reviews (or appeals on a point of law to the Court of Appeal) as to the Tribunal's procedure, which may shed both light upon and give guidance as to the Tribunal's approach.

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[28] S.51 MCA 2016 in relation to short-term authorisations; s.52 in relation to longer-term authorisations.

[29] Paragraph 4 of Schedule 3 to the Mental Health (Northern Ireland) Order 1986, as amended; see also paragraph 1 of the same Schedule.

[30] Rule 24 of the 1986 Rules (as amended).

Conclusion

No system can ever be perfect, but any system that places such legal weight upon the attempt "to accurately assess the inner-workings of the human mind"[31] must continuously test itself, and be tested, to see whether it can be improved. This article suggests one way in which systems which place reliance upon a judge as the sole decision-maker in cases of complexity or dispute might wish to reconstitute themselves. Northern Ireland has done so, although perhaps not for the reasons that we have proposed above, and as the Tribunal starts to build experience there many will be looking to see whether three heads do appear to be better than one.

Reading list

For those who want to dig further into thinking underpinning this article, we recommend the following articles and books.

Banner NF, 'Unreasonable reasons: normative judgments in the assessment of mental capacity' [2012] Journal of Evaluation in Clinical Practice 1038

Case P, 'Negotiating the domain of mental capacity: Clinical judgement or judicial diagnosis?' [2016] Medical Law International 174

Sir Mark Hedley, The Modern Judge: Power, Responsibility and Society's Expectations (LexisNexis 2016)

Ruck Keene, A and Kong K, Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues (Jessica Kingsley Publishers, 2018).

Skowron P, 'The Relationship between Autonomy and Adult Mental Capacity in the Law of England and Wales' [2018] Medical Law Review 32

[31] Part of the critique of the concept of mental capacity advanced by the Committee on the Rights of Persons with Disabilities in General Comment 1 on Article 12 CRPD (equal recognition before the law): CRPD/C/GC/1, para 15.

Some observations on selected aspects of Wills for Northern Ireland practitioners

Sheena Grattan, TEP, Barrister

This article examines current topical issues such as will-making during Covid-19, testamentary capacity and costs in contentious probate issues. It also addresses other probate concerns and misconceptions that the writer has encountered.

This article was written in unprecedented times. The original subject-matter was precipitated by the recent judgment of Madam Justice McBride in *Guy v McGregor*.[1] While this decision establishes no new principles, it is a rare illustration of a reported Northern Ireland judgment on testamentary capacity, with useful guidance to solicitors on the keeping of attendance notes, as well as some interesting observations on the weighting of evidence in capacity cases. It is also a salutary warning about the costs risk of probate litigation. Between deciding that *Guy v McGregor* was worthy of an extended case note and submitting final copy, the world changed beyond recognition due to Covid-19. It would be rather remiss if an article about wills did not touch upon the current public health crisis and the particular challenges that it presents for professionals taking instructions for and executing wills, an unprecedented situation that has resulted in both the Law Society of Northern Ireland[2] and the Society of Trusts and Estate Practitioners (STEP) issuing guidance.[3]

The scope of the original article has therefore been extended to address some 'coronavirus-specific' concerns. As well as a review of *Guy v McGregor* there is a summary of previous Northern Ireland decisions involving testamentary capacity, as well as some observations on the 'golden rule' and what might reasonably be expected of busy solicitors in discharging their duties when instructed to make a will. There is also a reminder on the costs principles which apply to contentious probate claims, before the article concludes with a miscellany of practical concerns which in the writer's experience frequently arise in contentious probate claims.

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[1] *Guy v McGregor [2019] NI Ch 17.*
[2] https://www.lawsoc-ni.org/guidance-on-the-execution-of-wills-during-the-covid-19-crisis
[3] https://www.step.org/industry-news/making-will-time-coronavirus

The perils of will-making in a Covid-19 crisis

Northern Ireland law requires all wills to be executed in accordance with a number of formalities, unless the testator is entitled to make a privileged will.[4] In broad terms these formalities, currently found in article 5 of the Wills and Administration Proceedings (NI) Order 1994 ("the 1994 Order"), require the will to be signed by the testator and attested by two witnesses. There are various permutations to this basic position, including that a testator may direct someone to make the signature on his behalf, and it is worth reproducing article 5 in full:

(1) No will is valid unless it is in writing and is executed in accordance with the following requirements, that is to say,

(a) it is signed by the testator, or by some other person in his presence and at his direction;
and
(b) it appears from the will or is shown that the testator intended by his signature to give effect to the will; and
(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
(d) each witness, in the presence of the testator (but not necessarily in the presence of any other witness) either

(i) attests the testator's signature or the testator's acknowledgment of his signature and signs the will; or
(ii) acknowledges his signature.

(2) No form of attestation or acknowledgment is necessary.

Article 5 re-enacted, with two minor relaxations,[5] the provisions of section 9 of the Wills Act 1837. Significantly, Northern Ireland requires strict compliance with the terms of the statute and there is no over-riding statutory discretion which allows the court to ignore technical breaches of the will formalities if there is no allegation of fraud. In this respect the Irish jurisdictions and England probably stand alone in the common law world. Virtually all other jurisdictions have introduced some form of dispensing provision or substantial compliance doctrine, whereby the courts are given discretion to admit wills to probate where the formalities have not been observed and there is no allegation of fraud. Some of these jurisdictions

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[4] i.e. soldiers, sailors and airmen on active service.

[5] The testator's signature no longer had to appear at the 'foot or end' of the will and it is possible for a witness to acknowledge a signature made earlier, so long as that is done after the testator signs or acknowledges his signature.

additionally allow a holograph will to be admitted to probate on the basis that the testator's handwriting provides an adequate safeguard against forgery.

The Law Society of England and Wales is currently in negotiations with the Ministry of Justice with a view to relaxing the will formalities on a temporary basis in England and Wales, perhaps allowing similar concessions as currently apply to privileged wills under section 11 of the Wills Act 1837. The unofficial indication is that such legislation may not be enacted and that the best that can be hoped for is that the pandemic provides the catalyst for future reform.[6] Unless and until such changes are introduced (and Northern Ireland may not necessarily follow suit) practitioners must ensure that wills made during the Covid-19 crisis comply with the letter of article 5.

Most problematically in the context of lockdown, social distancing and shielding, the will formalities require the testator to be 'in the presence' of two other persons. And, of course, those persons cannot be beneficiaries under the will, their spouses or civil partners[7] and, ideally, not wider family members of beneficiaries who, although outside the letter of the witness-beneficiary rule, can hardly be described as disinterested.

Some solicitors, justifiably classifying themselves as keyworkers, have continued to work from their otherwise empty offices, consulting in person with social distancing in place for clients who are prepared to attend to execute a will. In the majority of cases this has not been possible. The other options for executing wills are essentially sending the engrossment through the post for unsupervised execution or finding creative ways to execute the will safely at a distance, but still within the established scope of article 5.

Sending engrossments by post to the client

Most Northern Ireland practitioners had long abandoned the practice of sending engrossed wills through the post, particularly after the extensive consideration of the duties of professional will-drafters by *Longmore J. in Esterhuizen v Allied Dunbar Assurance PLC*.[8] It will be recalled that Allied Dunbar was held to have breached its duty of care when its official left a set of (entirely accurate) instructions with an elderly testator who, unable to find two independent witnesses, asked an electrician to act as the sole witness.

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[6] The Law Commission for England and Wales is currently in the middle of a project to review the law of wills. The Consultation Paper can be found on the website – The Making of Wills, Consultation Paper No 231 (2017). https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/Making-a-will-consultation.pdf

[7] The witness-beneficiary rule is found in article 8 of the 1994 Order.

[8] [1998] 2 FLR 668.

Longmore J. concluded that *"[i]n ordinary circumstances* just to leave written instructions and to do no more will not only be contrary to good practice but also is in my view negligent." Rather, a prudent solicitor would:

> *"…invite a client who has approved his draft to come into the solicitor's office to sign his will and have it attested. If a client is unwilling or unable to come to the office then a solicitor should ask the client if he would like the solicitor to attend him at home to get the will executed. If the client says "No" it is the end of the matter. If the client says "Yes" it is easy to take a member of staff who together with the solicitor can witness the testator's signature.*"

The current circumstances are far from 'ordinary' and what can reasonably be expected from solicitors must reflect that. The touchstone is always reasonableness. Prior to Covid-19 the only prudent practice was that all clients had their wills supervised by the solicitor and, if necessary, in their own homes. Sending engrossed wills by post for execution was to be avoided entirely (even though *Esterhuizan* did not prohibit it *per se*). In the current crisis solicitors will now have to rely on posting out engrossed wills with, of course, a clear set of accurate instructions. It is suggested that a copy sample will which has been executed might also be sent, to show where names and addresses are to be placed. If clients want wills done they may have to accept the risk that the solicitor bears no further responsibility for execution and letters of retainer should if possible be amended to reflect this.

As with the pre-Covid-19 situation, if the original will is returned to the solicitor for safe-keeping, the solicitor is expected to do a basic check of the will (e.g. has the witness the same name as any of the beneficiaries?). In *Humblestone v Martin Tolhurst*[9] a disappointed beneficiary successfully sued solicitors who had failed to check that the will returned to them for safekeeping had been signed by the testator. Mann J. held that in the situation where solicitors were not required by the client to supervise the execution of the will, but the will was being returned to them for storage, the normal fulfilment of the retainer was to check that, on its face, and on the facts then known to them, its execution was ostensibly valid.

"In the presence of…": Remote executions and executions through windows

The phrase 'in the presence of' appears twice in article 5 of the 1994 Order. The testator must initially sign or acknowledge (or direct) his signature in the presence of the witnesses and they must sign in his presence.

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[9] The Times, February 29th, 2004.

It is well-established from the existing jurisprudence that 'presence' means actual 'visual presence.'[10] Many commentators have considered whether remote witnessing via Skype or video conferencing will suffice. The writer would most certainly not risk witnessing a will via Zoom or Skype on the strength of existing authorities. Even allowing for a diminution of what 'reasonable care and skill' means in the unprecedented times we find ourselves, surely the most fundamental duty that the will drafter owes to the testator is to produce a will that the solicitor knows to be formally valid.

On the other hand, it is submitted that one or both of the witnesses being on the other side of a glass window to the testator and having sight of the will and its execution is incontrovertibly within the statutory requirements. Indeed, the current crisis has breathed fresh life into the sorts of old cases that practitioners last encountered in a law examination. The classic example is *Casson v Dade,*[11] still the leading authority on the 'line of sight' test. The testatrix, sitting in her coach at the door of her attorney's house, was held to have executed her will effectively when the witnesses attested it in the office, the testatrix being in a position to watch through a window.[12] Moreover, there is rather more recent support, if such were needed, from the decision of Senior Judge Lush in *Re Clarke*[13], albeit in the context of the witnessing of a Lasting Power of Attorney:

> *"I am also satisfied that Mrs Clarke signed … "in the presence of the witness", W. Even though he was sitting in the adjacent room, there were clear glass doors with "Georgian bars" between the two rooms, and he had a clear line of sight through those glass doors. Equally importantly, although we cannot know for certain because she is not competent to give evidence on the point, Mrs Clarke would have been able to see W witness the LPAs by means of the same line of sight through the glass doors. I have no difficulty in relying on a very old legal authority like Casson v Dade. The fact that the judgment is over two hundred years old simply means that it is basic commonsense and has stood the test of time."*

There is anecdotal evidence that many solicitors have been utilizing this facility to execute wills while separated from the testator by glass. While some such executions have involved the engrossed instrument being passed physically through a window after being signed by the testator (with the necessary precautions such as wearing gloves), in light of the fact that

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[10] *Brown v Skirrow [1902]* P 3.
[11] (1781) 21 ER 399.
[12] The beady-eyed will have spotted that this decision predated even the Wills Act. The governing legislation, the English Statute of Frauds 1670, also required witnesses to be done 'in the presence of'.
[13] 19th September 2011.

the virus is thought to live on paper for upwards of 24 hours, others have relied on the facility whereby a testator may direct a third party to sign on his behalf allowing a shielding testator to execute the will without any risk of the virus being transmitted.

One of the writer's instructing solicitors has been offering what she has dubbed 'drive through wills' whereby a client attends at the solicitor's home with a copy of a will emailed previously, satisfaction with the contents of same having already been confirmed by email. The solicitor and her longsuffering husband are outside the car, with the engrossed will which is to be executed. The solicitor engages in conversation with the client using mobiles if necessary to make sure that the client knows and approves the contents of the will. The solicitor checks that the engrossed version that she has is the same as the document that the client has printed at home (and has been confirming the contents of), by holding the document up to the window or whatever is necessary. The client then directs the solicitor to sign the will on her behalf. The solicitor and her husband then witness the will. Helpfully, the attesting witness can be the same person who signs on behalf of the testator. It should also be remembered that while normally it is good professional practice to ensure that attesting witnesses are adults, this is not a legal requirement (and this was recently confirmed by the Law Commission in its recent Consultation Paper on the Making of Wills). In these unusual times sensible teenage children, whether belonging to solicitors or neighbours, may have to be witnesses of last resort.

The attestation clause should be amended and a careful attendance kept (as well ideally as a video record). The following attestation clause is based on one in the writer's *Succession Law in Northern Ireland*. The solicitor signs the name of the client and not her own name.

> Signed by [name of solicitor] with the name of the above named [client's name] as and for her last will (the same having been previously read over to her by me the undersigned [name of solicitor] (when she seemed thoroughly to understand same) in her presence and within her sight and by her direction and in the presence and in the sight of us both present at the same time who at her request and in the presence of her and in her sight and in the presence and in the sight of each other have hereunto subscribed our names as witnesses.

At all times a solicitor conducting this type of execution must take care to be satisfied through the window that the client knows and approves the contents. Without in any way diluting the principle that it is the solicitor's obligation to implement the testator's instructions, it is suggested that it would be prudent to keep wills as simple as possible during these unprecedented times. The English Court of Protection's concept of a 'holding

will' comes to mind. Last minute amendments are obviously difficult, so it is imperative that the solicitor liaises by phone and/or email with the client to make sure that the client is content with the draft before she arrives.

Time will tell, but it is likely that the current crisis will spawn a spate of estate disputes. There may even be the seminal test case on the statutory interpretation of the phrase 'in the presence of' in a nineteenth century statute as applied to our virtual, digital age. The trend in will cases in the modern era, culminating in *Marley v Rawlings*[14] in the Supreme Court, has been unrelenting in endorsing a purposive, pragmatic and intentional approach to upholding testamentary intentions. While it is inconceivable that the courts would develop a full-blown judicial substantial compliance doctrine, there is every likelihood that they will be prepared to be creative and facilitative in individual cases. There may also be more use of *donationes mortis causa*, some of which may precipitate litigation.

The writer, however, expects the lion's share of the disputes to concern the much more well-worn and mundane territory of lack of capacity, lack of knowledge and approval and alleged undue influence.

Not surprisingly, the early concern of the legal profession was focused almost exclusively on the will formalities and of the witnessing requirements in particular. In reality it is likely to be those components which comprise the substantial validity of the will, loosely together described as 'the mental elements', which present more of a challenge. Instructions taken over the phone when it is impossible to ascertain who is in the background. Or even to whom one is speaking. Engrossments sent via the Royal Mail as discussed above – not so much from the perspective that the testator might not follow the execution instructions correctly, but the absence of an opportunity to confirm capacity, knowledge and approval and free volition at the time of execution. Experienced solicitors will already be alert to their own classic 'red flags' and ordinarily will insist on being satisfied that there is no undue influence. But to what extent will that solicitor now be alert to the additional vulnerability when a family member is with the testator 24/7 during lockdown with other family members physically absent or limited to a daily telephone call? Just as 9/11 was infamously described as a 'good day to bury bad news', the Covid-19 emergency will undoubtedly prove to be a fertile time for the legacy hunter.

At all times solicitors should remain as alert to capacity, knowledge and approval and undue influence as they are about satisfying the witnessing requirements. The Law Society of Northern Ireland has now updated its

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[14] [2014] 2 WLR 213

Guidance on executing wills during the crisis to remind its members that they should always be in a position to give satisfactory replies to *Larke v Nugus*[15] requests.

The importance of the careful keeping of attendance notes will be revisited below in the context of *Guy v McGregor*. It hardly needs stating that in any 'atypical' execution in current circumstances as much contemporaneous evidence as possible should be gathered, including, as noted above, possible recording, to confirm formal validity and to dispel the suspicion that the will is the product of coercion or that the person lacked capacity. In circumstances where wills are executed without the presence of a supervising solicitor, consideration might be given to the preparation of short statements from the attesting witnesses confirming how execution and attestation took place (and again filming of the execution might assist in avoiding a contentious probate dispute).

A separate record should be retained of all wills which have been executed during the crisis in ways which depart from previous 'normal' office practices. Once such becomes possible, consideration might be given to re-executing the will free of charge. If nothing else this gives a further opportunity to meet the client. One longer-term advantage of the coronavirus emergency may be that individuals become more focused on estate planning and the general ordering of their affairs.

Finally, it should always be remembered that a solicitor has the option of refusing to accept an instruction, so long as it is done promptly. No doubt many solicitors, fearing precarious financial futures, have been welcoming the opportunity to build up a healthy strong room of wills. The old adage, 'be careful what you wish for' comes to mind, especially with entirely new clients.

Guy v McGregor

The facts of *Guy v McGregor* will strike a chord with many Northern Ireland practitioners as being a dispute between siblings in a modest estate with little liquidity. The testator, John McGregor, had been predeceased by his wife of 58 years. Together they had four children, the plaintiff and the three defendants to the action. In August 2005, about three months after the death of his wife, the testator made his only will which left his entire estate, comprising a dwelling house subject to mortgage, to his daughter, the plaintiff. In and around the same time the testator appears to have persuaded this daughter, on the cusp of marriage in her late thirties, not to move out but instead come to live in the house with her new husband.

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[15] https://www.lawsoc-ni.org/guidance-on-larke-v-nugus-letters

Following the testator's death some eight years later, the defendants opposed the validity of the will, making the plaintiff prove the will in solemn form. The Defendants opposed the grant on grounds of lack of due execution and lack of capacity, but by trial the only real issue was the 3rd limb of the familiar *Banks v Goodfellow*[16] test:

> "*It is essential to the exercise of such a power that a testator* ***shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect;*** *and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property, and bring about a disposition of it which, if his mind had been sound, would not have been made.*"

In particular, did the testator understand that by giving the house to one daughter, he was excluding three of his four children?

The outcome was that the will was upheld and admitted to proof in solemn form, with the Defendants condemned in the entirety of the costs. As such it is another decision in which the Northern Ireland High Court has upheld the disputed will. The other Northern Ireland decisions are summarised for information later in this article.

The point was made in the introductory comments to this article that *Guy v McGregor* does not create any new law. It does, however, provide an up to date endorsement by a Northern Ireland court of several well-established principles relating to testamentary capacity, including what is required in practical terms to satisfy each of the three components of *Banks v Goodfellow*, that the capacity required varies with the complexity of the will, and the burden of proof (including the shifting of the evidential burden). It is also a useful illustration, particularly for those non-contentious probate practitioners, who have not yet encountered a contested dispute, of the different strands of evidence found in the typical set of proceedings. Most cases where lack of capacity is alleged will involve a mixture of medical evidence, evidence from the solicitor who took the instructions and supervised the execution, and evidence of family and friends. The weight that is attached to each of these will vary with the circumstances, an obvious point, but one which is sometimes lost by the time that the voluminous trial bundles have been prepared.

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[16] (1870), L.R. 5 Q.B. 549.

The Medical evidence

In *Guy*, as is so often a characteristic of contentious probate disputes, there was a dispute as between two experts who had each prepared retrospective assessments on the basis of the testator's medical records. Those records were sketchy and importantly did not record the extent of the testator's symptoms on the key year of 2005. There were relevant entries from 2007, the date that the testator had first been referred in respect of dementia.

The Plaintiff's expert evidence was that it was more likely than not that the testator had testamentary capacity on the requisite date. The Defendants' evidence was that it was difficult to say, with confidence, whether the testator had testamentary capacity. As is now standard practice in all contentious probate cases, the experts had been directed to meet prior to the hearing and to file a joint minute.

The experts agreed that the testator was suffering from a form of dementia which first presented as problems with speech and that in 2005, when the will was executed, the testator's dementia was at a relatively early stage. It was further agreed that it is difficult to assess the extent of receptive dysphasia (comprehension of speech) when expressive dysphasia (expression of speech) is very marked.

Determining testamentary capacity at the date of the execution of the will thus required the learned Judge to decide whether the testator's dysphasia was sufficiently advanced at that date to undermine his ability to understand, recall relevant matters and express his testamentary wishes. Her conclusion was that, on balance of probabilities, the testator did not have receptive dysphasia when he executed his will. An influential factor was the confirmation in notes by a specialist therapist that as late as 2008 '[the testator's] ability to understand what is being said to him remains good, he uses gestures and some single words to reply most appropriately.' A year later, in the summer of 2009, a Consultant Psychiatrist in Old Age recorded that the testator demonstrated "comprehension of single commands."

Given that two experienced practitioners in dementia both confirmed that the testator retained an ability to comprehend what was being said to him and was able to respond appropriately as late as 2009 satisfied the Judge that the testator did not have any significant receptive dysphasia in 2005.

The Legal evidence

The testator's disputed will had been witnessed by two solicitors, one of whom had died before hearing, but he had sworn an affidavit of the circumstances in contemplation of his death. Instructions had initially

been given over the telephone by the testator to the other solicitor, Mr McAteer. Mr McAteer was a very experienced probate solicitor, who had not long before had had dealings with the testator when he acted for him in a complex probate case. Following the telephone attendance Mr McAteer prepared a short handwritten and undated note:-

> "Executor: Jacqueline McGregor
> of 12 Waterloo Gardens, Belfast
> House: Mortgage of £60,000
> No savings
> Leave all to Jacqueline"

Having prepared a short will, Mr McAteer dispatched same by post to the testator for his approval, together with a covering letter which referred to the life policy which covered the amount due on the mortgage being due to expire the following year. The will was duly executed in the presence of Mr McAteer and his late colleague. No attendance note was prepared in respect of this visit to the testator's home, with Mr McAteer giving oral evidence of same in court. That evidence, which was accepted by the Judge, was to the effect that the testator wanted the Plaintiff to get the house to reward her for caring for the testator and his late wife and because she lived in the house. Mr McAteer did not discuss expressly with the testator his reasons for eliminating his other children from the will or suggested any other structures for the will which would not have benefited the Plaintiff to the exclusion of the other children. The learned Judge observed:

> "*45. Mr McAteer is a very experienced solicitor who has drafted hundreds of wills and, although he is not medically trained, I consider that he has particular knowledge and experience in the area of testamentary capacity derived from practical experience over many years and he would therefore be alert to any signs that a person lacked testamentary capacity. Although he did not have a specific conversation with the testator in respect of testamentary capacity as such, he did not note anything about his presentation which caused him to have any concern regarding his capacity. Whilst I accept Mr McAteer had limited opportunity to assess the testator's capacity as he only had a brief telephone conversation with him and a short meeting with him when he executed his will, this was a case where the solicitor knew the deceased quite well having had recent frequent contact with him relating to a complex probate case. I therefore consider that the fact Mr McAteer noted nothing untoward about the testator during any of these meetings points towards the testator having capacity.*"

> "*46. In addition, I am satisfied the testator gave clear instructions to Mr McAteer to make a will; knew what assets he owned and was able*

to identity his assets with accuracy and particularity and knew in particular that if his life policy expired before his death the impact this would have on his estate. In addition the testator gave rational reasons to the solicitor for wishing to leave his entire estate to the plaintiff. I consider that all of these matters indicate that the testator had testamentary capacity."

The Plaintiff and two other lay witnesses for the Plaintiff also gave evidence, including a Presbyterian minister who sat beside the testator at the Plaintiff's wedding the same month as the will had been executed and had a long and rational conversation with the testator about church business.

None of the Defendants chose to give oral evidence, a matter which the Judge considered unusual when the key issue was their father's mental state in August 2005.

The following aspects of the decision are of particular interest:

Categories of evidence

Older reported decisions in Northern Ireland generally tend to put much more emphasis on the assessment and evaluation of a solicitor (particularly an experienced family solicitor who knew the deceased well) rather on a medical expert who had never met the deceased. *Guy v McGregor* might be analyzed as changing that emphasis a little. However, it is submitted that the decision does no more than underline the fundamental principle that all cases are fact-specific. There is no 'hierarchy of evidence'. The learned Judge's comments are worth reproducing in their entirety:

"In my view, in determining whether a testator has capacity the court must consider the evidence of all the witnesses including the medical experts, the drafting solicitor and the other lay witnesses. The weight to be given to each type of evidence will depend upon a number of factors, including the witness's expertise, knowledge, experience and independence. In some cases the assessment of a medical expert may be limited by the fact he has never met nor examined the testator and there are limited medical notes and records available to him, for example in respect of the severity of the testator's speech problems or memory loss as of the date of execution of the will. In such cases the weight to be attached to the medical evidence may be significantly less than that attached to the evidence of an experienced solicitor who knew the testator well or who carried out a specific assessment of capacity at the date of execution of the will. In other cases the nature of the medical evidence may be such that it outweighs the evidence of even an experienced solicitor. In general the weight to be attached to the view expressed by a solicitor as to capacity will depend

on that solicitor's experience, his knowledge of the testator, and the nature of any assessment carried out by him in respect of capacity. The weight to be attached to the evidence of lay witnesses will generally depend on their independence, experience and knowledge of the testator. In cases where there is a divergence in the views of the expert medical witnesses or where there is a paucity of medical notes and records, the evidence of lay witnesses who can give detailed evidence of the testator's behaviour, demeanour and activities around the time of the execution of the will, by reference to conversations they had with the testator or in respect of activities conducted by the testator at the relevant date, will be of much assistance and will be given great weight.

Accordingly, I consider that there is no hierarchy of witnesses. Each case will be fact specific. In some cases the medical evidence will be the weightiest factor. In other cases the evidence of the solicitor will be of magnetic importance."

The importance of attendance notes

Ultimately, as McBride J reminds us, testamentary capacity is a legal concept rather than a medical one, a fact that is often overlooked. In any contentious probate case involving a professionally drafted will, the solicitor's evidence will be of fundamental importance. Short of having the misfortune of defending a professional negligence claim, there is no routine work of a solicitor that will bring him more under the microscope of a court than where a will which he has made is being impugned in a probate action.

Following several *dicta* in English decisions on the solicitor's sin on not keeping adequate attendance notes (or, indeed, any attendance notes) and Horner J's pithy observation in *Connolly v Connolly* that 'memory can be slippery and unreliable'[17], McBride J has now underlined the point very firmly. Again, the learned Judge's observations are worth setting out in full as they set out in some detail what an attendance note should cover (writer's emphasis):

"*Solicitors are busy people and do hundreds of cases and they are often called to give evidence years after the event. In such circumstances memories fade and solicitors may not be able to specifically remember the details of each case. Accordingly, it is very important that they keep detailed contemporaneous attendance notes so they can give accurate reliable evidence.*

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[17] [2017] NI Ch 8 at para 43.

*Attendance notes **should be dated** and **state the times involved, state who was present** and **record comprehensively what was said and done and what advices were given.** In probate cases **the solicitor should set out specifically how he satisfied him or herself as to the testator's capacity** and **details of the testator's estate.** Further, **it is good practice for solicitors to discuss with testators the claims that others may have on their bounty especially in circumstances where no provision is made for such persons.** The solicitor should **take a note of the fact that this was discussed and note the reasons why the testator has decided to exclude or reduce the provision made for other potential claimants.** In cases **where the testator is changing his will detailed notes should be kept recording the testator's reasons** for the changes made in the will.*

The task of the court is to determine testamentary capacity rather than to rule on professional practice. Therefore, in this case, notwithstanding the fact no attendance note existed of the meeting when the will was executed and the telephone attendance note was not as fulsome as the court may have desired, nonetheless the court was still satisfied as to the testator's capacity.

The court however wishes to impress upon probate solicitors the importance of preparing detailed attendance notes given the role they play in probate actions. This case, like most probate actions, revolved around the determination of factual disputes. The existence of detailed attendance notes can often prevent proceedings being issued and thus obviate the need for the solicitor to attend court and be subjected to cross examination. Where proceedings are contested the existence of such notes not only assist solicitors in giving reliable evidence but also assist the court in determination of the factual disputes.

Solicitors, capacity and the golden rule

In the writer's experience no subject generates more discussion at CPD events than the golden rule and when and from whom solicitors should obtain a medical capacity report. Any CPD lecture even loosely connected to wills invariably results in the ubiquitous Q & A session being hijacked with heated discussions about what solicitors 'should' be doing about capacity and the practical difficulties of securing experts. This is not surprising in that assessing the testamentary capacity of elderly clients is probably the trickiest and most delicate issue a solicitor will encounter in day-to-day practice. The frequency of capacity issues has undoubtedly increased as the population ages, but the borderline case is not a new phenomenon:

> *"On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty with the case of a raving madman or driveling idiot in saying that he is a person incapable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no mistaking midnight for noon, but at what precise moment twilight becomes darkness, is hard to determine."*[18]

The so-called "golden rule", which emanates from the English decision in *Kenward v Adams,*[19] and which was subsequently approved in *Re Simpson*[20] is now hopefully familiar to all solicitors. Essentially it is to get advice from a medical practitioner and, if possible have a medical practitioner present when the will is being executed. In reality, medical practitioners generally refuse to act as attesting witnesses but some will prepare a report on the client's testamentary capacity (for an appropriate fee). Increasingly it seems that GPs are unwilling to prepare such reports on the basis that they do not have sufficient expertise. The Law Society of Northern Ireland however holds on its website a list of medical and psychological practitioners who are prepared to conduct capacity assessments.

It is worth quoting the precise words of Templeman J, as he then was in *Re Simpson* (writer's emphasis):

> *"In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding."*

The mandatory language in which Templeman J[21] articulates this guidance has not been helpful. Nor is the indiscriminating reference to all 'aged' testators, whatever that actually means in practice, particularly when one thinks of Her Majesty the Queen and Sir David Attenborough both of whom were inspiring the nation a few weeks short of their 94th birthdays. Most experienced practitioners would consider it impracticable, if not insulting,

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[18] Lord Cranworth in *Royse v Rossborough* (1857) 6 HLC 2 at 45.

[19] [1975] The Times, 29th November.

[20] (1977) 127 NLJ 487.

[21] (As an interesting aside, the will of the late Lord Templeman was itself subject to a challenge and his solicitor's failure to observe the golden rule the subject of discussion. Ultimately the will was upheld. *Goss-Custard v Templeman* (2020) EWHC 636 (Ch).

to insist on a medical examination of a long-standing nonagenarian client who clearly is as capable of making a will as the draftsman is.

Nonetheless this 'golden rule' has been approved in many English cases, most notably perhaps by Briggs J in *Key v Key*.[22]

Contrary to popular belief, failure to follow the golden rule does not automatically invalidate a will: nor does compliance guarantee validity.[23] However, failure to follow the rule makes it more difficult for a person faced with discharging the burden of proving that the testator had capacity and therefore increases the chances that the will might be challenged. In *Key* Briggs J was highly critical of the will draftsman's failure to comply with the golden rule, an omission which had "greatly increased the difficulties to which this dispute has given rise and aggravated the depths of mistrust into which [the testator's] children have subsequently fallen."

In Northern Ireland there has been relatively little judicial consideration of the golden rule. The practice was described (but not with reference to the expression 'golden rule') by Horner J in *Connolly v Connolly*[24], which in fact involved the successful setting aside of an *inter vivos* transfer. Prior to that there was a fleeting mention by Gillen J in *Re Potter* to confirm that on the basis of the cogent evidence given by the experienced solicitor who took the instructions the learned judge was 'convinced…that [the testator who was 83 years of age at the time of execution] displayed absolutely no unsoundness of mind or defect in intelligence.". The learned Judge 'found it compelling evidence that this was not a case where the golden rule applied'.

Almost two decades earlier, Carswell J made no obvious criticism of the experienced solicitor in *Lee v Johnston* that he had not considered a medical report and, indeed, *a propos* the earlier discussion on the sin of not keeping adequate attendance notes, had not actually recorded any details of assessing capacity (writer's emphasis):

> *"Counsel for the Challenger] pressed [the experienced solicitor who drafted a series of wills] a good deal in cross-examination about his practice in assessing the capacity of elderly or ill testators, and about his acceptance of the testator's capacity without making any medical inquiry. It is no doubt easy to say in hindsight that such inquiry would have removed any element of doubt, and* ***that a practice of recording impressions relating to capacity and keeping those records might be of considerable service***

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[22] [2010] WLR 2020.
[23] See e.g. Sharp v Adam [2006] EWCA Civ 449
[24] ([2017] NI Ch 8 at para 42.

> ***in the case of a future dispute.*** *But the court must pay considerable regard to the judgment of a very experienced and reputable solicitor. He has deposed that the testator was a man whom he knew well over a period of many years and with whose circumstances he was familiar, and that he was content to make four wills for him in a period of less than two years, extending both before and after his illness and admission to hospital, without entertaining doubts about his capacity. This must take one a very considerable distance, and when it is allied to the evidence of [the GP and practitioner from the surgery] I am left with no doubt about the testator's capacity to make any of the wills in question.*"

If nothing else this dictum emphasises how much client care practice in the solicitor's profession has changed since 1986.

Following a decade or so in which English texts tended to endorse a slavish compliance with the golden rule, some reported decisions and commentators started questioning the merits of a golden rule of universal application. In particular Stephen Lawson wrote a very persuasive article in STEP's Trusts Quarterly Review[25] highlighting the limitations of the "rule". The editors of the Journal nonetheless endorsed the article with a 'health warning' to the effect that it was published to generate discussion and that failure to follow the golden rule might have consequences.

The English Court of Appeal appeared to row back from the automatic application of the golden rule in *Hawes v Burgess*[26].

> *"The courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer… The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert, after the event, particularly when that expert has neither met nor medically accepted the testatrix". (per Mummery LJ)*

> *"Where a will is drafted by an experienced solicitor who oversees its execution and records at or close to the time that the testatrix was compos mentis and able to give instructions persuasive evidence to the contrary is required. I was impressed by the points made [on behalf of the appellants], in particular that little weight could be put on the evidence of Professor Jacoby who never saw the deceased". (per Sir Scott Baker)*

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[25] [2010] TQR Vol III.
[26] [2013] EWCA Civ 94.
[27] [2013] EWHC 411 (Ch).
[28] [2014] EWCA 280 (Civ).
[29] [2013] WTLR 1331.

Similar sentiments were expressed in two further cases that year, *Greaves v Stolkin*[27] and *Simon v Byford*[28], but in *Re Ashkettle*[29] the court underlined that the solicitor's assessment must be based on accurate information.

The potential confusion generated by this rash of decisions in 2013 prompted the UK Practice Committee of STEP to consider the jurisprudence and the golden rule more comprehensively. The Guidance ultimately produced is the most sensible and pragmatic advice which the writer has seen to date. Rather than be seeking a 'checklist' or 'tick box' procedure, a professional should always seek to exercise individual judgment to each fact-specific situation, asking themselves at all stages whether the client (the testator) would be dissatisfied with how this retainer was being handled and whether the professional could in due course explain and justify the handling of the retainer before a High Court judge without being subjected to fair criticism and be comfortable to 'hold their corner'. The STEP guidance is expressed as follows, with the core portion emboldened (writer's emphasis):

> ***"The duty** of a will maker who is asked to take instructions for and see to the making of a will is **in essence no more and no less than the general duty in contract and tort of a professional person who is instructed to perform a service. In relation to testamentary capacity, they must do what they reasonably can to satisfy themselves that the testator has capacity to make the will; and they must do what they reasonably can to prevent the will being challenged on the ground of want of capacity.** What is required to perform the **duties will vary with the circumstances** of the case. Perhaps the most important considerations are three: first, **solicitors must always direct their minds to the capacity** of would-be testators. Second, **they should err on the side of caution, taking positive (although no doubt tactful) steps to assess capacity themselves, and in more extreme cases seeking medical advice.** Third, circumstances may properly restrict such investigations; an example is the circumstances of Wharton v Bancroft. Another example would surely be the situation where the testator refuses to allow a doctor to assess his capacity (unless the solicitor forms the view that the refusal is itself evidence of lack of capacity).*
>
> ***The golden rule is helpful as to what the duties may require in some circumstance**s. The remarks of Mummery LJ and Sir Scott Baker in Burgess v Hawes may be misleading unless they are merely read as a necessary qualification to the sweeping way in which Templeman J expressed the golden rule. It is important that the words of Templeman J, Mummery LJ and Sir Scott Baker are read together with the judicial remarks in Wharton v Bancroft, Hill v Fellowes Solicitors and Re Ashkettle."*

Ultimately, testamentary capacity is a legal concept rather than a medical one, a fact that is often overlooked (but one which was helpfully underlined by McBride J in the *Guy* case). It is a very valid point that a medical assessment in the course of a short routine attendance by the general practitioner or based on the results of a mini-mental examination (which is essentially a basic screening test for dementia patients) may be of much less value than a lawyer who understands the *Banks v Goodfellow* testamentary capacity test, consciously assesses the testator against its elements by carefully crafted "open" questions and records the questions and answers.

In the English cases in which members of the legal profession have been subjected to criticism for their handling of a will instruction file, the problem has generally not been a failure to obtain medical evidence per se, but rather a complete failure to take any reasonable steps to ensure that the client had the requisite capacity (which in the circumstances of the cases in question would have undoubtedly required a medical examination). The factual matrix in the *Key* case comprised several of the classic 'red flags' to which all competent solicitors should be alert: the solicitor had never previously met the elderly testator; the testator had lost his wife of 65 years only a week before; the testator was purportedly wishing to alter a long-standing testamentary disposition in favour of his sons, to benefit his daughter who was home from the United States for her mother's funeral and who had arranged the appointment.

What if an elderly client refuses to undergo a medical examination? So long as the draftsman has assessed the client as, on balance, having testamentary capacity, he or she can only advise the client that having a confirmatory examination may provide protection if anyone were to make a costly challenge to the will after death, take very clear instructions of that advice and the refusal to be examined, and proceed to make the will, again keeping very clear records of the circumstances surrounding the instructions, preparation and execution. It is different where a solicitor has very serious concerns about testamentary capacity: if a will is executed which is later found to be invalidated due to lack of capacity, the solicitor's professional indemnity insurers may be held responsible for the costs of the contentious probate case. It has already been noted that in this area of practice, possibly more than any other, there are many shades of grey. On many occasions there will be no easy answer, but solicitors who act reasonably and with common sense should not find themselves condemned by a Judge. Ultimately, as has already been noted in the

specific content of the Covid-19 challenges, there is always the option of refusing to accept the instructions, but this has to be done in this context virtually immediately in the will context.

The instructing of experts has been the subject of a recent article in this Journal[29] and readers are reminded of the sample letters of instruction produced by the Law Society of Northern Ireland.[30]

A survey of previous contentious probate judgments in the Northern Ireland High Court

Any common law jurisdiction with a population of less than two million people will obviously have difficulty in generating a meaningful volume of jurisprudence and generations of Northern Ireland lawyers have become accustomed to relying heavily and even at times exclusively on case law from England and Wales. The point has already been made that *Guy v McGregor* does not develop any new principles, but that a recent Northern Ireland decision by the current Chancery Judge with a well-reasoned judgment is always of interest to those who practise in this jurisdiction.

In fact, *Guy v McGregor* is one of only nine judgments involving will capacity in a trawl going back to the 1940s, a statistic came as a surprise to the writer. It also underlines just how few contentious probate cases run to full hearing in Northern Ireland. The judgments in question, heard by eight different judges, are summarized in the following Table. *Re Brian Mackenzie and Watton v Crawford* were essentially about costs. In all seven decisions in which the court was asked to make a determination the will was upheld (all seven were professionally drafted instruments). It is well known among the legal profession that undue influence is virtually impossible to establish in a testamentary context and that there are as yet no reported decisions in Northern Ireland in which such a challenge has succeeded. Fewer practitioners are probably aware that cases in which lack of testamentary capacity is established after a contested hearing are equally absent from the law reports.[32]

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[30] Dr Barbara English: Mental capacity assessments – a medical perspective on legal instruction 2019 1 JELC 16

[31] https://www.lawsoc-ni.org/new-precedent-letters-of-instruction-for-capacity-assessments

[32] Of course, in practice there will be cases that are compromised on the basis, perhaps inter alia, of undue influence. Similarly, there are cases in which both medical experts opine as to lack of capacity and a compromise is reached (including ones where the purported final will is propounded against on the basis of lack of capacity, following the essentially paper exercise that is now permitted under article 34 of the Wills and Administration Proceedings (NI) Order 1994.

Case	Outcome	Points of Note
Johnston v Smart, 1st January 1987, unreported Lowry CJ	Will upheld, following pleas of lack of execution and undue influence	Very succinct judgment in holding that undue influence had not been made out
Estate of Joseph Johnston [1988] NIJB 67, Carswell J	Will upheld, following pleas of lack of capacity, lack of knowledge and approval and undue influence.	The comments about attendance notes were of their time and cannot safely be relied upon now.[33] The main focus of the judgment is on lack of knowledge and approval.
Salmon v Doherty [1997] NIJB 119 (Higgins J)	Will upheld following pleas of lack of capacity, notwithstanding that the testatrix suffered from schizophrenia.	This remains the main Northern Ireland consideration of schizophrenia on testamentary capacity and includes a discussion about the impact of delusions on a will.
McCullagh v Fahy [2002] NI Fam 21 (Coghlin J)	Will upheld following pleas of lack of capacity and undue influence.	An overview of the general principles of undue influence and testamentary capacity, again underlining the heavy burden in respect of the former. There is also a useful reminder to lay witnesses and parties as to their demeanour at the back of the court!

[33] See further the above discussion at page 32

Case	Outcome	Points of Note
Potter v Potter [2003] NI Fam 2 (Gillen J)	Will upheld following pleas of lack of capacity and undue influence.	Clear indication that the 'golden rule' does not apply to all aged testators Emphasis of the importance in the factual matrix of the evidence of the experienced solicitor That the plea of undue influence should never have been advanced in the circumstances.
Thompson v Thompson [2003] NI Fam 3 (Girvan J)	Will upheld – pleas of lack of testamentary capacity, knowledge and approval and undue influence rejected	Discussion of the difficulties of establishing undue influence. Review of testamentary capacity principles. Knowledge and approval is of contents rather than the legal effect of a will.
In the Estate of Brian McKenzie, McKenzie v McKenzie and others [2016] NICh 10 (Horner J)	The validity of the purported will had been conceded – the judgment concerns the costs of the executor who sought to defend it.	The importance of early exchange and consideration of medical reports. If an executor wishes to concede the validity of an instrument on the strength of a new medical report this should be done very promptly if the executor is to obtain costs to that date from the estate.

Case	Outcome	Points of Note
Watton and Watton v Crawford [2016] NICh 14 (Horner J)	Application to overturn disputed will had been discontinued by challenger. Only issue was costs. Challenger condemned in 50 per cent of the costs rather than in their entirety.	A general direction for solicitors to comply with Larke v Nugus including guidance as to what might reasonably be asked. A firm endorsement for all parties to put their 'cards on the table' or risk a costs sanction should the court have to determine costs.[34] Executors may be acting unreasonably in failing to share wills at an early juncture.[35]
Guy v McGregor [2019] NI Ch 17 (McBride J)	Final will upheld, following pleas of lack of due execution (not discussed) and lack of capacity.	A recent endorsement of the current principles applying in England with useful guidance on how the court may assess evidence and to solicitors on what is expected in an attendance note.

[34] Costs are discussed more fully at page 43 below
[35] See further the discussion at page 45 below.

Costs in contentious probate

Guy v McGregor

It has been noted that notwithstanding the criticism of the solicitor who failed to keep adequate attendance notes, the learned Judge had no hesitation in upholding the disputed will in *Guy v McGregor*. Moreover, the unsuccessful challenger was condemned in the entirety of the costs of the action (this aspect of the decision is not reported). The challenger no doubt had hoped to persuade a court that, even if unsuccessful, there was sufficient merit in the challenge (not least the fact that there was the expert medical evidence was disputed and the attendance notes fell below what the Judge would have liked) to justify a more generous costs order, such as one providing for a contribution of the costs to be borne by the estate. As always, only those involved in a case understand the full underlying dynamic of the reported decision. It was relevant perhaps that none of the Defendants gave evidence and or even that the plaintiff may have had the grounds of a proprietary estoppel or 1979 Order claim had the will been overturned. Ordering costs out of the estate may have required the Plaintiff to sell the house.

The default is NOT 'costs out of the estate'

One of the greatest misconceptions (and not just among lay clients) about contentious probate disputes is that 'costs will always come out of the estate'. The misconception has even extended to literature with David Copperfield's Master famously explaining the benefit of a good probate practice to his charge as follows:

> *I asked Mr Spenlow what he considered the best sort of professional business? He replied, that a good case of a disputed will, where there was a neat little estate was, perhaps, the best of all. In such a case…not only were there very pretty pickings, in the way of arguments at every stage of the proceedings, but, the costs being pretty sure to come out of the estate at last, both sides went at it in a lively and spirited manner, and expense was no consideration.*[36]

The proposition that costs will invariably come out of the estate has always been nonsense but, equally, it has been a fair comment that validity disputes do have peculiar characteristics which, historically, formed the basis for a couple of specific exceptions to the general position that "costs follow the

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[36] Charles Dickens, *David Copperfield.*

event." That these exceptions apply in Northern Ireland was confirmed most recently by Girvan J as he then was in *Re Thompson:*[37] if litigation is the fault of the testator (which tends to mean keeping disorderly paperwork, rather than unmercifully teasing rapacious nephews about future inheritances), all costs come out of the estate. If there is a genuine cause for investigation the unsuccessful challenger will not be condemned in costs.[38]

Recent English decisions have confirmed that the exceptions to the general rule are to be interpreted more narrowly then ever and during his tenure as the Northern Ireland Chancery Judge, Horner J also endorsed the principle that ordinarily 'costs follow the event', a reminder that perhaps got rather lost in the judgments of *Watton v Crawford*[39] and *Re Brian Mackenzie*[40] which are remembered more for promoting an 'open book' approach to probate litigation, with a costs threat for those who do not.

It is evident that contentious probate litigation is increasingly characterised as being just another type of dispute between individuals about property and only a very small remnant of the historic "supervisory" jurisdiction of the ecclesiastical courts remains. Yet how many clients continue to say to their legal advisers with defiance that they would prefer the lawyers to get the deceased's estate, than their sibling, or cousin, or the Rest Home for Aged Donkeys? All prospective challengers must be disabused of the misconception that the estate will be bearing the costs, irrespective of the outcome, at the earliest opportunity. All parties to contentious probate litigation should all go into the process fully apprised of the reality that if they lose (or, indeed, issue proceedings and are forced to discontinue) they risk being condemned in the entirety of the costs.

A word about the special position of executors

Prospective executors have rather more protection, but it is not without limits. The general litigation principle is that an executor who is acting reasonably will be entitled to his costs out of the estate if not secured from another party. However, there are two caveats to highlight. First, this principle is limited to an executor *qua executor* and not as a beneficiary.

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[37] The costs judgment is reported as *In the Estate of Norman Edward Thompson Deceased* [2003] NI Fam 4.

[38] For those who also practise in the Republic of Ireland it should be noted that a more general principle applies. So long as the litigation is bona fide and there was a reasonable issue which required investigation then the unsuccessful party will probably obtain their costs out of the estate. No Northern Ireland judge has shown enthusiasm for adopting the Republic's approach.

[39] *Watton and Watton v Crawford* [2016] NICh 14.

[40] *In the Estate of Brian McKenzie, McKenzie v McKenzie and others* [2016] NICh 10.

Secondly, the executor must be acting reasonably.

Indeed, there appears to be an increasing tendency for personal representatives to purport to initiate all types of disputes surrounding wills and the administration of estates in their representative capacity, seeking to rely on the principle that they will always be indemnified by the estate, when in reality they are acting in their own personal interests. It should be remembered that Order 62 Rule 2(6) of the Rules of the Court of Judicature (NI) which deals with the costs of fiduciaries such as personal representatives and trustees has two important qualifications:

> (2) Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall be entitled to the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the fund held by him in that capacity or out of the mortgaged property, as the case may be, and the Court may order otherwise only on the ground that he has *acted unreasonably* or, in the case of a trustee or personal representative, has *in substance acted for his own benefit* rather than for the benefit of the fund [emphasis added].

If we return to contentious probate claims specifically, while it might be said that there is a general duty to propound a will, that duty falls away in the face of evidence of the instrument's invalidity. The dicta of Horner J in the cases referred to above, *Watton v Crawford*[41] and *Re Brian Mackenzie*,[42] underline the costs risk for executors, as well as other parties, who refuse unreasonably to engage in pre-proceedings investigations:

> "*For the avoidance of doubt, I must stress that a headlong rush into litigation where serious allegations are made by a disappointed beneficiary without ascertaining all the relevant circumstances and/or obtaining the key documents will almost certainly have adverse costs consequences for that party. By the same token a refusal by an executor or personal representative to provide a full response to a reasonable request for information under cover of a* ***Larke v Nugus***[43] *letter and/or to make disclosure of key documents will almost certainly have serious cost implications for the estate and/or the principal beneficiary. There should always be full disclosure as soon as reasonably possible of both the circumstances in which the will was made and executed and/or the*

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[41] *Watton and Watton v Crawford* [2016] NICh 14.

[42] *In the Estate of Brian McKenzie, McKenzie v McKenzie and others* [2016] NICh 10.

[43] *Larke v Nugus* [2000] WTLR 1033 (reported belatedly). The Law Society of Northern Ireland has now issued guidance on *Larke v Nugus.* https://www.lawsoc-ni.org/guidance-on-larke-v-nugus-letters

capacity of the deceased if the validity of the will is being challenged. Any behaviour by either side thwarting this laudable aim is almost certainly contrary to the overriding imperative enshrined in Order 1 Rule 1A."

The full parameters of these *obiter* comments and others such dicta from the two judgments mentioned have not yet been explored in later decisions. It remains to be seen in future cases how they will interplay with the general principle of 'reasonableness' in rule 62(6), the fact that *Larke v Nugus* is a special category of disclosure requested of a solicitor (who would otherwise be bound by duties of confidentiality) and not of an executor as such, the fact that there is not yet clarity on what constitutes a 'xxx' dispute so as to invoke *Larke v Nugus*, and of McBride J's strong endorsement in *Guy v McGregor* of the 'costs follow the event' principle.

If an executor without beneficial interest (or with minimal beneficial interest) is to prove a will and be the plaintiff, he must ensure that he has sufficient protection in relation to costs. In practice, this might mean obtaining indemnities from the beneficiaries – provided, of course, that these are not worthless should those beneficiaries fail to get something under the will.

A professional executor should be particularly careful in this position: why would he choose to act? A solicitor executor who drafted the will in dispute has a potential conflict of interest and should consider his position very carefully before accepting office.[44]

A miscellany of other 'probate litigation' concerns, pitfalls and misconceptions

While the burden of costs is arguably the most common misconception of contentious probate practice, there are several other recurring issues which the writer encounters sufficiently frequently to make them worth highlighting. For those readers who are less familiar with litigation (and often in Northern Ireland it is the non-contentious and transactional lawyers who will have carriage of *ad hoc* estate litigation in many solicitor firms) a definition may be useful. While the term "contentious probate" is frequently used by lawyers generically to refer to lots of different types of estate dispute, in the strict, narrow sense "contentious probate" refers to those disputes where there is a claim that a will is not valid (on the ground(s) of forgery; want of due execution; lack of capacity; lack of knowledge and approval or undue influence).

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[44] See in particular the cautionary note in the LSNI Guidance on *Larke v Nugus.*

The procedure, assuming that the estate is within the High Court jurisdiction,[45] is governed by Order 76 of the Rules of the Court of Judicature Act 1980. Very few, if any, estate disputes are within the current County Court jurisdiction and this exacerbates the difficulties with costs referred to above. So many estates in Northern Ireland, although comfortably within the High Court jurisdiction, simply cannot bear High Court costs in a multi-party action with numerous experts. The reality is that even palpably weak and nuisance claims will be bought off.

The writer's impression is that the increase in the number of contentious probate disputes since she was called to the Bar two decades ago is verging on the exponential, the majority of which concern the allegation of lack of testamentary capacity. In particular, it would appear that the number of *Larke v Nugus* requests has increased dramatically following Horner J's above comments in *Watton v Crawford*.

As has been seen, it is ultimately the very rare exception of such cases that 'troubles the court' to a full hearing and judgment. Of those, we still await a determination of a will actually being overturned.

However, in the vast majority of those situations the amount of the estate passing to those intended by the testator will be reduced (either by costs or a payment to the challenger). If it is accepted that, as a matter of policy, testamentary freedom is to be the cornerstone of our system of intergenerational transfer of property, an officious bystander without a vested interest might suggest that care has to be taken to ensure that disputing wills as a 'tree shaking' exercise is not made too easy for potential challengers. In the meantime, the legal profession awaits with baited breath the expected increase in estate disputes arising from the current public health emergency.

Standing to bring a contentious probate action

The first question which prospective challengers to the validity of a particular will should ask is whether they have standing to bring that challenge and, if so, where precisely does such a challenge take them? Defeating the last of a long line of wills serves only to 'reinstate' the penultimate will, the terms of which may be no more generous to the challenger. Many lay clients believe that if they invalidate the final will, the testator will be considered to have died intestate. On more than one occasion the writer has been consulted by neighbours or other purportedly interested parties who simply seek to challenge a will because they consider it to be in some

[45] The County Court jurisdiction is £45,000.

manner "unfair" or "unjust" that Betsy the home help or Fred the gardener has been benefited at the expense of remote relatives, who do not actually seek to make a challenge. Part of the process of investigating earlier wills involves confirming that, irrespective of substantive merits, the prospective challenger actually does have standing to bring that challenge.[46] If so, is there sufficient to be gained in monetary terms to justify doing so (especially in light of the earlier observations about High Court costs)?

Having sight of the disputed and earlier wills

Obviously, this exercise can only be undertaken if the party has access to both the alleged disputed will and earlier wills. Many prospective challenges start with the aggrieved party not even knowing the contents of the instrument which they expect to want to challenge and lay clients are often horrified to learn that there is no requirement on the living to register their wills. It remains unclear precisely what documents executors have a legal obligation to disclose prior to them obtaining the grant. Once proceedings are issued all parties have to swear an affidavit of 'testamentary scripts'. The concept is defined in Order 76 and includes all wills and attendance notes.

Horner J's guidance in *Watton v Crawford* indicates that executors are expected to disclose the final disputed wills and, probably, all other testamentary scripts, with a possible sanction in costs on the basis that they are not acting 'reasonably' if they fail to do so. When asked to advise executors as to whether they should disclose copies of testamentary scripts, the writer generally recommends that they do so, so long that there is any evidence of a genuine dispute. This is primarily on the basis that the executor is being asked in his capacity as executor and not as a beneficiary (it is the executor and not the beneficiaries who have the right to possession of the testator's documents) and flows from the point made earlier that the executor must take care at all times not to be seen as only grinding his own personal axe.

It is acknowledged that this view is not universal and other practitioners still prefer the 'old fashioned' approach of not disclosing wills unless required to do so either on foot of an order following an application to the Master under article 15 of the Administration of Estates (NI) Order 1979 or as part of discovery and the affidavit of testamentary scripts once a probate action has been commenced. Those taking such an approach may ultimately have to satisfy a court being asked to adjudicate on costs that the withholding

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[46] Traditionally, this has meant those who would benefit under an earlier will or the intestacy rules, or the executor named in an earlier will. However, the interesting decision of the English Court of Appeal in *Randall v Randall* [2016] Fam. Law 949, which is only of persuasive authority, has widened this somewhat.

was, in the fact-specific circumstances, 'reasonable' so as to fall outside the *Watton v Crawford* guidance. It is suggested that the rule of thumb for an executor qua executor is not what the opposition is strictly entitled to see but rather what, as an executor, he could be criticized for not sharing and thus risk falling on the wrong side of the 'acting unreasonably' qualification in Order 62(6)(2).

What is the maximum gain from a validity challenge?

In many cases the differences between the last purported will and an earlier will (or the intestacy code) are straightforward and one beneficiary has simply replaced another. It is obvious who stands to gain and by how much. Often it is much more complex, particularly when one factors in as yet unknown administration and testamentary expenses. Many estate disputes in Northern Ireland involve rural testators with a series of earlier wills, each with several different devises of lands, sometimes, but not always, with the residuary beneficiaries remaining the same. At first blush it is often far from clear what the precise difference between the instruments is from the perspective of any given individual, particularly in situations in which residuary entitlement differs as to both recipient(s) and value and testamentary and administration expenses are factored in.

A very useful exercise which should be undertaken (by all potential parties, not just the challenger) as soon as the necessary information is available is the preparation of a 'compare and contrast' table, setting out the differences between the purported last and penultimate wills (and if relevant earlier wills) with reference to each individual portion of land or other specific gift, together with a sensible estimate of the probate values of each. The net residuary estate should be reduced by the approximate non-contentious administration of estate costs (as well, of course, of approximate inheritance tax liabilities etc. if applicable).

Consideration should then be given to estimating the contentious probate costs and how, should such costs, or even some of them, be ordered 'from the estate' this would impact upon each of the beneficiaries. It is sometimes not appreciated from the outset that an order (or an agreement) that 'costs be borne by the estate', without more, means borne as per the statutory order set out for the burden of debts and liabilities in Part II of the First Schedule to the Administration of Estates Act (NI) 1955. In simple terms this means residuary estate, pecuniary legacies and finally all specific gifts (realty and personalty) *pro rata* according to the probate value (not the current value). In practical terms the residuary estate will be the target for any costs ordered out of the estate and this should be taken into account, particularly if an individual changes from being a specific devisee to a residuary legatee.

On occasions it becomes obvious from this exercise that there is relatively little benefit to an individual challenger in pursuing a validity challenge, when viewed against the inherent complexity of the procedure and need for numerous parties to be involved if the matter is to be compromised (which is often the private aim of many prospective challengers). If no other beneficiaries have the appetite for a challenge (which generally means not being prepared to risk the costs), the challenger is effectively left to carry the risk of a claim which, if successful, will benefit others.

The challenger may have the basis for an alternative claim (such as one on foot of the family provision legislation or the doctrine of proprietary estoppel) which would involve a more straightforward structure. It is fundamental that there is sufficient clarity of analysis from the lawyers at the outset to ensure that all viable options are kept open (and within time), while minimizing any damage to the client by concentrating on weaker claims or unleashing a "kitchen sink" attack. Going down costly and time-wasting cul-de-sacs should be avoided.

The use and abuse of caveats

A caveat operates to ensure that no grant will be sealed (or resealed) without notice first being given to the caveator. Some practitioners choose to enter a caveat against an estate in order to "buy time", for example, so as to allow a client who is a prospective claimant under the Inheritance (Provision for Family and Dependants)(NI) Order 1979 Order to investigate more fully the merits of his case. This approach is misconceived, unless there is also some doubt about the validity of the will itself or there is some other reason why it is inappropriate for the intending personal representative to proceed and apply for the grant.

A caveat was never intended to be a "poor man's injunction" (an expression which is credited anonymously to one of the writer's instructing solicitors). While a caveat may be entered by anyone who has an "interest" in the deceased's estate (which includes someone who has a potential claim under the 1979 Order), it is generally entirely counterproductive for a claimant under the 1979 Order to delay the grant. In England wasted costs orders have even been made against practitioners who inappropriately issued a caveat in a family provision claim.

Consider limited grants

In the writer's experience, there is a tendency for matters to grind to a complete halt while there is a validity challenge ongoing. Consideration should always be given as to whether it is necessary or appropriate to apply for either a *pendente lite* grant under article 6 of the Administration of Estates

(NI) Order 1979 (if proceedings are already issued) or an *ad colligenda bona* grant if it has not.[47]

Care should be taken to ensure that everything does not come to a standstill, incurring interest and penalties in respect of Inheritance Tax and allowing wasting assets and properties to depreciate in value. It is an interesting (and as yet uncharted) proposition as to who precisely owes duties of care (and to whom) in this context. According to the press, the impact of the current public health crisis has put Northern Ireland on the cusp of a property crash of 2008 proportions. Many painful lessons were learnt in the last recession as disgruntled clients sought to pass dramatic losses in the value of their asset on to their lawyers for unreasonable delay. It is important to take all reasonable steps to move matters forward as expeditiously as possible at each stage of the proceedings. It is suggested that it is in the interest of all of the lawyers involved in a validity dispute to address collectively whether a limited grant is needed and, if so, who should apply. Often a joint application might be appropriate.

Conclusion

The writer of the Book of Ecclesiastes (1:9 *NIV*) wisely declares that 'there is nothing new under the sun'. The current pandemic may be unprecedented in living memory, but various generations of our ancestors have faced life-threatening plagues, perhaps most famously Boris Johnson's political hero Pericles (whose bust sits in his Number 10 office). Contentious probate disputes have also been with us seemingly forever with, it might appear, little change. Mid-19th century judges, who would have been mystified by the making of what is effectively a judicial will in favour of a successful family provision applicant, would still feel reasonably confident in their ability to deal with questions of will validity. Yet not withstanding the enduring relevance of cases from the 19th century (and earlier), contentious probate practice has undoubtedly changed from that familiar to the lawyers of earlier generations, not least because the 21st century probate lawyer has to grapple with the extension of the law of negligence to include duties owed to those with legitimate expectations to share in an estate. Such a development would have been unthinkable to our 19th century forbears.

Historically will-drafting within solicitor's firms has been a "loss-leader" (the "sprat to catch the mackerel", being the future administration of the estate), and was "relegated" to the more junior solicitors or even to non-legally qualified staff. There has undoubtedly been a perception that the work is straightforward, involving the mechanical "taking" (rather than taking "and evaluating") of instructions, followed by the mechanical copying of precedents.

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[47] A precedent and procedural guidance is found in the LSNI publication Probate Applications Less Frequently Encountered.

It should be evident that there is nothing "mechanical" about the taking, evaluating and implementing of will instructions. In consequence, solicitors must consider whether to charge more for this aspect of their practice. Shortly after *White v Jones* the chair of the English Law Society's Wills and Equity Committee wrote as follows in *Butterworths' Wills Probate and Administration Service:*

> *"Practitioners should, it is suggested, take a conscious decision: either to make a full economic charge for will-making, 'educating their clients to see its justifiability; or to make a deliberately uneconomic charge and reconcile themselves to the resulting loss. No good can come from trying to have the best of both worlds, putting an artificially low ceiling upon charges and then trying to confine the work within it. Such a policy is liable to lead to inadequate wills prepared upon inadequate instructions and inadequately explained, and perhaps to the delegation of will-making to staff who are not fully trained for the work."*

In light of the developments explored in this article, this advice is even more compelling a quarter of a century on. Preparing wills *ex gratia* or for preposterously low fees is in no-one's interests. This cost culture reflected very much the absence of the modern duty of care and is no longer appropriate in light of the mushrooming of testamentary negligence cases.

Challenging times no doubt lie ahead for the law of wills specifically, and for the legal regulation of the intergenerational transfer of wealth more generally in an increasingly digital and virtual age, which is characterized by longevity and complex family relationships. Time will tell to what extent the Covid-19 emergency will act as a catalyst for future reform in the area.

Postscript

Video-witnessed wills to be made legal during coronavirus pandemic in England and Wales

- The Government has announced Legislation via a Statutory Instrument will be laid in September and made retrospective to 31 January 2020. The measures will apply to England & Wales and remain in place until January 2022 however they can be shortened or extended if deemed necessary. After this point wills would return to being made with witnesses who are physically present.
- The new law will amend the Wills Act 1837 to stipulate that where wills must be signed in the 'presence' of at least two witnesses, their presence can be either physical or virtual.
- Wills still need to be signed by two witnesses who are not its beneficiaries and electronic signatures will not be permitted.
- In the longer term the Government will be considering wider reforms to the law on making wills and responding to a forthcoming Law Commission report. The Law Commission has been consulted in the development of the Government's response to this issue.

Personal autonomy, mental capacity and the construct of a utopian society[1]

Sam Karim QC[2] & Aisling Campbell[3]

In this article the writers consider the competing concepts of personal autonomy and the protection imperative in the Court of Protection, with reference to social media and internet access, and the decision in *B v A Local Authority*.

Introduction

The concepts of autonomy and the jurisdiction of the Court of Protection have vexed many academics and practitioners alike, and indeed the Court itself. On one side of the spectrum is the importance of maintaining and establishing personal authority[4], and on the other, the need to protect a vulnerable class of individuals within our society[5]. Both are compelling concepts, and indeed at the heart of this debate is the prospect that we are creating a utopian construct for individuals who lack capacity to make a decision[6], which is not analogous to individuals who have the ability to make the same decision. To this extent, are individuals who are unable to make a decision by reason of sections 2 and 3 of the Mental Capacity Act 2005 (MCA), being treated differently?

A perfect example of the interplay of these concepts being filtered into a real-life scenario is the use of the internet and social media. Last year, the Court of Protection in *Re B*[7] formulated a list of relevant information[8] for this

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1 These views expressed in this article are purely those of its authors and not to be construed as anything further.

2 Sam Karim QC is the Head of Public Law and the Court of Protection at Kings Chambers. He can be contacted via mronson@kingschambers.com.

3 Aisling Campbell is a member of the Court of Protection team at Kings Chambers. She can be contacted via mronson@kingschambers.com.

4 A concept arguably enshrined in the Mental Capacity Act 2005, s 4

5 To ensure that decisions are made in their best interests pursuant to the Mental Capacity Act 2005, s 4

6 Pursuant to the Mental Capacity Act, ss 2 and 3

7 *Re B* [2019] EWCOP 3

8 *For the purposes of the Mental Capacity Act, ss 3(1) and 3(4)*

decision, which was later affirmed in the Court of Appeal's decision in the case of *B v A Local Authority*, albeit *obiter*[9].

Fundamental considerations

Why is Autonomy relevant?

The consequences of being deemed a capacitous person are profound: those with capacity have the ability to make autonomous decisions. This concept is key as it is pre-requisite to the right of bodily integrity and autonomy because of the restrictions a lack of capacity can impose. Lord Goff in *Airedale NHS Trust v Bland* said:

> *'It is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that, if an adult of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for this care must give effect to his wishes'.* [10]

The foundations are found in the works of the great legal philosophers such as Immanuel Kant[11] and John Stuart Mill[12], who expounded concepts such as the Categorical Imperative, i.e. self-governance and civil liberty, i.e. freedom from coercion. Ronald Dworkin also said:

> *'Autonomy makes each of us responsible for shaping our own life according to some coherent and distinctive sense of character, conviction and interest… This view… focuses not on individual decisions one by one, but the place of each decision in a more general program or picture of life the agent is creating and constructing, a conception of character and achievement that must be allowed its own distinctive integrity'.*[13]

In an attempt to codify such concepts, Parliament adopted the 'functional' assessment of capacity rather than a 'catch all' determination on capacity, which was proposed by the Law Commission as part of the law reform project that resulted in the MCA. In *R v Cooper*, Baroness Hale explained the consideration that had been given to three broad approaches: the 'status', the 'outcome' and the 'functional' approaches:

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[9] *B v A Local Authority* [2019] EWCA Civ 913
[10] *Airedale NHS Trust v Bland* [1993] AC 789
[11] Immanuel Kant, *The Groundwork for the Metaphysics of Morals* (1785)
[12] John Stuart Mill, *On Liberty* (first published 1860, John W. Parker & Son)
[13] Ronald Dworkin, 'Medical Decision Making for the Demented and Dying' *The Milbank Quarterly*, Vol. 64, Supplement 2 (1986), pp. 4-16

> *'The 'outcome' approach focused on the final content of the decision: a decision which is inconsistent with conventional values or with which the assessor disagreed might be classified as incompetent. This approach 'penalises individuality and demands conformity at the expense of personal autonomy': Mental Incapacity (1995) (Law Comm No 231) (HC 189), para 3.4. The Commission therefore recommended the functional approach: this asked whether, at the time the decision had to be made, the person could understand its nature and effects. … However, the Commission went on to accept that understanding might not be enough. There were cases where people could understand the nature and effects of the decision to be made but the effects of their mental disability prevented them from using that information in the decision-making process…'* [14]

The 'decision-specific' approach is an example of ensuring limited interferences of the lives of individuals. In *PC & Anor v City of York Council*, Lord Justice McFarlane observed agreeing that the assessment is decision-specific as follows:

> *'The determination of capacity under MCA 2005, Part 1 is decision-specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act-specific. Some other decisions, for example whether P should have contact with a particular individual, may be person-specific. But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the statute to be embellished.'* [15]

Capacity: the test

The MCA sets out a two-stage test for capacity. Stage one, the 'diagnostic' element: a person lacks capacity in relation to a matter if, at the material time, he or she is unable to make a decision in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.[16] Stage two is the 'functional' element, which asks whether the person being assessed can understand, retain, use and weigh the information that is relevant to the decision in question, and communicate his or her decision.[17]

As outlined above, to preserve autonomy:

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[14] *R v C* [2009] UKHL 42, [13]
[15] *City of York Council v C* [2013] EWCA Civ 478, [35]
[16] Mental Capacity Act 2005, s 2(1)
[17] Mental Capacity Act 2005, s 3(1)

(a) all considerations of capacity must be decision-specific, rather than generic;
(b) the outcome of the decision made is not relevant to the question of whether a person taking the decision has capacity;[18] and
(c) even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision.[19]

Relevant information

Although it is clear that information relevant to a decision is central to any assessment of capacity, there is little statutory guidance as to what that information might be: the MCA provides only that the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding on way or another or failing to make the decision at all.[20] The Code of Practice[21] to the MCA expands slightly insofar as it states that relevant information includes the nature of the decision[22], the reasons why the decision is needed, and the likely effects of deciding one way or another, or making no decision at all.[23]

It could be said that there is an appetite amongst capacity assessors (who are often social workers and sometimes psychiatrists, not lawyers) for the information relevant to various decisions to be distilled into a formula that can be universally applied. This not only ensures some measure of consistency among assessors, and, as a consequence, fairness for those being assessed, but also makes it easier for assessors to apply the two-stage capacity test without having to undertake an exercise of statutory interpretation each time.

It is for these reasons that the Court of Protection has often been asked to indicate what constitutes the information relevant to specific decisions. The applicability of the same is another matter entirely and is discussed below.

The judgment in the case of *LBX v K, L, M,* is perhaps the most notable example of a judge answering this question.[24] Theis J devised lists of

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[18] *R v C* [2009] 1 WLR 1786, [13]; *York City Council v C* [2014] 2 WLR 1, [53-54]
[19] Re SB [2013] EWHC 1417 (COP)
[20] Mental Capacity Act 2005, s 3(1)
[21] This is in the process of being revised, but to date nothing has been amended. See: https://www.gov.uk/government/consultations/revising-the-mental-capacity-act-2005-code-of-practice-call-for-evidence.
[22] This going beyond the statutory provision
[23] Mental Capacity Act Code of Practice, paragraph 4.16
[24] *X v K* [2013] EWHC 3230 (Fam)

information relevant to decisions about residence, care and contact with others, thereby defining the functional elements of the capacity test in those domains. These lists are now widely accepted and adopted by assessors, legal representatives and judges operating within the jurisdiction of the Court of Protection.

In the years following *LBX v K, L, M*, there emerged an increasing demand for similar clarity in respect of internet and social media use, which became so widespread that by 2018 88 per cent of adults in the UK were online and 77 per cent of those had accounts for social media/messaging apps.[25]

Ultimately, the question of what information is relevant to decisions about internet and social media use received judicial input from the Court of Protection and then the Court of Appeal in the case of *B v A Local Authority*.[26]

Internet and Social Media

The Autonomy connection

The issue of the use of the internet and social media is a good example of the juxtaposition between the need to preserve autonomy and maximise protection.

The backdrop must be to recognise, putting aside issues of capacity, that use of the internet and ergo social media is significant. The significance of unfettered access to, and of, the internet and its associated platforms cannot be understated.

A resolution adopted by the Human Rights Council of the United Nations (to which the United Kingdom is a signatory[27]) at its 32nd session on 1 July 2016 titled *'The promotion, protection and enjoyment of human rights on the Internet'* [28] states that the access to information on the internet facilitates vast opportunities for affordable and inclusive education globally, thereby being an important tool to facilitate the promotion of the right to education, while underlining the need to address digital literacy and the digital divide, as it affects the enjoyment of the right to education. It also emphasised Articles 9[29] and 21[30] of the Convention on the Rights of Persons with Disabilities (the CRPD), which calls upon States to take appropriate measures to promote access for persons with disabilities to

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[25] *Ofcom, Adults' Media Use and Attitudes Report, Ofcom https://www.ofcom.org.uk/__data/assets/pdf_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf, accessed 8 May 2020*

[26] *B v A Local Authority* [2019] EWCA Civ 913

[27] Although this is not binding to domestic law.

[28] A/HRC/RES/32/13

new information and communications technology and systems, including the internet.

The UN report of the *'Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio*n' on 16 May 2011, also reaffirmed that, *'… the Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression…'* .[31]

The European Court of Human Rights has also commented in relation to Articles 8[32] and 10 in *Cengiz and Others v Turkey*, when it is said that:

> *'[T]he internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest. ... User-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression ...'* [33]

However, there is a further dimension of the use of the internet by those with a disability. It could be seen a tool to rebalance.

Interpreting Article 21 of the CRPD, the UN Charter of Human Rights and Principles for the internet states that the Internet is important in enabling,

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[29] Article 9(1) states, *1, 'To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.'*

[30] Article 21 states, *'States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by: a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost; b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions; c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities; d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities; e) Recognizing and promoting the use of sign language'*

[31] United Nations, *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*

[32] Insofar as private life relates to photographs, personal development and the right to establish and develop relationships with others

[33] *Cengiz and Others v Turkey* (application nos. 48226/10 and 14027/11) Judgment of 1 December 2015, [49], [52]

'… persons with disabilities to fully enjoy all human rights and fundamental freedoms. Special measures must be taken to ensure that Internet access is accessible, available and affordable…Persons with disabilities have a right to access on an equal basis with others, the Internet'. [34]

In addition, and quite fundamentally, it has been said that there are clear benefits from the use of social media for persons with an intellectual disability, in particular providing another means to express a social identity, talk about lives and experiences and voice opinions, promoting self-determination; increasing opportunities to make and maintain relationships; increasing self-confidence and self-esteem through learning new skills; decreasing isolation; and providing enjoyable activities.[35]

These considerations came to the forefront in *Re B*.[36]

Re B

In this case, B was a young woman with diagnoses of learning difficulties and epilepsy. She had considerable social care needs. B lived with her parents but benefited from occasional respite care and some community support. B made frequent use of social media, which caused repeated concern to her adult social care workers because she was known to send intimate photographs of herself and communicate personal information to male strangers. B was assessed as requiring support to maintain her safety when communicating with others, which meant that the local authority that owed duties to B under the Care Act 2014, and so supplied the adult social care workers assigned to B, sought to restrict her internet and social media use.

The local authority therefore applied to the Court for a declaration that B lacked capacity in relation to internet and social media use. It is important to note that, without such declarations, the local authority could not lawfully restrict B's internet and social media use as part of her care plan. As a result of the decision-specific approach to capacity as set out in the Mental Capacity Act 2005, and for reasons beyond the scope of this article, it would not have been sufficient for restrictions upon B to be imposed by reason of her lacking capacity to make decisions about residence, care or contact with others.

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[34] The Charter of Human Rights and Principles for the Internet 2014, Article 13

[35] Darren Chadwick, 'Internet Access by People with Intellectual Disabilities: Inequalities and Opportunities', Future Internet, 2013, 5, 376. See also Sue Caton and Melanie Chapman, 'The Use of Social Media and People with Intellectual Disability: A Systematic Review and Thematic Analysis', Journal of Intellectual and Developmental Disability, vol 41 2016 issue 2

[36] *Re B* [2019] EWCOP 3

At first instance, the Court concluded that the relevant information that a person needed to be able to understand, retain, use and weigh is:

(i) information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it;
(ii) it is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites;
(iii) if you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended;
(iv) some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;
(v) some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;
(vi) if you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime.[37]

On appeal, the Court of Appeal made *obiter* reference that:

> *'whether the list or guideline of relevant information is shorter or longer, it is to be treated and applied as no more than guidance to be adapted to the facts of a particular case'.* [38]

The correct approach: autonomy vs protection

The strict application of a complete list of relevant information in all assessments of capacity is wrong in law because it frustrates personal autonomy and is an unjustified interference with Articles 8 and 10 of the European Convention on Human Rights. An ad hoc application of relevant information in all assessments of capacity strays into the protective narrative creating a utopian society. Whilst this may derive from good intentions, it arguably discriminates against those who come into the guise of the MCA.

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[37] ibid
[38] *B v A Local Authority* [2019] EWCA Civ 913, [44]

To ensure compatibility, it is suggested that the following regard must be had to the formulation of relevant information.[39]

No need to understand everything

It is now well established that there is no requirement for an individual to understand every facet of relevant information relating to the decision.

In *Heart of England NHS Foundation Trust v JB*[40], Peter Jackson J (as he then was) restated the principles outlined in sections 1 and 2 of the Act, namely:

> *'5. These principles reflect the self-evident seriousness of interfering with another person's freedom of action. Accordingly, interim measures aside, the power to intervene only arises after it is has been proved that the person concerned lacks capacity. We have no business to be interfering in any other circumstances. This is of particular importance to people with disadvantages or disabilities. The removal of such ability as they have to control their own lives may feel an even greater affront to them than to others who are more fortunate.'*

The Court has emphasised consistently that the individual is not required to understand every aspect of the decision to be made:

> *'25. What is required here is a broad, general understanding of the kind that is expected from the population at large. JB is not required to understand every last piece of information about her situation and her options: even her doctors would not make that claim. It must also be remembered that common strategies for dealing with unpalatable dilemmas – for example indecision, avoidance or vacillation – are not to be confused with incapacity. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.'*

This was further exemplified in *LBL v RYJ*[41] when Macur J stated that the individual needs to understand 'the salient details' but not necessarily *'all the peripheral details'*:

> *'24. I read section 3 to convey, amongst other detail, that it is envisaged that it may be necessary to use a variety of means to communicate relevant information, that it is not always necessary for a person to comprehend all*

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[39] We use the decision of the use of internet and social media as an example.
[40] *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342
[41] *L v J* [2010] EWHC 2665 (COP)

peripheral details and that it is recognised that different individuals may give different weight to different factors…

58. In Dr Rickard's view it is unnecessary for his determination of RYJ's capacity that she should understand all the details within the Statement of Special Educational Needs. It is unnecessary that she should be able to give weight to every consideration that would otherwise be utilised in formulating a decision objectively in her 'best interests'. I agree with his interpretation of the test in section 3 which is to the effect that the person under review must comprehend and weigh the salient details relevant to the decision to be made. To hold otherwise would place greater demands upon RYJ than others of her chronological age/commensurate maturity and unchallenged capacity' (emphasis added).'

Understand the importance of the decision and protect against the unique risks to titrate the relevant information

As outlined above, it is imperative, and to some degree the starting point must be, to recognise the significance of unfettered access to, and of, the internet and its associated platforms.

In respect of the use of the internet and social media, and with all decisions, it is important to have regard to the unique risks that are presented. This is a socio-legal consideration.

To this extent, it has been said (in the context of children) that the risks include being bullied; being groomed; engagement in antisocial behaviour; negative contact online and exposure to harmful and manipulative or exploitative content (e.g. advertising, violent or hateful material, harmful sexual material, extremist or racist information.[42]

This research is supplemented by the Home Office, which says that there is a number of risks associated including bullying, harassment, exposure to harmful content, sexual grooming and encouragement of self-harm, access to dangerous individuals and/or information, which may not be so immediate if contact was in person.[43]

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[42] Sonia Livingstone, 'Taking risky opportunities in youthful content creation: teenagers' use of social networking sites for intimacy, privacy and self-expression' New Media and Society 2008 10(3) pp.393

[43] Home Office Task Form on Protection on the Internet (2008). *Good Practice guidance for the providers of social networking and other use interactive services.* London: Home Office. See also the Guide entailed 'Learning Disabilities, Autism and Internet Safety: A guide for parents' prepared by Cerebra in association with Mencap, 2015, which also identifies the risks as being cyberbullying, privacy and preventing grooming and antisocial behaviour and criminal activity (pages 11 to 15).

Imperatively, empirical research has been undertaken on the associated risks of internet access by those who have an intellectual disability, which states that:

> *'The greatest perceived risks of being online for people with intellectual disabilities were being bullied, threatened or harassed online, providing too much personal information to others and being susceptible to online marketing scams…*
>
> *Comparing these to the self-ratings of the people without intellectual disabilities, different risks were perceived as more likely to affect the participants themselves, including being exposed to inappropriate or offensive adult pornographic content, becoming addicted to using social networking sites, spending less time on work, learning or personal development, engaging in copyright infringement and illegal downloading and being hacked. Inadvertently, downloading spyware or malware (e.g. viruses) onto one's computer was viewed as a high risk for both groups, although higher for those with intellectual disabilities'.*[44]

These unique risks need to be distilled into relevant information in order to protect against the same.

Germane to the facts and to P

Decisions require application in a particular factual context, without which there is *'nothing for the evaluation of capacity to bite upon'* and therefore the relevant information must include reference to matters specifically relevant to that broad factual context.[45] In the same vein, there must also be a practical limit on what needs to be envisaged as a 'reasonably foreseeable consequence' as otherwise it risks unnecessary interference with a person's autonomy.[46]

There is a clear need for information germane to the factual matrix of the decision to be made. There must be no attempt to filter in irrelevant considerations. For instance, in Re B there was no relevance (as far as can be seen in the judgment) to:

(iii) if you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended (limb three); and

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[44] Darren Chadwick, 'Perceptions of the risks and benefits of Internet access and use by people with intellectual disabilities', British Journal of Learning Disabilities, (2016), 45, 21-31

[45] *City of York Council v C* [2013] EWCA Civ 478, [31], [35], [38]

[46] *Re M (An Adult) (Capacity: Consent to Sexual Relations)* [2015] Fam 61, [80] – [82] (Sir Brian Leveson P)

(vi) if you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime (limb six).

The inclusion of these two limbs means that the functional test for capacity in this domain is problematic because it asks more of those whose capacity is questioned than those whose capacity is not (contrary to the remarks of *Peter Jackson J in Heart of England NHS Foundation v JB)*.[47] As a result, the complete application of the test fails to balance the competing rights of the individual with the potential risks posed, and overlooks the undeniable benefits offered by internet and social media use.

By comparison, for those whose capacity is not questioned there is no requirement that adults give any consideration whatsoever to the prospect of upsetting or offending other people through rude or offensive material or images: internet and social media users across the country are able to upload or share whatever they wish, subject only to the possibility of breaching the rules of any particular platform. Take, for example, the tweet of Danny Baker (a former BBC radio host), which featured a photograph of a couple holding hands with a chimp alongside the caption *'royal baby leaves hospital'.*[48] In response to the criticism levied at the tweet because of its overt racist connotations, Mr Baker stated that it had *'never occurred to [him]'* that the photograph might upset or offend other people.[49] Plainly, Mr Baker would have failed the functional test for capacity in relation to internet and social media use, but because his capacity is not in question, he is not asked to understand, retain, or use and weigh the relevant information.

Moreover, there is no requirement that adults understand, retain, or use and weigh the information that extremely rude content may lead to trouble with the police or the committing of a crime. When explaining a number of aspects of his test in *Re: A*, the Court focuses on limb six in relation to indecent images of children and that *'a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending'.*[50] This presents two interesting points. The first is that the reference to child pornography highlights the overly specific nature of limb

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[47] *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP)

[48] The tweet in question has since been deleted, but is copied here https://www.theguardian.com/media/2019/may/10/police-investigate-danny-baker-royal-baby-chimpanzee-tweet)

[49] Sarah Young, 'BBC Host Danny Baker Apologises for 'Racist' Royal Baby Tweet Featuring Photo of Chimp' (*Independent*, 9 May 2019) https://www.independent.co.uk/life-style/royal-baby-danny-baker-archie-racist-tweet-monkey-meghan-markle-a8905886.html accessed 8 May 2020

[50] *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2, [29]1

six, in that it is grossly unsuitable to be included in the relevant information for the vast majority of internet and social media users who would never encounter or actively search for such material. The second is that, whilst it is agreed that in theory most adults could be expected to know that such images are illegal, adults whose capacity is not in question are not asked to demonstrate this before they can access the internet or social media. In other words, the criminal law does not recognise a defence of ignorance – people are expected to suffer the consequences of their actions whether they knew they were criminal or not. There is no box for adults whose capacity is not questioned to tick before going online to confirm that they can satisfy limb six, nor are there restrictions imposed upon those who cannot. More should not be asked of those whose capacity is in question.

If the Court's test were refined to remove limbs three and six, it would mean asking only that people whose capacity is questioned can comprehend and weigh the salient details, rather than every single factor involved in a decision about internet and social media use (which would mean placing greater demands upon them than others of unchallenged capacity).[51]

By including limbs three and six in the list of relevant information, the Court shifted the balance between the competing factors considerably in favour of avoiding the potential risks. The test represents a readiness to mitigate the risks at the expense of the most fundamental rights of the individual. Arguably, it goes further than that by seeking to eradicate the risks altogether, rather than just mitigating them, by placing upon people whose capacity is questioned so high a burden that they must be able to grapple with virtually every risk (no matter how remote) before they can enjoy unfettered internet and social media use.

A possible counter-argument to this position is that those without capacity are vulnerable and in need of greater protection in a way that those with capacity are not. However, it is this approach to cases within the Court of Protection jurisdiction that leads to insufficient importance being placed upon the rights of an individual who may lack capacity, and hence the construct of a utopian society.

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[51] *LBL v (1) RYJ (2) YJ* [2010] EWCOP 2665 [58]

Conclusion

The use of the internet and social media is a good example of new decisions coming to the forefront of decision-making in the Court of Protection. Given the fast-paced development of algorithms, artificial intelligence and technology, individuals will be faced with new decisions, which do not fall under the remit of, for example, the use of the internet. In these circumstances, there is an ongoing need to keep the information simple. By way of analogy, in respect of decisions relating to consenting to sexual relations, Hedley J (as he then was) in *A Local Authority v H* said that:

> '*given that that is linked to the knowledge of developments in medicine, it seems to me that the knowledge required is fairly rudimentary*'.[52]

In these situations, the authors commend that a balance is struck in deciding the relevant information between maximising personal autonomy and reducing the protective narrative to what is necessary.

In this context, the balance is to appreciate:

(1) the significance of the use of the internet and social media, not least because:

   (a) it has become a key manner in which individuals exercise their right to freedom of opinion and expression[53];

   (b) it engages Articles 8 and 10 of the European Convention on Human Rights; and

   (c) Parliament has yet to govern the legality of users (save for cybercrimes, there is no real governance of the use of the internet for all individuals); but fundamentally because

   (d) research suggests that there are significant benefits for persons with intellectual impairment in using social media; and

(2) the unique risks, which the research outlined suggests relate to being groomed and oversharing (be it uploading sexually inappropriate pictures or text or otherwise), which then threaten privacy, identity and reputation.

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[52] *A Local Authority v H* [2012] EWHC 49, [23]

[53] It is the common modern means of communication, and in some cases creating and developing connections/relationships is via the internet and social media platforms.

To this extent, the reference, albeit *obiter*, by the Master of the Rolls in *Re B* that relevant information as outlined in cases is to be *'treated and applied as no more than guidance to be adapted to the facts of the particular case'* is important assistance.[54] It directs all assessors to have regard to the personal circumstances of the individual.

In doing so, we avoid the 'protection imperative' – the danger that the Court, that all professionals involved with treating and helping P, may feel drawn towards an outcome that is more protective of her and fail to carry out an assessment of capacity that is detached and objective.[55]

The above approach promotes and recognises that autonomy is of *intrinsic* value as a means of securing P's well-being rather than being of instrumental value: a formulation expounded some 20 years.[56]

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[54] *Re B* [2019] EWCOP 3

[55] *CC v KK* [2012] EWHC 2136 (COP)

[56] Sam Karim, *'Autonomy: a fundamental ideology in biomedical ethics in the era of reproductive technologies',* Kings College London LR, July 2002

The development of a non-discriminatory alternative to mental health law, the Mental Capacity Act (Northern Ireland) 2016.

Gavin Davidson, Professor of Social Care, Queen's University Belfast;
Tomas Adell, Head of Mental Health and Capacity Unit, Department of Health; and
Aine Morrison, Professional Officer, Office of Social Services, Department of Health.

In this article the authors explore the alternative approach to decision-making contained in the Mental Capacity (NI) Act 2016 and identify some of the drivers for change. The new law is outlined and some of the issues in the process of change are discussed, together with some possible future directions.

A person's ability to make a decision, which can be time and decision-specific, is usually referred to as their mental capacity. Traditional mental health law has enabled compulsory intervention, based on the criteria of 'mental disorder' and risk to self and/or others, regardless of whether the person has the ability to make the relevant decision/s about intervention. This is in contrast to most other aspects of health and social care where, if the person has ability to provide or refuse consent, then their decision is respected. In Northern Ireland a new approach has been developed which will create a single, comprehensive legislative framework to provide the necessary protections and safeguards for a decision to be made when a person is unable to do so themselves, regardless of the cause of their impaired decision- making ability.

There were a number of developments which provided the context for this alternative approach in Northern Ireland. The first was that there was a gap in the current statutory framework as there was no statute law to enable health and welfare decisions to be made for people who lacked the capacity to do so. The common law provided the principles that governed

intervention in those circumstances so that people were provided with a defence to an act that otherwise would have been unlawful if they had a reasonable belief that the person to whom the act related, was unable to make a decision in relation to the act, and that what they were doing was in the person's best interests. However, the need to address the gap in statute had been recognised in the UK and Ireland, for example, by the 1995 Law Commission report on Mental Incapacity in England but became more pressing following what tends to be referred to as the *Bournewood* case which was considered by the European Court of Human Rights in 2004.[1] The circumstances of that specific case involved the informal admission to hospital of a person who did not refuse or resist but did not have the relevant decision-making ability so they were in effect detained. Article 5 of the European Convention on Human Rights - the right to liberty - allows that people may be deprived of their liberty in some circumstances but this must be 'in accordance with a procedure prescribed by law' and the common law principles were not sufficient.[2]

The second was that the existing mental health law, the Mental Health (Northern Ireland) Order 1986, although progressive at the time, had been developed when mental health services were still relatively hospital-focused and so it did not provide a comprehensive framework to enable decision-making across other settings.

A third factor was that the legal frameworks in the neighbouring jurisdictions of Scotland, England and Wales, and the Republic of Ireland were being reviewed and new mental health and mental capacity-based laws being introduced, the first being the Adults with Incapacity (Scotland) Act 2000. In those jurisdictions, the approach was to introduce a new capacity-based law but to also retain an updated form of separate mental health law.

Another influential development was the debate in the literature about whether having mental health law, which was based only on mental disorder and risk, and didn't include the person being incapable of making the relevant decision as a criterion, was discriminatory as it allowed compulsory intervention even when the person retained the capacity to refuse it, a possibility not allowed in other areas of health and social care. In some countries this anomaly has been addressed by adding a capacity criterion to new or revised mental health law. In jurisdictions where consent/capacity has been added to mental health legislation there is usually (if not always) an element of forced compulsion that can be used,

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[1] *HL v UK* 45508/99 [2004] ECHR 471.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

based on a mental health diagnosis, which overrides the consent/capacity of the person. For example, in Sweden no treatment can be made without samtycke (essentially consent). However, the relevant mental health law, Lag (1991:1128) om psykiatrisk tvångsvård, allows compulsory treatment, if the purpose is to enable the person to be treated to the extent that the person will be in a position to consent to the treatment (essentially if the person says no, compulsory treatment can be done until the person says yes, then the treatment can only be done with consent as the person now says yes. If the person says no (i.e. withdraws consent) the cycle restarts – whilst this is consent/capacity provisions in mental health legislation it doesn't actually provide any real rights to consent or capacitous decisions). An early version of the argument to no longer have specific mental health law was made by Campbell and Heginbotham (1991) who suggested that such laws are *"institutionalised forms of discrimination"*.[3] In 1998, Tony Zigmond, in the Editorial of the Journal Psychiatric Bulletin, argued that mental health law should be replaced by a new Medical Incapacity Act which would *"establish a statutory framework offering the same protections to all patients who are unable to consent to medical intervention, from both physical and psychiatric conditions"*.[4] In the same issue of that journal, Szmukler and Holloway (1998) suggested that mental health law was now *"a harmful anachronism"* (p. 662) and that a capacity based framework for all would address some of the contradictions, discrimination, stereotyping and stigma of separate mental health law.[5]

Other concerns about specific mental health laws included: that they reinforced the wider issues of stigma and discrimination that people with mental health problems often encounter; that they may encourage a status-based approach in which people make assumptions about decision-making ability based on specific labels; there is also a growing debate about the reliability and validity of traditional diagnostic labels; and a developing evidence base that suggests our ability to accurately predict future harm is very limited.

A further aspect of the wider context of the approach in Northern Ireland was the adoption of the Convention on the Rights of Persons with Disabilities and its Optional Protocol by the United Nations in 2006[6]. Although the

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[3] Campbell, T. and Heginbotham, C. (1991) *Mental Illness: Prejudice, Discrimination, and the Law* (Medico-Legal Series). Aldershot: Dartmouth Publishing Group. p.94.

[4] Zigmond, A. S. (1998) Medical Incapacity Act. *Psychiatric Bulletin*, 22(11), 657-658. p.658.

[5] Szmukler, G. and Holloway, F. (1998) Mental health legislation is now a harmful anachronism. *Psychiatric Bulletin*, 22(11), 662-665. p.662.

[6] Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) adopted on 13 December 2006 at the United Nations Headquarters in New York, and opened for signature on 30 March 2007. The United Kingdom signed on 30 March 2007 and ratified on 8 June 2009.

UNCRPD was not a major factor in the initial discussions about the way forward in Northern Ireland, it has certainly become an important part of the debate. The focus has tended to be on the interpretation of Article 12 which requires States to recognise *"that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life"* (12.2), to provide access to *"the support they may require in exercising their legal capacity"* (12.3) and to provide safeguards *"to ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person"* (12.4). The reaffirming of universal legal capacity, that everyone retains their rights regardless of their mental capacity to make decisions, hasn't in itself been controversial but there have been a range of interpretations of what this means in practice. It also seems relatively uncontroversial that traditional mental health laws, that base compulsory intervention on a specific form of disability, are not compatible with the UNCRPD. A very helpful summary of the issues has been provided by the Essex Autonomy Project which suggested that what has traditionally been referred to as substitute decision-making could be more positively reframed as part of a supported decision-making framework, even if this includes someone else making the decision, as long as the focus is clearly on respecting the person's rights, will and preferences.[7]

In Northern Ireland the process which led directly to the new Act was the Bamford Review of Mental Health and Learning Disability commissioned by the Department of Health, Social Services and Public Safety (now the Department of Health). It was a wide-ranging review which considered law, policy and practice and was a very inclusive process. It started in 2002 and was completed in 2007. The report of the Legal Issues Committee of the Review was published in 2007 and it stated that:

> *"The Review considers that having one law for decisions about physical illness and another for mental illness is anomalous, confusing and unjust… Northern Ireland should take steps to avoid the discrimination, confusion and gaps created by separately devising two separate statutory approaches, but should rather look to creating a comprehensive legislative framework which would be truly principles-based and non-discriminatory."*[8]

This is often referred to as the fusion approach as it brings together mental health and mental capacity laws into a single, capacity based law.

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[7] Martin, W., Michalowski, S., Jutten, T. and Burch, W. (2015) *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*. Colchester: University of Essex.

[8] Legal Issues Committee (2007) *A Comprehensive Legislative Framework*. Belfast: Bamford Review of Mental Health and Learning Disability (Northern Ireland). p.36

[9] Dawson, J., & Szmukler, G. (2006) Fusion of mental health and incapacity legislation. *British Journal of Psychiatry*, 188(6), 504-509.

In response to the Review's recommendation for a comprehensive legislative framework the Department initially proposed two separate pieces of legislation (mental health and mental capacity) both supported by an overarching set of human rights principles. However, the submissions to the public consultation on this proposal, which ran from January to March in 2009, were almost universally in support of the original Bamford recommendation for one, capacity-based framework for all and the Department then agreed to develop that approach. It also set up a Reference Group of users, carers and professionals from across disciplines and sectors which continued the inclusive approach of the Bamford Review. Responsibility for policing and justice was devolved to the Northern Ireland Assembly in April 2010 and so the new Department of Justice became involved with the relevant aspects of the proposed Bill. There was an Equality Impact Consultation in July 2010 to explore whether the new approach would disadvantage any specific groups. The first set of instructions were then provided to the Office of Legislative Counsel in June 2011 to begin the process of writing the Bill. In July 2012 the Department of Justice conducted a public consultation and in May 2014 the Department of Health, Social Services and Public Safety released the Draft Bill for consultation and the Department of Justice had a further public consultation on the policy aspects of the Bill it had responsibility for. The full Bill was introduced to the Assembly in June 2015 and considered by an Ad Hoc Joint (Health and Social Services, and Justice) Committee. It was then passed by the Assembly and received Royal Assent on 9th May 2016. The Assembly in Northern Ireland was suspended from January 2017 until January 2020 which delayed implementation but the Department of Health was able to proceed with partial implementation of the Act, for those aspects which relate to deprivation of liberty, on 2nd December 2019. An action point (6.1) to fully commence the Act, was included in the recently published Mental Health Action Plan.[10]

The Mental Capacity Act (Northern Ireland) 2016 is made up of 15 Parts, 308 Sections and 11 Schedules. It provides a capacity based approach and will replace rather than be parallel to the mental health law for everyone who is aged 16 and over. For those under 16, amended/improved mental health law, which will introduce a statutory best interests consideration, will remain in force. It provides protection from liability rather than compulsory powers for acts in the best interests of a person who lacks capacity for the relevant decision as long as the relevant processes/safeguards are in place. There are some powers, mainly in the justice sections, but the Act mainly provides protection from liability and safeguards for the person who lacks capacity.

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[10] The Department of Health 2020 Mental Health Action Plan. Belfast: Department of Health

The Act is principles based and these are set out in Part 1. Section 1 sets out four principles related to capacity (that it is decision-specific; it's based on functional evidence not status; all practicable help and support must be provided to enable the person before the person can be deemed to lack capacity; and a person cannot be treated as lacking capacity merely because the decision is unwise) and Section 2 sets out the best interests principle. Part 1 also defines what "lacks capacity" means and, in Section 3(2) specifies that it does not matter whether the impairment or disturbance is permanent or temporary; or what the cause of the impairment or disturbance is. The capacity test is set out in Section 3 which provides that a person lacks capacity if he or she is unable to make a decision because of an impairment of, or disturbance in the functioning of, the mind or brain. Section 4 provides what it means to be unable to make a decision, that is: understand the relevant information; retain the information for the time required to make the decision; appreciate the relevance of that information and to use and weigh that information; or communicate their decision.

The safeguards provided by the Act depend on the level of intervention that is proposed. All treatment under the Act is compulsory by definition. As there is no consent to the treatment (as the person lacks capacity), the treatment is de facto without the person's support. Routine interventions can proceed on the reasonable belief that the person lacks capacity and the intervention proposed is in their best interests. Serious interventions (such as those involving major surgery, serious and prolonged pain and/or distress) and treatment with serious consequences where the nominated person does not reasonably object also require a formal assessment of capacity, consultation with the person's nominated person and for some interventions a second opinion and an independent mental capacity advocate. For interventions that involve treatment with serious consequences where the nominated person reasonably objects, deprivation of liberty, attendance requirement or a community residence requirement, then, in addition to the other safeguards, an independent mental capacity advocate is appointed, a report must be completed proposing the intervention/s, additional criteria must be met (for treatment and deprivation of liberty, prevention of serious harm condition; for attendance requirement receipt of treatment condition and for community residence requirement prevention of harm condition) and a Panel must consider the report before deciding whether to authorise the intervention. Under Schedule 2 of the Act short-term (up to 28 days) detention in hospital is still possible for examination of illness (or examination followed by treatment) but further deprivation of liberty would require authorisation by a Panel.

It's interesting to speculate about the combination of reasons which contributed to Northern Ireland adopting this progressive, and so far unique, alternative to mental health law at this time.

One important factor may have been the timing of the process in Northern Ireland. Although the Bamford Review began in 2002 it was not completed until 2007 and the fusion approach wasn't fully agreed until 2009. This enabled learning from the experiences of other jurisdictions, perhaps especially England and Wales where the combination of the Mental Capacity Act 2005, the Mental Health Act 1983 reform process and the Deprivation of Liberty Safeguards had created what appeared to be a very complex legal framework which had not addressed the discrimination of separate mental health law.

Other variables may include specific aspects of the Northern Ireland context. It is a relatively very small country with a population of 1.8 million people. Its history of political violence is possibly relevant in a number of different ways. The conflict has perhaps increased people's awareness of rights-based approaches and the importance of the law in protecting rights. The impact of the violence and division on people's mental health, which has been more fully acknowledged since the Good Friday Agreement in 1998, may also have facilitated a greater openness to discussing these issues and accepting the need to address them. The Northern Ireland Assembly was only established in 1998 and so is a relatively young legislature. Although some of the Members of the Legislative Assembly may still be divided along sectarian lines, there may be a relatively high level of consensus on social issues. It may also have been important for the Assembly to demonstrate that it had the collective ability and will to make difficult decisions about reform and was able to draft complex, innovative and progressive law.

It's hard to estimate the relative influence of these factors but the Bamford Review is definitely of central importance. The general approach of the Review was very inclusive with a strong emphasis on the involvement of service users and carers. Although this inclusive approach may have contributed to the length of time needed for the Review that also enabled a high level of debate, reflection, consultation and so allow consensus to emerge. With a change as significant as the fusion approach, time to enable people to consider the issues and the possible impact does seem important. Although there were many people involved in the Review there were some key individuals in leadership positions who may have been influential: Professor David Bamford chaired the Review and championed the inclusive approach; Professor Roy McClelland, who was the Deputy Chair, was already very familiar with the complex wider debates about mental health law and the possible alternatives; and Siobhan Bogues who led on the intellectual disabilities aspects of the Review also promoted a very progressive and rights based approach. Sadly, during the Review, David Bamford died but this may also have contributed to how important the Review was felt to be, and Roy McClelland, as Chair, continued the engaging and inclusive approach. Following the completion of the Review,

the Department of Health, Social Services and Public Safety also facilitated a high level of ongoing discussion and consultation. Two issues which caused considerable debate were whether those aged under 16 should be included and how the new framework would work in the Criminal Justice System. Although universal consensus was not achieved on these issues there was certainly considerable time devoted to working through the different issues and possible approaches.

The high level of interaction with people with lived experience, professionals and the community and voluntary sector does seem to have been of key importance, both during the Bamford Review and the work in the Department since. It has created a real level of urgency and support from all major stakeholders meaning the policy work developed based on a very high volume of ongoing discussions; something absolutely vital when the work is as innovative and progressive as the Mental Capacity Act (Northern Ireland) 2016. In short, due to the strong 'movement' for fused capacity legislation it became the clear way to proceed and was therefore relatively straightforward to get support within the Department and Assembly.

In terms of evidence of the impact of the new Act, there are a few issues that are important to clarify and acknowledge.

The first is that, although the Act was enacted into statue law on 9th May 2016, it still has not been fully implemented. Although the Departments of Health and Justice have continued to work on the plans for implementing the Act, and partial implementation (to address the immediate need for Deprivation of Liberty safeguards but not to replace the Mental Health (Northern Ireland) Order 1986) was achieved on 2nd December 2019, the date for full implementation has not yet been set.

The process of developing the Act, even though it has not yet been fully implemented, has had some impact on practice however, with a much greater awareness of the issues involved in decision-making processes. This has also been reinforced by developments in the neighbouring jurisdictions and in the relevant case law, perhaps especially Cheshire West. This is most concretely evidenced by a rise in applications to the High Court for Declaratory Orders but it is also reflected in routine practice around decisions and determination of best interests.

Even if the fusion approach contributes to addressing some of the issues of discrimination and stigma, it won't, and shouldn't be expected to, address all the wider societal, policy, services and practice issues that are relevant to people's mental health.[11] One important example of this is the relationship between deprivation and mental health but there are positive indications that these wider issues are being actively considered and responded to for

example the Department of Health's Anti-Poverty Practice Framework for Social Work in Northern Ireland which was launched in July 2018.[12]

There are also some specific issues which may raise further complex questions under the new Act although arguably these complexities also exist under the current legal framework. These include the position of those under 16, the professional roles under in the operation of the Act and the practice issues at the interface between mental health services with the Criminal Justice System. Those aged under 16 have no decision-making powers in NI statute. In some, very specific, situations the case of Gillick provides that a capacitous under 16 can make decisions for themselves. A person aged under 16 who doesn't have the relevant capacity has no such rights in current law. The new Act only applies to those aged 16 and over and does not remove parental responsibility, rights or power, meaning that a parent can consent on behalf of an under 18, whether they lack capacity or not.[13] Only where those with parental responsibility do not make any decision (i.e. provide or withhold consent) does the Act apply, and then only for those aged 16 and over. Professional roles under the Act are not fully addressed in the Act itself but draft Regulations and the Code of Practice have provided much more detail on how the Act will operate in practice. In terms of the interface with the Criminal Justice System, this is addressed in Part 10 of the Act, although as already mentioned, this will not resolve all the complexities involved with that interface.

Another potential issue is that the Act will still facilitate the use of force with its potential for additional trauma for the people involved.[14] Throughout the process of developing the Act, there has been a high level of consensus that, in some specific circumstances, the use of force is still justifiable, and indeed necessary to protect people's rights, but how this can be done in a way that minimises the potential distress and trauma involved will not be fully resolved by the Act or even the Code of Practice. It has been argued,

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[11] Black, D., Morris, J. N., Smith, C., & Townsend, P. (1980) *The Black report: inequalities in health*. London: DHSS.
Acheson, D. (1998) *Independent inquiry into inequalities in health.* London: HM Stationery Office.
Marmot, M., Allen, J., Goldblatt, P., Boyce, T., McNeish, D. and Grady, M. (2010) *The Marmot Review: Fair society, healthy lives.* London: UCL Institute of Health Equity.

[12] Department of Health (2018) *Anti-Poverty Practice Framework for Social Work in Northern Ireland.* Belfast: Department of Health.

[13] Although this position may be questioned following Re D (A Child) [2019] UKSC42

[14] Beattie, N., Shannon, C., Kavanagh, M., & Mulholland, C. (2009) Predictors of PTSD symptoms in response to psychosis and psychiatric admission. *Journal of Nervous and Mental Disease*, 197(1), 56-60.
Berry, K., Ford, S., Jellicoe-Jones, L., & Haddock, G. (2013) PTSD symptoms associated with the experiences of psychosis and hospitalisation: a review of the literature. *Clinical Psychology Review*, 33(4), 526-538.

particularly in the context of the UNCRPD, that the use of force in the health and social care sector is never acceptable but there has been no satisfactory explanation for how such a system (i.e. without force) can protect the rights of, and provide care to, those who are highly disturbed, or highly affected by something (such as trauma or drugs) and pose an immediate risk of serious harm to self and/or others. In effect, if force cannot be used it would not be possible to stop a person, whose ability to make decisions may be significantly impaired, from killing themselves or to stop them killing another person. It is sometimes argued that these are relatively unusual circumstances but there are precisely the circumstances in which a clear legal framework is needed to protect the rights of all involved.

It is also difficult to estimate the future impact of the Act. It may be that it has very little impact in practice – that the language of mental disorder is replaced with mental capacity but the experience for professionals and service users is more or less the same. It may also be that there is a negative impact, for example if the Act creates excessively bureaucratic procedures that divert resources from service provision to administration which does not directly benefit the service user.

It does seem likely however, that the Act will have a positive impact. Most importantly there should be a positive impact on people whose decision making is impaired. The new framework, especially through the support principle which requires support to be provided to maximise people's autonomy, should have a dramatic impact on those decision-making processes. The Act also provides a clear set of safeguards for persons who lack capacity. Without adherence to the safeguards the person doing an act is not protected from liability. This means that the Act has considerable teeth. There are a number of offences provided in Part 13. Failure to adhere to the safeguards may render a professional (or other person acting on behalf of a person who lacks capacity) criminally liable. Indeed, there have been some interesting criminal convictions in England relating to similar provisions. There is also potential positive impact for the practitioners and lawyers involved as the Act will provide a more coherent and accessible framework for decision-making. The Act also has the potential to have a wider societal impact for all of us. It carries the clear message that we all need to consider the circumstances in which our ability to make decisions may be impaired and emphasizes that everyone's decision-making processes depend on the support and involvement of others. Although this will not resolve issues of stigma associated with mental health problems it will, at the very least, create a non-discriminatory legal framework for all.

It is exciting that Northern Ireland has adopted this progressive approach and, although there may be challenges ahead in the implementation process, the enthusiasm and support for this change has been sustained.

The approach of having one legal framework for all, regardless of the cause of their impaired ability to make the relevant decision, is necessary to avoid the injustice of separate mental health law and has the potential to help address some of the wider issues of stigma and discrimination associated with mental health problems. Whether the mental capacity fusion approach is the most effective way to achieve that is still debatable but it is certainly a positive attempt to do so.

Cross-border incapacity: where are we now?

Richard Frimston, Russell-Cooke LLP

This article examines the private client consequences of elderly people living in a different state to that of their families, highlighting the complex conflicts issues arising where there are increasing numbers of cross border estates both during lifetime and on death.

The United Kingdom has ratified the Hague Convention 35 of 13 January 2000 on the International Protection of Adults (HCCH35) but for Scotland only and not for Northern Ireland or England & Wales. EU member states have been encouraged to ratify and more are doing so. Ireland is still intending to ratify within the next 2 years.

Many of the problems in the UK stem from the fact that HCCH35 has only been ratified for Scotland, but HCCH35 is still enforced internally by the courts but not at an administrative level.

Background

Globalisation has not had a good press recently. Did it begin as a result of the ending of the Bretton-Woods agreement in 1971 and the subsequent abolition of exchange controls which in the UK occurred in 1979? The ability to purchase property in other states and the freedoms within the EU pioneered in the Maastricht Treaty increased the trend of ever larger numbers of citizens moving, studying, working or retiring abroad. Brexit may reduce the speed of this increase, but is perhaps unlikely to reverse it.

The private client consequences of elderly people living in a different state to that of their families, are that there are increasing numbers of cross border estates both during lifetime and on death. The conflicts issues are particularly complex.

The Hague Convention on the International Protection of Adults of January 13, 2000 (HCCH35) attempts to produce some solutions across borders to the issues of:

- jurisdiction,
- applicable law

- recognition and enforcement for court powers and
- acceptance and enforcement of forms of enduring or lasting powers of attorney.

Professor Eric Clive of Edinburgh University and the Scottish Law Commission chaired the original 1997 Hague Commission with members from France, USA, Canada, Denmark and Switzerland which proposed the wording of the Convention. It was modelled on the 1996 Protection of Children Convention (HCCH34), without perhaps sufficient thought as to the differences that need to be considered between the protection of children and that of adults. More information, including the very valuable Lagarde Report (slightly revised in 2017) is available from the Hague Conference website: http://www.hcch.net

HCCH35 has now been ratified by Austria, Cyprus, Czechia, Estonia, Finland, France, Germany, Latvia, Monaco, Portugal, Switzerland and the UK (but only for Scotland[1]). HCCH35 came fully into effect on January 1, 2009. Although the UK has not ratified for Northern Ireland, by virtue of s.283 and Sch. 9 to the Mental Capacity Act (Northern Ireland Act) 2016 (MCA(NI)2016) the current law is virtually identical to HCCH35, although with a few differences.

The same applies to the law of England & Wales by virtue of s.63 and Sch. 3 to the Mental Capacity Act 2005 (MCA2005).

Ireland is clearly intending to ratify HCCH35, in the next year or two, by virtue of the Assisted Decision-Making (Capacity) Act no.64. Belgium should also ratify shortly.

For those practitioners not used to dealing in private international law issues, Sch. 9 and Sch.5 MCA(NI)2016 may appear to be odd beasts bolted on without thought and are dealt with in more detail below.

All of the Hague Conventions deal with private international law. Accordingly, they must use generic terminology that can be understood in different jurisdictions. HCCH35 is no exception.

1. Capacity and incapacity

It is well understood that whether an individual has sufficient capacity is not a question with a binary yes or no answer. "Capacity, to do what precisely?" should be the response.

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[1] by the Adults with Incapacity (Scotland) Act 2000 asp 4

A person may have capacity to marry, but not to manage complex financial affairs or make a valid Will.

Similarly, which may be the correct applicable law to decide the question of capacity will depend on the action for which capacity is needed. The capacity to contract or to make a binding gift may be decided by the proper law of the contract governed by the Rome I Regulation as for example discussed in the case of *Gorjat and others v Gorjat* [2010] EWHC 1537 (Ch).

Most states have regarded questions of capacity as a matter for the "personal law" of the individual usually governed by the law of the nationality in civil law systems or by the law of the domicile in common law systems.

2. HCCH35 and Schedules 5 and 9 of the Mental Capacity Act (Northern Ireland) 2016

The main restrictions on the application of HCCH35 and Sch.9 are the exclusions contained in Art.4 referred to in Sch.9, para.32. The extent of these exclusions relating to maintenance obligations, marriage, dissolution and divorce, matrimonial property regimes, trusts and succession, social security, public health matters, crime, immigration and public safety are not necessarily as broad as may first appear.

Study of the Lagarde report is necessary if the boundaries of any of these matters need to be considered, but it should be borne in mind, however, that any Explanatory Report is just that and that "it would be unfortunate if words in the Explanatory Report were treated as if they were words in the Convention itself."[2]

The three main differences between HCCH35 and Sch.9 are that HCCH35 applies:

- to adults of 18 years whilst Sch.9 applies to persons of 16 years (para.4),
- only to adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests whilst Sch.9 also applies not only to 16 year olds who have such an impairment, but also to donors of powers of attorney of any age whether or not so impaired or insufficient and
- only to recognition and enforcement of measures from states that have ratified HCCH35, whilst Sch.9 applies to all states.

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[2] *In the matter of J (a child)* [2015] UKSC 70, per Lady Hale at [38] with reference to HCCH34.

The powers granted by Lasting Powers of Attorney created by persons under 18 are limited whilst they are under 18[3], whilst the point is not dealt with in relation to Enduring Powers of Attorney[4].

The main cross border effects of HCCH35 and Sch.9 are to make habitual residence the main connecting factor for deciding questions of jurisdiction and applicable law and for purposes of recognition and enforcement.

Therefore, now, in Northern Ireland, the Office of Care and Protection has jurisdiction in relation to property in Northern Ireland and also in relation to property anywhere and the person if they are habitually resident in Northern Ireland. The court will usually apply the law of Northern Ireland, but under Sch.9 para.12 may apply foreign law if the matter has a substantial connection with that country. Similar rules apply in the remainder of the United Kingdom.

However, since HCCH35 has not yet actually been ratified for Northern Ireland, it must be remembered that although its private international law is virtually identical to HCCH35, the cross-border co-operation provisions in Chapter V, Art. 28 onwards cannot be used, whilst they can be in Scotland. Similarly, it is not currently possible to obtain a certificate under Art.38 in Northern Ireland (or England & Wales), whilst it is in Scotland.

Prior to ratification, it is also presumed that Art.7 and 8 requests under Sch.9, para. 9 are not available. As has been highlighted, HCCH35 came into existence in the law of England & Wales without any consideration as to its administrative needs and consequences[5]. It is to be hoped that the OCP has learnt some of these lessons.

Private international law always illustrates the tensions between simplicity of rules for jurisdiction, applicable law and recognition and enforcement together with comity between legal systems versus local discretion and public policy issues in hard cases.

David Hill in his excellent review of HCCH35[6] concluded:

> *"The need for legal systems to provide adequate protection for incapacitated adults will undoubtedly become more pressing the coming*

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[3] S.98(8) MCA(NI)2016

[4] Defined under s.306(1)(b) MCA(NI)2016 as one within the meaning of the Enduring Powers of Attorney (Northern Ireland) Order 1987.

[5] Court of Protection Rules dealing with applications under the MCA 2005 Sch.3 in England & Wales were not introduced until 2017 by SI 2017/1035 (L.16) that came into force on 1 December 2017.

[6] *International Comparative Law Quarterly* (vol 58, April 2009 pp 469–476)

years, domestically as well as internationally. The 2000 Hague Convention provides a valuable framework of rules which will promote increased certainty and uniformity within this area. Whilst these rules are not free from criticism, the concerns which exist are of a minor nature and do not strike at the core of the instrument. Indeed, the primary challenge is the necessity of extending the Convention regime beyond France, Germany and Scotland."

Over ten years has passed since HCCH35 came into force and many of us think that it has long been high time that the UK ratified HCCH35 with effect both for Northern Ireland and for England & Wales.

3. Powers of representation and Enduring and Lasting Powers of Attorney

This is where theory and practice do begin to diverge.

HCCH35 refers to powers of representation whereas Sch.9 refers to Lasting Powers. The only definition in HCCH35 is in Art,15 which refers to "powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests".

Sch,9 para.14(6) defines Lasting Powers (for the purposes of Part 3 only) as a Lasting Power of Attorney[7], Enduring Power of Attorney[8] or any other power of like effect.

The law applicable to such a power is either that of the country of the donor's habitual residence or that of a country of which they are a national, or in which he has formerly been habitually resident or in which he has property (but only in respect of that property), if the donor specifies that law in writing and even though that applicable law does not itself recognise such powers.

Art.45 of HCCH35 sets out detailed rules in relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in HCCH35 apply in different territorial units. Most of these are straightforward.

Thus any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit, any reference to the presence of the adult in that State shall be construed as referring to presence

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[7] As defined in s.97 MCA (NI) 2016
[8] As defined in s.306(1)(b) MCA (NI) 2016

in a territorial unit and any reference to the location of property of the adult in that State shall be construed as referring to location of property of the adult in a territorial unit.[9]

However, reference to nationality is trickier. Under Art.45 (d) any reference to the State of which the adult is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the adult has the closest connection.

Since there are no United Kingdom-wide rules as to private international law, but only the individual rules of each separate jurisdiction, reference to nationality will not be narrowed down to Northern Ireland (or Scotland or England & Wales) by the connecting factor of domicile, but by that of closest connection.

Like para.13 of Sch.3 to the MCA2005, the drafting of para.14 of Sch.9 MCA (NI) 2016 is not as clear as Art. 15 of HCCH or para.4 of Sch.3 of the Adults with Incapacity (Scotland) Act 2000. There are a number of lacunae, one of which was discussed in some detail in the decision *In the Matter of Various applications concerning foreign representative powers*[10].

If the donor at the time of making the power is not habitually resident in Northern Ireland but is a UK national, in what circumstances may Northern Ireland be chosen as a connected country? Under HCCH35 it should be on the basis that the donor is most closely connected with Northern Ireland at the time of designation.

This provision does not have any transitional provisions and will therefore apply to historic Enduring Powers of Attorney made at a time when thought was not given as to the habitual residence, nationality or closest connection of the donor at the time of creation.

It is not at all clear as to what is required to specify a particular law in writing. It may well be arguable that the use of the form of Enduring Power of Attorney[11] which includes the words: " ..... to be my attorney[s] for the purpose of the Enduring Powers of Attorney (Northern Ireland) Order 1987" are impliedly specifying the law of Northern Ireland.

However, this is by no means clear, and if it is not clear that a donor is or was habitually resident in Northern Ireland at the time of making an Enduring

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[9] Art.45. (a), (b) and (c).

[10] [2019] EWCOP 52

[11] Set out in the schedule to the Enduring Powers of Attorney Regulations (Northern Ireland) 1989 (S.R. 1989 No.64)

or Lasting Power of Attorney it would be good practice specifically to state that the Power is subject to the condition that the law of Northern Ireland is to apply as the specified law. If Northern Ireland is a "connected country", the particular fact that makes it so connected, such as a former habitual residence, or nationality and closest connection should also be stated.

There is, however, no requirement under Sch.9 MCA(NI)2016 that such specification must be within the Enduring Power itself, or that it must be made at the time of making the Enduring Power. Indeed, the fact that a requirement for writing is separately specified indicates, that it can be made later and the specification can therefore presumably be by a separate statement in writing, made at a later time.

Art.15 of HCCH35 is not drafted in this way, and might indicate that the choice must be made at the time of making the agreement. The Lagarde Report does not deal with the issue.

However, under Sch.9 MCA(NI)2016 it is probably not too late to arrange for clients who have created historic Enduring Powers of Attorney whilst not habitually resident in Northern Ireland, to specify the law of Northern Ireland now, provided that such a Northern Ireland connection exists, either having been a previous habitual residence or by UK citizenship and Northern Ireland being the part of the UK with which the adult is most closely connected.

Many other jurisdictions have forms of powers of attorney that have a like effect to an Enduring Power of Attorney. These are often called Lasting, Continuing or Durable Powers. In some states, such as Germany, subsequent incapacity does not automatically revoke a general power of attorney. It should be remembered, however, that in many jurisdictions marriage or divorce can automatically revoke a power of attorney.

Sch.9 MCA(NI)2016 directs that Northern Ireland must now recognise such powers if valid under the applicable law as set out in para.14 both before and after capacity may have been impaired. This is the case even though HCCH35 may not apply in the other jurisdiction whether because that state has not ratified or because capacity has not yet been impaired.

4. Other Issues

Statutory Wills

The concept of a Statutory Will is unknown in many jurisdictions. Accordingly, the cross-border effect of a Northern Ireland statutory Will is particularly

complex. Those States that have ratified HCCH35 might recognise a Northern Ireland Statutory Will as being a protective measure.

The cross-border effect of a statutory Will made under Sch.9 MCA(NI)2016 is limited by Sch.5. paras.1-4. In particular para.4(4) and (5) set out that:

"(4) But sub-paragraph (3) does not have effect in relation to the will—

(a) in so far as it disposes of immovable property outside Northern Ireland; or

(b) in so far as it relates to any property or matter **other than immoveable property** if, when the will is executed—

(i) P is domiciled outside Northern Ireland; and

(ii) the condition in sub-paragraph (5) is met.

(5) The condition is that, under the law of P's domicile, any question of P's testamentary capacity would fall to be determined in accordance with the law of a place outside Northern Ireland."

The provision in Sch.2 MCA 2005 para.4 is similar but omits the words shown in bold and underlined.

In *In the Matter of P* [2010] EWHC 1928 (Fam), Mr Justice Lewison clearly indicated (at paras 31-34) that the omission of words similar to "other than immovable property in England or Wales" contained at the end of s.97(4)(a) Mental Health Act 1983 from para.4 (4) was an oversight of Parliament and that para.4(4) is therefore to be regarded as meaning:

(4) But sub-paragraph (3) (whilst it shall always apply in so far as the will disposes of immovable property within England & Wales) does not have effect in relation to the will …

The drafters of Sch.5 MCA(NI)2016 did not take this decision and these words as their model and the double negatives do require a wet towel and some thought.

It would appear to the writer, that a Northern Ireland Statutory Will whilst always effective over immovable property in Northern Ireland is never effective over immovable property outside Northern Ireland and if P is domiciled outside Northern Ireland is only effective over other property (movable property) if the law of P's domicile directs that Northern Ireland law is the applicable law to decide questions as to P's capacity.

This provision is somewhat at odds with the thrust of HCCH35 that the law of the state of habitual residence should be the applicable law for all questions and that the domicile of P should be irrelevant.

The Scottish courts by contrast are not subject to such a limitation under the Adults with Incapacity (Scotland) Act 2000 and therefore it is presumed could make an Intervention Order authorising a will to be executed over immovable property in other parts of the United Kingdom or elsewhere.

Whilst art.19 of HCCH35 abolishes the doctrine of *renvoi*, para.4(4) of Sch.5 MCA(NI)2016 envisages that the doctrine of *renvoi* can apply to the personal law governing capacity for the purposes of a Statutory will. The doctrine of total *renvoi* probably applies in Northern Ireland to succession matters. It is thus perfectly feasible that the succession law of Northern Ireland may apply to foreign immovable property or to the movable property of someone not domiciled in Northern Ireland if the law of the domicile directs that the law of Northern Ireland should apply. A statutory will made in Northern Ireland may however not have effect, in relation to such property unless saved by the order of a relevant court elsewhere.

Settlements

The provisions of s.115 and Sch.5 paras 5 and 6 relating to settlements created or later varied by the court are not subject to any such particular restriction based on domicile or the situs of property.

Clearly any of the powers relating to Statutory Wills or settlements can only be exercised by the court if P is habitually resident in Northern Ireland or one of the other grounds for jurisdiction exists.

Ademption of gifts

The saving para.8 of Sch.5 under which a gift is not to lapse in a Will if the relevant property is disposed of by virtue of s.18, causes similar cross border confusions.

It is uncertain as to whether a court would regard this issue as one of construction of the provisions of a Will or alternatively as one of the effects and implementation of a protective measure.

If it is a matter of construction of a Will then the applicable law would be that intended by the Testator, which in the absence of any indication is presumed to be the law of the testator's domicile at the date of execution of the Will, but this can be rebutted by any sufficient indication that the testator intended his Will to be construed according to the law of another country. Such intention can be expressed in the Will, or may be implied

from circumstances such as his use of a particular language or of expressions known only to a particular law as in the case of *Dellar v Zivy, Zivy, Lemarchand and Zivy*[12].

Thus, for example, if the OCP makes an order for the sale of property of a person who at the time of execution of his Will was domiciled outside Northern Ireland, it is probable that the "Preservation of interests in property disposed of on behalf of person lacking capacity" provisions of Sch.5, para.8 will not apply, since the construction of the Will would be governed by the law of the other jurisdiction.

If, however, the matter is one of succession law, as supported by the decision in *Turner (Gordon's Exor) v Turner*[13], then immovables in Northern Ireland would be governed by Sch.5 para.8, whilst movables would be governed by the law (including its private international law rules) of the domicile of the deceased at the date of death. Other immovables would be governed by the law directed by the PIL, including any *renvoi,* of the place of the immovables.

For the purposes of the EU Succession Regulation[14], matters of construction are, under arts. 24 and 26, governed by the law that would apply to the succession if the testator died on the date that the will is made, subject to a specific choice of the law of nationality.

Considerable care needs therefore to be exercised before necessarily relying on the Sch.5 para.8.

Conclusion

Theoretically, it ought now to be possible to avoid having to arrange the execution of a local Enduring Power in each relevant jurisdiction for an adult, but this may still be the simplest practical solution. However, some historic powers may no longer be valid.

Before considering the internal law of Northern Ireland, thought should always be given as to whether a cross border connection means that the first question should be as to whether the law of Northern Ireland applies at all.

If any cross-border issues may be relevant in relation to capacity, very careful analysis and thought needs to be applied. It may not be possible to provide clients with a simple and straightforward overall solution. If HCCH35 was ratified for Northern Ireland (and England & Wales), the position would be somewhat more straightforward.

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[12] *[2007] EWHC 2266 (Ch)*
[13] [2012] CSOH 41
[14] (EU) No.650/2012

Incapacity of a company director

Kevin McVeigh, Solicitor, Elliott Duffy Garrett

In this article the author outlines the dilemmas and difficulties that can arise in a small family business when a director loses capacity, and identifies issues that need to be addressed.

Introduction

Company law in Northern Ireland is an area currently reserved by the Westminster Parliament and therefore the Companies Act 2006 ("the Companies Act") applies to Northern Ireland as it does to the rest of the UK.

The role of company director

Small family companies are very much a feature of the commercial landscape in Northern Ireland. A typical private company in Northern Ireland has one or two shareholders and the same number of directors. The shareholders and directors are usually the same persons. Directors are responsible for the day to day operation of a company's business. Shareholders own the company but have a limited role in the business itself.

A director owes certain duties to the company which include exercising independent judgment, reasonable care and skill. A director must have the mental capacity to allow them to discharge these duties and to act in accordance with the company's constitution and the provisions of relevant legislation.

What can be done in advance if a company director is likely to suffer a loss of mental capacity?

If a director is unable to attend board meetings for a temporary period, they may decide to appoint an Alternate Director. The Alternate Director should be approved by the other directors, if there are any, and will be able to attend board meetings and vote on resolutions or sign written resolutions. The Alternate Director is a substitute and the appointor cannot act as director while the Alternate Director is in place. Details of the Alternate Director must be filed at Companies House.

In the unfortunate event that a director suffers from a degenerative condition and is aware that she is likely to suffer a permanent loss of mental capacity in the future, the shareholders or the board of directors of the company may decide to appoint an Additional Director. Failure to appoint an Additional Director may result in a lack of quorum should future incapacity arise.

It should be noted that a director cannot use a power of attorney to appoint a person to act as director in her place.

What happens when a company director suffers a loss of mental capacity?

If a director suffers a loss of capacity and no Additional Director has been appointed, the shareholders and the other directors should review the Company's articles of association. There may also be a shareholder agreement in place, however this is not mandatory and many small companies do not have one.

In many cases, the articles of association will adopt the model articles in Table A of the Companies Act 2006, or earlier legislation.
Article 18 of the model articles provides:

> 18. A person ceases to be a director as soon as—
> …
> (d) a registered medical practitioner who is treating that person gives a written opinion to the company stating that that person has become physically or mentally incapable of acting as a director and may remain so for more than three months

Therefore, if the company receives an appropriate written medical opinion, the director in question ceases to be a director and the company can file a notice to that effect at Companies House.

Removal of a company director

If a director suffers a loss of capacity but a written medical opinion is not available, they will continue to be a director until their removal. It would not be appropriate for a director to attend board meetings if they are unable to understand the information given to them, retain that information long enough to make a decision and communicate their decision.

Article 9 of the model articles provides that notice of a directors' meeting must be given to each director unless a director has waived their entitlement to notice. A director may stop attending meetings, as long as their absence

does not affect the quorum, but they will still be liable for decisions made by the other directors. In most cases, it would be prudent to remove the director in question who has lost capacity

The model articles do not contain a provision for the removal of a company director but section 168 of Companies Act 2006 provides:

(1) A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him.

(2) Special notice is required of a resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed.

(3) A vacancy created by the removal of a director under this section, if not filled at the meeting at which he is removed, may be filled as a casual vacancy.

(4) A person appointed director in place of a person removed under this section is treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become director on the day on which the person in whose place he is appointed was last appointed a director.

(5) This section is not to be taken—

(a) as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director, or

(b) as derogating from any power to remove a director that may exist apart from this section.

An ordinary resolution is a resolution that is passed by a simple majority of the shareholders (section 282 Companies Act 2006). It should be noted that a meeting of shareholders must be held; a written resolution is not sufficient.

It should also be noted that "special notice" of the meeting is required. The resolution to remove a director is not effective unless notice of the intention to move it has been given to the company at least 28 days before the meeting at which it is moved (section 312 Companies Act 2006).

Section 169 of Companies Act 2006 provides:

(1) On receipt of notice of an intended resolution to remove a director under section 168, the company must forthwith send a copy of the notice to the director concerned.

(2) The director (whether or not a member of the company) is entitled to be heard on the resolution at the meeting.

(3) Where notice is given of an intended resolution to remove a director under that section, and the director concerned makes with respect to it representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so—

(a) in any notice of the resolution given to members of the company state the fact of the representations having been made; and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company).

(4) If a copy of the representations is not sent as required by subsection (3) because received too late or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting.

(5) Copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this section are being abused.

Therefore, the director must receive notice of the meeting and may attend the meeting of shareholders even if the director is not a shareholder. In the case of a director who has suffered a loss of mental capacity, attendance at the meeting is likely to prove difficult. However, the director is entitled to make written representations to the company and may have sufficient capacity, with or without assistance, to do so.

Shareholders should take legal advice before removing any director who is also an employee of the company. Removal of a director does not terminate that director's contract of employment and the director could argue that

their removal resulted in a loss of authority which made it impossible for them to continue in their capacity as an employee. A claim for constructive dismissal could potentially then follow.

What happens if the removal of a director will leave a company without a quorum of directors?

In many companies. the articles provide that the quorum for a meeting of directors is two. Article 11 of the model articles provides that the quorum will be two unless fixed otherwise.

If a quorum is not present at the start of a meeting, the meeting cannot proceed and no resolution can be approved. The failure of one director to attend meetings, due to incapacity or otherwise, can frustrate the business of the company. In such circumstances the shareholders may hold a meeting to approve an ordinary resolution to appoint one or more additional directors (section 17 Companies Act 2006).

However, in the case of a small family company, the directors and shareholders are often the same persons. If a company has two directors and two shareholders, who are the same persons, an incapacitated director will also be an incapacitated shareholder. If the quorum for meetings of shareholders is two, the failure by a shareholder to attend meetings may stymie the convening of a shareholder meeting.

An alternative may be for the other shareholders to sign a written resolution to appoint a new director, by ordinary resolution, if together they hold more than 50 Per Cent of the shares in the company (section 296 Companies Act 2006).

Article 11 of the model articles provides:

(1) At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.

(2) The quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two.

(3) If the total number of directors for the time being is less than the quorum required, the directors must not take any decision other than a decision—

(a) to appoint further directors, or

(b) to call a general meeting so as to enable the shareholders to appoint further directors.

Article 11 enables one director, in a company which operates a quorum of two directors for board meetings, to appoint further directors or call a meeting of shareholders to appoint further directors.

In the case of a company having a sole director, if it is not possible to convene a meeting of shareholders, a shareholder may apply to the High Court for an order in accordance with section 306 Companies Act 2006, which provides:

(1) This section applies if for any reason it is impracticable—

(a) to call a meeting of a company in any manner in which meetings of that company may be called, or

(b) to conduct the meeting in the manner prescribed by the company's articles or this Act.

(2) The court may, either of its own motion or on the application—

(a) of a director of the company, or

(b) of a member of the company who would be entitled to vote at the meeting, order a meeting to be called, held and conducted in any manner the court thinks fit.

(3) Where such an order is made, the court may give such ancillary or consequential directions as it thinks expedient.

(4) Such directions may include a direction that one member of the company present at the meeting be deemed to constitute a quorum.

(5) A meeting called, held and conducted in accordance with an order under this section is deemed for all purposes to be a meeting of the company duly called, held and conducted.

In the case of a sole director who is also the sole shareholder, if that person is incapacitated no meeting of shareholders or directors can proceed and no business of the company can be transacted. In order to progress the business of the company, it may be possible for a relative of the shareholder to apply to the Office of Care and Protection for the appointment of a Controller. The Controller could then approve a shareholder resolution for the appointment of additional directors and the removal of the incapacitated director.

ANNE BRIDGET MACFARLANE 1930 - 2019

Master of the Court of Protection (1982-1995)

An obituary by Denzil Lush, Solicitor[1]

Mrs Anne Bridget Macfarlane, known as 'Biddy', died on 24 November 2019, aged 89. In 1975 she became the first woman in England and Wales to be appointed as a County Court Registrar, or District Judge,[2] and seven years later she achieved another historic first by becoming the first female and the first solicitor to be appointed as Master of the Court of Protection.

She was born on 26 January 1930, and was the fifth of six children of Dr David Griffith and Dr Grace Griffith, both of whom were medical practitioners. Her father served as a captain in the Royal Army Medical Corps during the First World War, and later requalified in dentistry and worked for what is now the Community Dental Service. During the school holidays, Biddy sometimes assisted him in his mobile clinic by operating the foot pedal on the treadle drill. Her mother was noted for her humanitarian deeds, the most memorable of which were a lone trip through France and northern Spain to deliver medical supplies during the Spanish Civil War, and working in a leper colony in Nigeria.[3] Although she was born in London, Biddy was brought up in the countryside around Sudbury, Suffolk, where she acquired an encyclopaedic knowledge of flora and fauna. Until almost her dying day, she would correct anyone who mistook a London plane tree for a lime, or a tree-creeper for a nuthatch.

In September 1940, a few days after the start of the Blitz, she and two of her sisters were evacuated to the Hudson Valley, just north of New York City, where they remained until November 1944. Her sisters were accommodated in Irvington, whilst Biddy was placed with the artist and illustrator, John Bradshaw Crandell, and his family in the village of Briarcliff Manor. Their evacuation was a private initiative, arranged by one of their mother's American patients, rather than part of a scheme sponsored by the government. Crossing the Atlantic was particularly perilous. Shortly after the Griffith sisters set sail from Greenock, another ship carrying 100

[1] Author and former Senior Judge at the Court of Protection

[2] County Court Registrars became District Judges under the Courts and Legal Services Act 1990, s. 74(1), which came into force on 1 January 1991.

[3] *British Medical Journal,* 7 November 1970, p. 373: Obituary Notices, Dr Grace M.G. Griffith.

evacuees was torpedoed by a German U-boat, and the overseas evacuation programme came to an abrupt halt. She didn't particularly enjoy living in the United States, and disliked the racial discrimination she saw there. It also disrupted her education. She attended nine schools altogether during her childhood, five of them while she was evacuated.

Her parents hoped that she would follow them into the medical profession, but she had other ideas. In 1949 she began studying for a law degree at Bristol University, where she met her future husband, James Douglas Macfarlane, known as 'Mac'. She also joined the Territorial Army, with the rank of 2nd Lieutenant, and learnt to drive. After obtaining her LLB in 1952, she became an articled clerk with Veale & Co., Solicitors, Bristol, and in 1954 passed the Law Society's final examinations and was admitted as a solicitor. A local newspaper, reporting her achievement, noted that: "Miss Griffith, who studied for her finals on her own in London, shares with one other young woman – Miss Wooles of the Town Clerk's Department – the distinction of being Bristol's only women solicitors."

She was subsequently an assistant solicitor with Sheppard Norcott & Co., Bristol (1954-56), and Prothero & Prothero, Greenwich (1956-57), and then worked from home, when she had two very young daughters to look after, before being employed on a part-time basis as an assistant solicitor with Philcox Sons & Edwards, Peckham (1960-66).

In 1966 she joined the civil service as a legal assistant at the Land Registry and later became an Assistant Land Registrar under the Chief Land Registrar, Theodore Ruoff, who encouraged her to pursue a judicial career. Having occasionally sat as a deputy registrar in the county court, she applied several times to the Lord Chancellor's Department for a full-time appointment as a County Court Registrar, only to be politely rebuffed by the Lord Chancellor, Lord Hailsham, who didn't feel that the country was ready yet for a woman to hold such a position. This was a surprising stance to have taken because there already was a female registrar in the court service. In 1970, Elizabeth Butler-Sloss, a 36-year-old barrister and mother of three, had been appointed as a registrar of the Principal Registry of the Family Division. Maybe, the Lord Chancellor's reticence in appointing Biddy to the County Court was less about gender than professional status. In any event, her perseverance paid off, and she was appointed as a registrar in 1975 and sat at Bromley, Bow, and Ilford County Courts, before being permanently based at Bromley.

In 1982 she became the first and only female, and the first solicitor, to be appointed as Master of the Court of Protection. Since the origin of the office in 1842, the Master had to be a barrister of not less than ten years'

standing;[4] and no less than ten of her eighteen predecessors had been silks. Fortuitously, the Supreme Court Act 1981 had recently extended the eligibility criteria to include solicitors of ten years' standing,[5] thereby enabling her appointment. She was sworn in by the Lord Chancellor on 1 November 1982, and decided that it would be more decorous to retain the title 'Master', despite its being gender-specific, than to be addressed as 'The Mistress'.

Almost immediately after she became the Master, the Court of Protection entered a brief phase of constant change. First, there was the Mental Health Act 1983, and then the Enduring Powers of Attorney Act 1985, and finally the Public Trustee and Administration of Funds Act 1986, which created the Public Trust Office ('PTO') to take over the administrative functions of the court. To form the PTO, the 150-odd members of staff at the Court of Protection had to relocate from Staffordshire House, 25 Store Street, London WC1,[6] which had been their home for forty years, to Stewart House, 24 Kingsway, London WC2.[7] In 1991 Biddy gave a talk to the Medico-Legal Society, later published in the *Medico-Legal Journal*, in which she described the effect of the reorganisation as follows: "There are six of us left in the Court of Protection. We occupy one corridor in Stewart House, Kingsway, which used to be the Public Trustee Building. We're called the 'Granny Annexe' – I've never quite understood why – and we say we make the orders and the Public Trust Office carries them out." [8]

She had a good rapport with the Public Trustee and first chief executive of the PTO, John Boland, a genial Irishman, who reckoned that England and Wales had a lot to learn from other common law jurisdictions. He and Biddy forged links with their Commonwealth counterparts, and became honorary members of the National Association of Public Trustees and Guardians, in Canada, and attended its biennial conferences. They also co-hosted the first International Conference of Public Trustees and Public Guardians in London in 1988.

The Enduring Powers of Attorney ('EPA') Act made considerable demands upon her time and attention, with the number of applications to register EPAs rising from 605 in 1986 to 7,562 in 1995, when she retired. An attorney

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[4] An Act to alter and amend the practice and course of proceeding under commissions in the nature of writs *de lunatico inquirendo* (5 August 1842) 5 & 6 Vict., c.84, s.1.

[5] Supreme Court Act 1981, s.88 and Sched. 2, Part II, 10.

[6] The building formerly known as Staffordshire House has a tall, red-brick Edwardian frontage and is located in the centre of South Crescent, Store Street.

[7] The building formerly known as Stewart House is now the New Academic Building of the London School of Economics.

[8] A. B. Macfarlane, "The Court of Protection", *Medico-Legal Journal,* 60 (1992), pp. 25-43, at p.26.

had a duty to apply to the Court of Protection for the registration of the power, if he had reason to believe that the donor was, or was becoming, mentally incapable of managing his property and affairs. The Act came into force on 10 March 1986 and, a fortnight later, the court received the first of what soon became a deluge of applications to register EPAs that had been made momentarily before the application itself. This raised doubts as to whether the donors had been mentally capable when they granted the powers, though the Act itself gave no guidance on what the requisite capacity might be.

Following a hearing in June 1987, in which Master Macfarlane refused to register such an EPA made by a member of a prominent Jewish family in Leeds, the attorney appealed to a nominated judge, whose decision was reported as *Re K, Re F* (1988).[9] Mr Justice Hoffmann held that, in practice, many EPAs would be executed when the symptoms of mental incapacity had begun to manifest themselves, as a result of which the donors may very well be, in the statutory sense, incapable by reason of mental disorder of managing and administering their property and affairs. However, the capacity to grant an EPA and the capacity to manage one's property and affairs are different and, in principle, as long as the donor was able to understand the nature and effect of an EPA, that should suffice for the instrument to be valid.

Biddy's own views on EPAs were summarised in her speech to the Medico-Legal Society. She asked a rhetorical question: "Which do you think is the better system (receivership or powers of attorney)?" Her reply was: "Well the answer is, I think, that there must be room for both and that in some cases the first is better, in some cases the second is better. … I would only say this: I think most people who have executed a power of attorney are pleased they have done so."[10] She certainly made an EPA herself, and was glad she did. In 2017, when she became briefly incapacitated following an infection, she advised her attorneys to register it.

Another area in which the caseload rose dramatically during Mrs Macfarlane's thirteen years as Master was the management of compensation awards for personal injury and clinical negligence. In all proceedings involving patients, which settled out of court rather than go to trial, the prior approval of the Master of the Court of Protection had to be obtained before the compromise could be approved by the trial judge in the Queen's Bench Division.[11] More than 95% of these cases settle at the eleventh hour and,

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[9] *Re K, Re F* [1988] Ch 310, [1988] 1 All ER 358, [1988] 2 WLR 781, [1988] 2 FLR 15.
[10] Macfarlane, *op. cit*., p.27.
[11] Rules of the Supreme Court (S.I. 1965 No. 1776), Order 80, rule 11.

as Biddy was approving, on average, five compromises a week, she became something of an expert in assessing quantum.

The most significant approval she gave - in terms of its historical importance and the extensive research, analysis, and deliberation undertaken by her and members of the investment and tax teams at the PTO - was in the case of *Kelly v Dawes*.[12] On 14 July 1989, a few days after Master Macfarlane had signified her approval of the proposed course of action, Mr Justice Potter made an order awarding damages by way of a structured settlement for the first time in the United Kingdom. Instead of receiving a conventional lump sum of £427,500, the plaintiff, Cathy Kelly, aged 25, was awarded a smaller capital sum of £110,000 plus a further £300,000, which was used to purchase an annuity providing a tax-free income of £25,562 a year, index-linked to the Retail Prices Index, and payable for the rest of her life or for ten years, whichever was longer. The differential of £17,250 enabled the defendants to participate in the benefits resulting from the tax break. In his judgment, Mr Justice Potter acknowledged that: "The terms of settlement have been the product of careful thought by the plaintiff's advisers and have been arrived at after substantial correspondence and consultation involving the Inland Revenue and the Master of the Court of Protection."[13]

Since 1970 judges of the Court of Protection have been able to make a statutory will for someone who lacks testamentary capacity.[14] One of the functions of a judge under the Mental Health Acts 1959 and 1983 was to make provision "for purposes for which the patient might be expected to provide if he were not mentally disordered,"[15] and, when Biddy was the Master, there was an expectation that applications for a statutory will would include a legacy to the charity that champions the interests of people suffering from the particular disorder afflicting the testator. In order to validate this policy, she expressly referred a case to Mr Justice Hoffmann, which was reported as *Re C (Spinster and Mental Patient)* (1991).[16] It involved a 75 year-old-woman with an intellectual disability, who had lived in the same hospital since she was 10. She was an only child and had inherited an estate worth £1.6 million from her parents. Most of her numerous distant cousins, who would have been entitled to her estate on intestacy, had no idea of her existence, and none of them had ever visited her. This was the first statutory will made on behalf of someone who has never had testamentary

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[12] *Kelly v Dawes*, The Times, 27 September 1990.

[13] A transcript of the judgment in *Kelly v Dawes* can be found in Iain Goldrein and Margaret de Haas (ed.), *Structured Settlements, A Practical Guide*, (Butterworths 1993), Appendix 1, pages 245-251. This quotation is at pages 246-247.

[14] Administration of Justice Act 1969, s. 17; now, Mental Capacity Act 2005, s. 18(1)(i).

[15] Mental Health Act 1959, s. 102(1)(c); Mental Health Act 1983, s. 95(1)(c).

[16] *Re C (Spinster and Mental Patient)* [1991] 3 All ER 866, [1992] 1 FLR 51

capacity. The judge held that a person in C's position would feel a moral obligation to show recognition to the hospital in which she had spent most of her life by leaving it a legacy. Biddy was delighted with the outcome and said: "It's nice to have it in black and white that this practice is justified."[17] She also practised what she preached by leaving a number of charitable legacies in her own will.

Not only was Biddy Macfarlane the first female and the first solicitor to serve as Master of the Court of Protection, but she also broke the mould by behaving differently from the stereotypical judge. She loved a good party and shocked her predecessor, John Armstrong, the Master from 1970 to 1982, by turning up to her first office Christmas party covered with tinsel and baubles like a Christmas tree. She usually took charge of making the punch, but her own preferred tipple was a pint of bitter. From its inception in 1988, she wore a clown's nose on Red Nose Day, though, contrary to popular myth, never at a hearing. She had the common touch, which endeared her to patients, their families, members of the legal profession and the civil servants in the court and PTO. She was also quick to realise that, for someone in her unique position, public relations was an essential part of the job-description, and she took time out to speak to local law societies and mental health charities, enthralling and enlightening packed audiences up and down the country. As a result, she raised the profile of the court immeasurably.

She could have remained in office until 2002, but chose to stand down in 1995, when she was 65, to spend more time with her husband, Mac, who had recently retired as an administrator with the NHS. She had a spectacular leaving do at the Barbican Centre, and was elected as an honorary life member of The Law Society. In 1998 she also became an honorary life member of Holborn Law Society. She had always supported its annual Legal Charities Garden Party, held midweek in mid-June on the lawns of Lincoln's Inn, by purchasing a wad of tickets and distributing them liberally among members of staff at the court and the PTO.

Sadly, Mac died unexpectedly on 27 February 1999, aged 68. After his death, Biddy spent a couple of winters in Granada, Spain. She was keen to learn Spanish, and thought the best way of doing so would be to immerse herself totally in the local culture for several months at a time. It was also beneficial for her health. Having battled with arthritis and scoliosis for more than a decade, in 2010 she was diagnosed with Parkinson's disease. Three years later, when independent living was becoming increasingly difficult, she checked in at Morden College, Blackheath, which enabled her to continue pursuing her interests and active social life, but also provided both residential and

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[17] Macfarlane, *op. cit.*, p. 39.

nursing care, when it was needed. One of the downsides of downsizing was that she had to dispose of her impressive collection of Victorian tiles, which she had enjoyed accumulating over five decades.

She died of pneumonia in Lewisham Hospital on 24 November 2019, two months shy of her ninetieth birthday. Her funeral at Hither Green Crematorium on 8 January 2020 was attended by over two hundred people, and was more like *Desert Island Discs* than a doleful rite of passage. The order of service revealed her eclectic taste in music, namely: *Sheep may safely graze* by J.S. Bach; *Luck be a Lady Tonight*, from "Guys and Dolls;" the *Jealousy Duet* from Bertolt Brecht's "The Threepenny Opera;" *Enjoy yourself*, by Jools Holland and Prince Buster; a recitation of her favourite poem, William Wordsworth's *Composed upon Westminster Bridge, September 3, 1802*, and a recording of her son-in-law and grandson playing the sea shanty, *Spanish Ladies*, which she often used to sing around the house loudly and distinctly off-key. Afterwards, there was a reception at the Clarendon Hotel, Blackheath; a joyous occasion, which would have delighted her. She is survived by her daughters, Jessica and Deborah, and her grandchildren, Hannah and Sam.

A Miscellany of Book Reviews – some recommended reading for Covid-19 alternative CPD

Sheena Grattan, TEP, Barrister

It is evident that some have had a better experience of lockdown than others. Those who have had to juggle home-schooling, navigating supermarket queues and the absence of a cleaner whilst keeping a business from bankruptcy via Zoom have probably never been busier or more fearful of the future. Others will have had more time than usual on their hands and may even have had the opportunity to read more widely. Or simply just to read. This piece started life as a single-item review of *Last Orders – The Essential Guide to Your Letter of Wishe*s by Patricia Byron. By the time the review was due for publication, it had become clear that most professional bodies would have to take a more flexible approach to their mandatory CPD requirements in light of the fact that face-to-face learning is unlikely to be possible before the end of the current year. The reality is that many businesses will struggle in the short-term to fund the attendance of staff at on-line seminars. The Law Society of Northern Ireland, the publisher of this journal, is one of many professional bodies to embrace the concept of alternative CPD. The Council of the Society has taken the decision to disapply the current rules relating to CPD and is encouraging members to complete their CPD by means of self-certified private study

This subject-matter of this review has therefore been widened to cover four relatively recently published books from the writer's own library, all of which should appeal to certain constituencies of the readership of this journal. Two reviews are considered in this issue - the final two will be considered in the next issue. None is a standard 'practitioner' text, but all of them will enhance the expertise of the private client practitioner sufficiently so as to meet CPD requirements, including at least one that would in normal times have satisfied the client care requirements of the Law Society of Northern Ireland.

Last Orders – The Essential Guide to Your Letter of Wishes, Patricia C Byron, (2019, 2nd edition, Stellar Books, £19.99)

The Covid-19 crisis will inevitably have focused the minds of a wider cohort of individuals to their own immortality and of the desirability of planning for their deaths. During the early phases of lockdown Dame Joan Bakewell wrote a moving letter to the Times, revisiting the subject-matter of her acclaimed Radio Four Series *We Need to Talk About Death*, encouraging the readership to make important decisions before such decisions were forced upon them in haste. Yet death remains the final taboo, with survey after survey confirming that the majority of people do not even discuss their wishes with their loved ones, let alone their legal adviser.

Most professional executors will have encountered the nightmare of a probate with virtually no paperwork and/or no-one knowing anything definite as to the testator's preferences, with the grieving family at loggerheads as to their differing perceptions of the deceased's likely wishes. The writer has lost track of the number of estate disputes that are credited by a family member as having started 'with a row about the funeral'.

The writer first encountered the phrase *Dying Tidily* more than 30 years ago in the *What to do when Someone Dies* consumer guide produced by Which? Magazine. There have been various publications promoting the same message in the intervening years, but *Last Orders* is the most comprehensive and user-friendly that the writer has seen. The first edition, published in 2010, came about because of the author's own stressful experience in being the executor of two single, childless friends who had chosen not to discuss their wishes during their terminal illnesses. Now updated and extended to take account of the increased importance of the digital footprint,[1] this excellent book guides the reader through those matters that will need to be dealt with in due course by executors. It does so with a series of questions (think school workbook), the answers to which will make life so much easier for all who are left behind. A random selection of the questions asked includes choice of music at the funeral, the colour of the flower arrangements, the preferred transcription for the headstone, and any idiosyncrasies of the pet cat. There is a separate page at the beginning where the reader is asked to complete all of the information required for a death certificate, and a chapter in which the reader records all types of assets and useful information such as utility providers. In addition, readers are encouraged to die as tidily as possible by collating a separate folder in which they retain copies of all policies and other important documentation

[1] Kirkpatrick: Estate planning for digital assets on incapacity and death. 2020 1 JELC 1

(not forgetting pet insurance). This short list does not do justice to the wide-ranging and imaginative list of material covered in the book's 80 pages.

While many solicitors currently advise clients to leave a letter of wishes and requests, few will advise their clients to go into this amount of detail. Importantly, Ms Byron emphasises that the purpose of *Last Orders* is to supplement a will prepared by competent, specialist lawyers (the Society of Trusts and Estate Practitioners gets an endorsement) and there is no encouragement of the false economy of the 'home-made' will. Readers are also warned of the dangers of 'unregulated, unqualified and uninsured will-writers' and the point is repeatedly made that a letter of wishes is just that – advisory and not mandatory.

It is reasonably foreseeable that solicitors will be asked to be both executors and attorneys more frequently in the future. A fundamental demographic change in the last decade is the growing number of individuals, particularly women with third level education, who do not have children. It is estimated that the number of childless older people in the United Kingdom is expected to more than double from the current one million to over two million by 2030, a trend of which charities such as *Ageing Well without Children* are all too conscious. Increasingly, less can be expected to be known of a late client's personal circumstances and preferences.

It is understood that some solicitors' firms in England now present a copy of this book to clients who request the solicitor to be their executor. In any event, the content and range of questions should act as an aide-memoire on which to base an in-house 'preparing for your death' resource. If we were not still in the midst of a public-health crisis, one might even have suggested leaving a few copies for reading in the waiting room.

Like the inadequately-shod cobbler's children, legal practitioners are notoriously bad at putting their own advice into practice and their own affairs into order. If nothing else, readers should at least complete their copy of *Last Orders* with their own personal details and requests.

Landmark Cases in Succession Law
(ed Brian Sloan, Hart Publishing, 2019, £120.00)

The rise of the 'research-industry' in academic law schools (more accurately 'writing' rather than 'research') has generated a plethora of essay collections and famous case compilations. Unfortunately, these are invariably less accessible to practitioners than they should be, not least because the true nature of the subject-matter is often obscured by an intriguing title which makes it impossible for a law librarian to index for practitioner use. More generally, it is acknowledged that succession law experienced something of a "dark age" in the British Isles for a period from the mid 1980s, with a complete dearth of seminal case law and few academics writing in the area. Today, it is heartening that succession law is again appearing on the law reform agenda and is much better served by the academic community. Useful additions to the area in the last decade which are not reviewed here but which have material of interest to the practitioner include *Current Issues in Succession Law* (Ed. Hacker and Mitchell, Bloomsbury, 2015) and *Passing Wealth on Death: Will Substitutes in Comparative Perspective* (Eds. Braun and Rothel, Bloomsbury, 2016).

Dr Brian Sloan, the editor of *Landmark Cases in Succession* has brought together a number of experts with international reputations and all of the twenty chapters include sufficient practical or doctrinal material to be of interest to probate practitioners. Those chapters that are likely to be of particular relevance to the readership of this journal include Professor Martin Dixon's consideration of the law of severance, Professor Roger Kerridge's analysis of the seminal lack of knowledge and approval case *Hastilow v Stobie* and Professor John Mee's examination of proprietary estoppel in the inheritance context. In addition the subject-matter of Dr Sloan's own chapter is the *Illott v Blue Cross* saga featuring adult claimants under the family provision jurisdiction.

Arguably, however, the chapter of most benefit to the Northern Ireland practitioner will be Barbara Rich's account of statutory wills, taking as its foundational plank the landmark case of *Re D(J)*.[2] In Northern Ireland statutory wills continue to be governed by 'the substituted judgment' test, which has now been replaced with the 'best interests' test in England by the Mental Capacity Act 2005. Surprisingly, there has never been a reported decision involving a contested statutory will in Northern Ireland. Consequently, practitioners have to rely on the finite body of pre-2005

[2] [1982] Ch 237

English jurisprudence with the *locus classicus* remaining the series of propositions set out back in the early 1980s by Megarry VC in *Re D (J):*[3]

> *The Patient should be assumed to have a brief lucid interval, during which he has full knowledge of the past but knows that he will relapse into the actual mental state that previously existed. The court considers the actual patient, not a hypothetical one, and assumes that he is advised by a competent solicitor who knows about ademption and lapse. The patient is also envisaged as taking a broad brush approach, rather than apply the accountant's pen.*

The Master of the Office of Care and Protection (like the English Court of Protection) has no jurisdiction to determine the validity of an earlier will, but a statutory will can achieve the same end by revoking all earlier wills. It would appear that an increasing number of applications for statutory wills are being made as a means of circumventing future probate disputes, no doubt inspired by a raft of decisions under the English 'best interests' test, which have not spoken with one voice as to whether it is in a patient's best interests to be remembered by his family as having 'done the right thing' after his death. Anecdotal evidence would indicate that the practice in Northern Ireland has also shown some inconsistency and there is as yet no authority as to how, if at all, the post-2005 English jurisprudence is to be applied in the context of a substituted judgment approach. In the absence of direct Northern Ireland authority and in light of the fact that the substituted judgment approach will obviously no longer be discussed by English practitioner texts, any commentary relevant to the prevailing test in this jurisdiction is a welcome addition to the resources of the Northern Ireland practitioner.

Not surprisingly, the case of *Banks v Goodfellow* forms the basis of a chapter, written by Juliet Brook. Those interested in a more in-depth contextual review of what arguably is the singularly best-known landmark decision in succession law will enjoy the following historical monograph.

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[3] Ibid

Casenotes prepared by Samantha Jones, Barrister, 39 Essex Chambers

Health, Welfare and Deprivation of Liberty

Residence, Contact, Care and Best Interests in the COVID-19 Pandemic
Between: BP and Surrey County Council and RP
[2020] EWCOP 17 and [2020] EWCOP 22
High Court - Court of Protection - Hayden J – two judgments delivered on 25 March 2020 and 29 April 2020

The Court was asked to consider an emergency application to determine whether it was in P's best interests to remove him from the care home to live at home in his daughter's care after the care home imposed a blanket suspension on all visits from family members and other visitors as a result of the Government lockdown in response to the Covid-19 pandemic. The matter came before Hayden J on two occasions as the situation evolved.

P, an 83-year old man, was diagnosed with Alzheimer's disease in December 2018. He is also deaf, but he is able to communicate through a communication board. The urgent application was made by his daughter and litigation friend, FP, and arose in the context of an existing challenge to the DOLS authorisation under section 21A of the Mental Capacity Act 2005. Since 25 June 2019, P had lived at the SH care home and received regular visits from his daughter, FP, six days a week, his son, AP, four times a week and with his granddaughters once a week, his wife, RP, three times a week and his other daughter once a month. Due to his deafness, he was not able to use a telephone, FaceTime or Skype. On 20 March 2020, in response to the Covid-19 pandemic and the Government's decision to go into lockdown, the SH care home issued a blanket restriction on all residents to suspend all visits from family members and visitors. The application was brought on an urgent basis as the restrictions were said to constitute an unlawful interference with P's rights guaranteed by Articles 5 and 8 of the ECHR. Hayden J characterized the change in P's quality of life as a result of the restrictions as "seismic". But he also noted the risk to life faced by P: *"In my view, it is necessary to state the risk P faces, were he to contract the virus, in uncompromising terms: there would be a very real risk to his life. Manifestly, there are powerful and competing rights and interests engaged when considering this application."*

The key question for the Court to consider was whether it remained in P's best interests to stay in the care home.

HELD -

After a thorough recitation of the applicable human rights and mental capacity legal framework and after hearing evidence via Skype, Hayden J ultimately dismissed the application on the basis that there were fundamental difficulties with the care plan proposed by FP. In his review of the Human Rights framework, Hayden J considered, inter alia, article 25 of the UN Convention of the Rights of Persons with Disabilities, the right to health and stated that:

> *"The essence of Article 25 resonates with the fundamental principles of the Mental Capacity Act 2005 (MCA). In the context of Coronavirus, the State's obligation is to ensure equality for people with disabilities and to guard against them being inadvertently left behind by a system which deprioritises them in the urgency of a response to crisis."*

He also recited the Statement of Principles relating to the treatment of individuals deprived of their liberty in consequence of the Covid-19 pandemic published by the Council of Europe's European Committee for the Prevention of Torture on 20 March 2020 and noted that it *"emphasises that any restrictions should be necessary, proportionate and respectful of human dignity. The obligation to consider alternatives to deprivation of liberty is identified, properly, as an imperative."*

The local authority acknowledged that the visiting restrictions were an interference with P's article 8 right to family life which was further aggravated by his deafness. It was accepted that while the restrictions imposed applied to all residents of the SH care home, the Court had to evaluate the interference from P's own perspective. Counsel for P drew the Court's attention to the Covid-19 guidance that existed at the time and emphasised that it did not envisage a blanket prohibition on visits, even where there were confirmed cases of Covid-19 in the care home and it did require consideration of the general well-being of residents and the *"positive impact of seeing friends and family."* Hayden J heard evidence from FP and the care plan proposed if P was to return home. The plan was that FP would look after her father alone 24-hours a day and while a care package would ideally support her, she had been unable to identify any package of professional support due to the coronavirus crisis. Hayden J stated that *"though she could not quite bring herself to acknowledge it, she recognised that her offer of 24 hour per day single handed care for her father is not, in truth, a realistic option."* A different care plan was therefore ultimately put together by the parties during the hearing which resulted in a plan to educate P on Skype with the use of a communication board and exploration of concurrent instant messaging. Also, the family could, by arrangement, go to P's bedroom window on the ground floor and wave at him and use the communication board. It would

appear that this plan was judicially approved by Hayden J in his dismissal of the application. He stated: *"I am entirely satisfied that this is a balanced and proportionate way forward which respects P's dignity and keeps his particular raft of needs at the centre of the plan."*

Other matters were considered by Hayden J, including derogation from the ECHR and whether the outstanding capacity assessment could be undertaken by Dr Babalola. While recognising the challenges, Hayden J, referring to the guidance he issued on 19 March 2020, considered that the assessment could take place by Skype or FaceTime *"with P being properly prepared and supported by staff and, to the extent that it is possible, by his family too."*

Further Developments ([2020] EWCOP 22)

The case came before Hayden J again on 17 April 2020 due to a change of circumstances. While P's daughter had continued to visit regularly and sit outside P's bedroom window, P had struggled to cope with the social distancing policy implemented. It was thought that the deprivation of contact had triggered a depression. It is not clear why the matter was re-listed as on the morning of the hearing the parties reached an agreement whereby P would be able to move to his daughter's home and care following an assessment of P's needs in the home and some adjustments to his accommodation. FP had also been able to identify carers to assist her.

A further development arose in the intervening period namely that Dr Babalola indicated that he was not prepared to assess P's capacity using remote means and the care home was not prepared to admit Dr Babalola even wearing suitable protective clothing. The home had remained free of the virus and they were concerned of the risk he might have presented to the residents and staff. Hayden J referred again to his guidance from 19 March 2020 and stated that had P remained at the SH care home, it would now be necessary to instruct a different assessor. He confirmed that he remained of the view that:

"…creative use of the limited options available can deliver the information required to determine questions of capacity. It may be that experienced carers well known to P and with whom P is comfortable can play a part in facilitating the assessment. Family members may also play a significant role in the process. I am aware that in many areas of the country innovative and productive approaches of this kind are proving to be extremely effective."

Comment

The case emphasises the acute difficulties faced by families and care homes in the current Covid-19 pandemic in ensuring that the well-being, health and best interests of the individual and the collective are maintained in the unprecedent situation. It demonstrates the competing considerations with which the Court has to grapple when assessing justifications to the serious interference of an individual's Article 5 and Article 8 rights in these challenging times. The agreement reached by the parties shows the ever-greater need for creativity and collaboration to ensure that the rights of the individual can still be secured. The case further demonstrates the serious difficulties faced by assessors conducting capacity assessments but reinforces that practitioners must continue to find creative means from the limited options available to carry out their assessments.

For further commentary please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (April 2020) (https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/Mental-Capacity-Report-April-2020-Compendium-1.pdf)

Health, Welfare and Deprivation of Liberty

Contact and Best Interests
Between: A Local Authority v PS & HS
[2019] EWCOP 60
High Court - Court of Protection - Judd J – delivered on 29 November 2019

In this matter, the Court was asked to make a declaration that P lacked capacity to make decisions about contact with her former husband, HS, and in the event that she did lack capacity, to make an order that it was not in her best interests to have contact with HS.

P was 80 years old at the time of hearing. She was married to HS and they had two children but they had divorced 25 years before. It was common ground that they lived independently until P became ill in 2016/2017, with limited contact between the two of them over the years. In January 2018, P was diagnosed with Lewy Body Dementia. All of this was an extremely difficult time for the family, made even more difficult by the fact that one of the daughters, DS, became ill with cancer and subsequently died. It was during this period that P's former husband started to spend more time with her, cooking for her and helping to look after her; this continued into 2019. The surviving daughter, DB, became more anxious about the time that HS

was spending with P especially as there had been comments about HS getting into bed with P. P was also telling DB that she did not want 'that man' to be in her home. In February 2019, the local authority received a safeguarding referral about P being sexually abused by HS, that he had a key to her home and had opened a joint bank account with her and P was moved to a care home.

HELD -

Mrs Justice Judd found that P lacked capacity to make decisions about contact with HS and that it was in P's best interests not to have contact with her former husband.

In respect of the capacity decision, Mrs Justice Judd carefully considered the evidence against the elements of section 3 of the Mental Capacity Act 2005 and found that P could not weigh up and retain information about what type of contact she could have and in what circumstances. She also referred to factors outside of those set out in section 3 namely that P did not know who HS was and could not 'appreciate' the "negative and positive effects that contact has upon her".

In respect of the best interests decision, Judd J considered a range of factors including P's past wishes, and the past relationship and contact with HS, P's presentation when HS started attending on her from 2016 onwards and P's presentation after she had moved to the care home and stopped contact with HS. Her decision is encapsulated in the penultimate paragraph:

> *"I have to make the decision as to whether it is in P's best interests to have contact with HS. I have come to the clear conclusion that it is not and that I should make an order to that effect. When she had capacity she did not want to see him other than very occasionally, and it seems impossible to believe that the values she held then would have changed now. I suspect that HS feels that the death of DS would have drawn them closer together, but that is very speculative. The fact that P can demonstrate some superficial pleasure upon seeing HS is not achieved because of who he is but because she does not realise who he is. Also, the contact can cause her anxiety, as was demonstrated during 2018, 2019 and also after the chance encounter in Waitrose. Ps important relationships for the last 25 years have been with DB and DS when she was alive, and also with her son in law and her grandchildren. DB has been very close to P for years, and her views about her mother's wishes, feelings and best interests deserve the greatest of respect."*

Comment

The case is a helpful example of a Court carefully addressing the questions of capacity and contact in an emotionally-fraught case in the context of what could have had a significant impact on P's rights under Article 8 of the ECHR. The commentary in the 39 Essex Chambers Mental Capacity Report: Compendium notes that this case also emphasises the 'translation gap' between the language of the Act (s.3) and the language of everyday practice which often differs, the study of which is currently driving the Mental Health and Justice project.

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2020) (https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2020/02/Mental-Capacity-Report-February-2020-Compendium-Screen-Friendly.pdf)

Appointment of RPRs, DOLs and Article 5

Between: The London Borough of Hillingdon v (1) JV (through her litigation friend, the Official Solicitor) (2) RV (3) PY
[2019] EWCOP 61
Court of Protection - Senior Judge Hilder – delivered on 20 December 2019

The case concerned an application for the reinstatement of P's son as P's Relevant Person's Representative ("RPR") which arose during the course of proceedings challenging a standard authorisation in respect of P's living arrangements. This case summary only deals with the RPR application.

P was a 73-year-old widow, with two children, the Second and Third Respondents. She had dementia, generalized anxiety disorder and obsessive compulsive disorder. She was fully mobile and able to communicate. The extent of her care needs and her living arrangements were the subject of the main proceedings. On 21 January 2016, P executed a LPA for property and for welfare and she appointed her two children jointly and severally as attorneys. In May 2018, she moved into a care home and three standard authorisations were granted for her living arrangements: the first appointed her daughter (PY) as the RPR, the second appointed her daughter-in-law (LV) as the RPR, and the third appointed her son (RV) as the new RPR as he could visit his mother regularly and he wished to undertake the role. The attorneys supported P's placement at the care home but failed to pay the fees and therefore she had to be urgently moved to an emergency placement. On 7 October 2019, a standard authorisation for the care home was granted and

the Best Interest Assessment recorded that while P's son (RV) nominated himself to take on the role of RPR, the Best Interest Assessor decided that it would be "more appropriate" to appoint a paid representative for P until the courts had made a decision because of the concerns raised about the non-payment of fees and the eviction of P from her former care home.

The Second and Third Respondents made their application promptly thereafter on the grounds that RV maintained contact and saw his mother regularly, provided support and made decisions as her LPA, that there was no conflict of interest in relation to him being RPR as the Official Solicitor was now involved in the litigation and if RV was removed from being an RPR, he could not apply for legal aid.

HELD -

Senior Judge Hilder determined that the application for "reinstatement" of RV as the RPR was not the issue to be considered because, after a careful review of the relevant legislation, he had not been selected as the RPR when the new standard authorisation was granted for P at the emergency placement. The Judge determined that the real issue to consider was whether the selection process adopted by the Best Interests Assessor when determining who should be P's RPR was followed properly.

In that regard, Senior Judge Hilder found that it had not been followed properly because the Best Interests Assessor should have invited RV to make a new selection of a RPR when she determined that he did not meet the eligibility requirements. She interpreted the Best Interest Assessor's decision on eligibility to mean that she thought that RV would not 'represent' or 'support' JV 'in matters relating to or connected with the Schedule', so that it would come under one of the grounds for ineligibility in the relevant Schedule (paragraph 140(1) of Schedule A1 of the Mental Capacity Act 2005). It was not open to the assessor to make no selection or for the supervisory body to select for appointment of a paid RPR. As a result, she found that RV should now be invited to make a further selection of RPR if he so wished. She found that the primary function of the RPR had already been discharged because proceedings were already before the court in respect of the standard authorisation and P had representation by way of the Official Solicitor, and that any other duties could be undertaken by RV which he could undertake as her son "within the active authorisation of also being her [P's] welfare attorney". The Judge found that matters of entitlement to legal aid funding were outside the jurisdiction of the court and therefore could not be relevant to the selection of the RPR.

Comment

This is a helpful case to show how the Best Interest Assessors should approach the issues surrounding the appointment of an RPR under the DOLs scheme (pursuant to Schedule A1 of the Mental Capacity Act 2005) where there is a welfare deputy in place. It is important to note that while this scheme is set to be replaced by the Liberty of Protection Safeguards scheme pursuant to the Mental Capacity (Amendment) Act 2019, this is still good law until the DOLs scheme ends.

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2020) (https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2020/02/Mental-Capacity-Report-February-2020-Compendium-Screen-Friendly.pdf)

The distinction between public law decisions and best interest decisions

Between: AG v AM and Others
[2020] EWCOP 59
Court of Protection – DJ Eldergill – delivered 13 January 2020

This case considered the liberty, residence and care of P who was deprived of his liberty at a nursing home under a 12-month standard authorisation. Proceedings were brought under section 21A of the Mental Capacity Act 2005 to challenge the authorisation and determine whether P should continue to reside at the nursing home or return home with a package of care.

In June 2008, P had suffered a brain haemorrhage which had left him with significant disabilities. Since March 2009, he had been a resident at a specialist nursing home for those with profound and complex disabilities and who required long-term 24-hour nursing case. P's wife brought the section 21A application asking for her husband to be discharged to the family home with a package of care. Given their limited financial means, P relied on state-funded care and treatment and therefore his care options were limited to what the Clinical Commissioning Group (CCG) was willing to provide.

HELD -

DJ Eldergill refused the application. He held that it would not be in P's best interests to be discharged home under the proposed package of

treatment and care. A significant factor was that the proposed package, while significant and could meet P's day-to-day care requirements, did not include the significant GP and nursing services which the nursing home offered and which "facilitated early assessment and treatment and avoided an escalation of medical deteriorations". The Judge found that "someone with [P's] complicated needs requires maximum effort and commitment from all involved in providing home care for it to have a chance of success. I cannot rely on the GP who is forced to register AM [that being the evidence from a number of GP practices] being able or willing to do more than is required under their general contract." As a result, the Judge found that granting AG's application "carries a significant risk of her husband losing his place and current quality of life at X Nursing Home without there being a corresponding 'risk of gain' which justifies this risk of harm."

Comment

The case is another reminder that the Court of Protection's jurisdiction is limited to making a best interests decision based on the available options on the table. It does not have the jurisdiction to order public authorities how to allocate their limited resources, unless they have acted so irrationally as to be unlawful.

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2020) (https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2020/02/Mental-Capacity-Report-February-2020-Compendium-Screen-Friendly.pdf)

Property and Affairs

The OPG, investigations and costs
Between: The Public Guardian v DJN
[2019] EWCOP 62
Court of Protection - HHJ Marin – delivered on 23 December 2019

The case considered the circumstances when the Public Guardian would be ordered to pay costs as a result of bringing unsuccessful proceedings to revoke a lasting power of attorney.

P, a gentleman who was 78 years old at the time, signed a lasting power of attorney (LPA) to his son, DN and subsequently became incapacitous. DN sold his father's property, worth £975,000 and an investigator of the Office of the Public Guardian ("OPG") became concerned that DN had not acted in his father's best interests. The OPG was also concerned about whether

JN had had capacity to execute the LPA at the time. Thus the OPG made an application to revoke the LPA. The OPG also applied, without notice, to suspend the LPA and appoint an interim deputy. The application made by the OPG was fully contested by DN and unsuccessful. While DN had been vindicated, he had also incurred £82,000 in costs and the question arose as to who should pay.

The general rule to apply in these cases is that set out in rule 19.2 of the Court of Protection Rules 2017, namely that the costs of the proceedings that concerns P's property and affairs shall be paid by P or charged to P's estate. Rule 19.5 gives the Court a discretion to depart from the general rule "if the circumstances so justify" and to determine whether the departure is justified the Court must have regard to a number of circumstances set out in rule 19.5.

HELD -

The Public Guardian was not entitled to be paid his own costs from P's funds and the Public Guardian should pay 50% of DN's costs, all of which shall be assessed at the Senior Courts Costs Office by a Senior Judge.

The Judge was particularly critical of the OPG's approach to the litigation in that it appeared that he had not reviewed the capacity evidence prior to commencing proceedings and if he had done so with care, he would have concluded that it was weak. The Court set out a number of steps that the Public Guardian could have taken to try to resolve the matter, such as inviting DN to instruct a joint expert to consider the capacity issue before issuing or only asking the Court to adjudicate on the issue of capacity, this being the real issue in the case. The Court was critical that instead the Public Guardian sought without notices orders of a very serious nature and approached the litigation in a standard way. The Court stated that this was a "serious failure especially when rule 1.4 COPR 2017 expects litigants to comply with overriding objective. This obligation applies equally to the Public Guardian."

Comment

This case demonstrates the circumstances in which the Court is willing to depart from the usual costs rules and the Court's scrutiny and criticism of the Public Guardian's approach to litigating these cases is of interest. It is of note that there was some confusion about the Public Guardian's stance on negotiation. Evidence from an investigator at the Office of the Public Guardian had stated that it was the Public Guardian's policy not to negotiate in any case. However, this was clarified after judgment was handed down by a statement from the Public Guardian who confirmed that there was no

general or blanket policy of not negotiating in cases brought before the Court.

For further detail please see the case summary and commentary in the 39 Essex Chambers Mental Capacity Report: Compendium (February 2020) (https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2020/02/Mental-Capacity-Report-February-2020-Compendium-Screen-Friendly.pdf)

Serious Medical Treatment – Practice Guidance

On 17 January 2020, the Vice President of the Court of Protection, Hayden J, published guidance[1] on serious medical treatment applications in the Court of Protection. The guidance is directed to those acting for providers and commissioners of clinical and caring services. It sets out the procedure to be followed where a decision relating to medical treatment arises and where providers/commissioners are considering whether to make an application to the Court of Protection.

It provides a non-exhaustive list of circumstances where it is highly probable that an application to the Court of Protection is appropriate. These will be where at the conclusion of the medical decision-making process, there remain concerns that the way forward in a case is:

- "**finely balanced**"; or
- "there is a **difference of medical opinion**"; or
- "there is a **lack of agreement** as to a proposed course of action from those with an interest in the person's welfare"; or
- "there is a **potential conflict of interest** on the part of those involved in the decision-making process".

It also provides that where a matter concerns a decision about the provision of life-sustaining treatment then an application must be made. It then provides guidance on the pre-issue steps, the parties to the proceedings, the allocation of the case, matters to be considered at the first directions hearing, steps to be taken in urgent hearings and details about the orders. The guidance is intended to operate until such time as it is superseded by the revised MCA Code.

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[1] https://www.bailii.org/ew/cases/EWCOP/2020/2.html

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Published by The Law Society of Northern Ireland