# Court of Protection Practice 2018

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# Introduction

The Judicial College now offers training courses for judges who sit in the Court of Protection, and all judges authorised to sit in the Court are expected to attend such a course. When I started sitting in the Court of Protection following my appointment to the Bench in 2009, no such training was available. Somewhat anxious about my ignorance of the law and practice in this area, I sought advice from a senior member of the judiciary who blithely told me 'don't worry, you'll pick it up as you go along'. Thus it was that I found myself in the splendid Manchester Civil Justice Centre a few weeks later conducting a preliminary hearing in the litigation which became known as *G v E*, in which I was confronted with a submission from counsel that the court was in contumelious breach of Article 5 of ECHR because of its failure to comply with its statutory obligations. At that point, I was only dimly aware of the Mental Capacity Act 2005 and the forbidding Deprivation of Liberty Safeguards. A furtive glance under the judicial desk at Schedule AI and Schedule 1A to the Act confirmed that there was no chance that I would be able to 'pick it up as I went along'.

Fortunately, help was at hand in the form of Court of Protection Practice, with its comprehensive coverage of the statutes, rules and codes of practice, and at the front a clear and succinct textual summary of the whole field, starting with a fascinating historical section explaining how we have arrived at where we are now. That evening spent reading the text in the judges' lodgings in Manchester was amongst the most useful few hours of my judicial career. By the following morning, I was able to look counsel in the eye and demonstrate sufficient understanding of the *Winterwerp* criteria to fend off her attack.

Ever since, I have always had a copy of this book by my side and on many occasions I have been grateful for the breadth of its erudition and the clarity of its exposition. And it is therefore an enormous privilege to be asked to succeed Gordon Ashton as General Editor. In taking on this responsibility, I am again aware that, notwithstanding over 8 years' experience of sitting in the court and delivering a number of judgments on the interpretation of the statute and rules, my knowledge of this area of the law will never approach the depth of understanding which Gordon acquired through a lifetime's work specialising in this field. I am pleased that, despite the change of General Editor, this remains very much Gordon's book. All those who have contributed to it – and, I am sure, all those who read or refer to it – will wish to join me in thanking him for his outstanding work and his profoundly important contribution to the law relating to mental capacity in this country.

This introduction affords me the opportunity to salute two other individuals whose contribution have been of immense importance, each of whom will retire from the Bench in the next few months. By the time this book is published, Mr Justice Charles will have stepped down as Vice-President of the Court. In that role, he has performed invaluable service in reforming the practices and procedures of the court, addressing the many deficiencies in its structure and administration, and helping to steady the ship and steer it through the storm raised by the *Cheshire West* decision. It is thanks to Bill Charles that the Court is now organised in a way which better equips it to serve the community and in particular those vulnerable members of the community for whom it exists.

The summer of 2018 will also see the retirement of the President of the Family Division and the Court of Protection. Over the past 30 years, stretching back to his appearance as counsel in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, no one has had a greater influence on the law relating to mental capacity than Sir James Munby. Under his leadership, the work of the family courts and the Court of Protection has achieved greater recognition and respect across the justice system and, thanks to his unswerving commitment to transparency, in the wider community. His legendary erudition is on a scale which will never be matched, but in addition he has a degree of wisdom and humanity rarely encountered even in this jurisdiction where those qualities are particularly prized. Anyone seeking inspiration to face the challenges of working in this field need look no further than paragraph 120 of his judgment in *Re MM* [2007] EWHC 2003 (Fam). That passage cites an observation of Mr Justice Oliver Wendall Holmes from a judgment in 1919. I venture to suggest that, a hundred years from now, lawyers and judges will still be citing decisions and dicta of Sir James Munby.

The format of the book remains unchanged from previous editions. As Gordon remarked in his introduction to the 2017 edition, the book is unusual for a volume on court practice in containing narrative chapters of a type more usually found in a text book. As in previous years, Chapter 1 contains a summary of the background to the court's existence and jurisdiction, and the wider social and legal context.

I have remarked elsewhere (*Kent CC v A Mother and others* [2011] EWHC (Fam) 402, para 132) that:

> '[The] last thirty years have seen a radical reappraisal of the way in which people with a learning disability are treated in society. It is now recognised that they need to be supported and enabled to lead their lives as full members of the community, free from discrimination and prejudice. This policy is right, not only for the individual, since it gives due respect to his or her personal autonomy and human rights, but also for society at large, since it is to the benefit of the whole community that all people are included and respected as equal members of society.'

The modern Court of Protection has a crucial role to play in implementing this policy. I have some sympathy with those who regret that, when passing the 2005 Act which did so much to reform the law relating to incapacitated adults, Parliament decided the name of the old court should be retained. As I have observed in a number of cases, those who work in this field, including judges, have to be on their guard against the 'protection imperative' – the tendency to be drawn towards an outcome that is more protective of the adult, both in the assessment of capacity and in making decisions about best interests. The focus of our work ought to be as much, if not more, on empowering those with a disability as on their protection. One of the challenges facing the new Court as it enters its second decade is to do more to enable those adults who are subject to its jurisdiction to participate in proceedings. The recently introduced rules and procedures governing representation – formerly in rule 3A, now in rule 1.2 of the new 2017 Rules – are an important step in addressing this challenge, but will be of limited use unless funds are found to resource the various options. Similarly, the programme of regionalisation – brought about largely through the determination of the President and Mr Justice Charles – will greatly improve access to the Court for the benefit of those who are the subject of proceedings and those who care for them. But the benefits of regionalisation will not be

realised unless sufficient resources are made available to ensure that there are judges and court staff in the places where they are needed. It seems scarcely credible that it was thought appropriate to set up the new Court largely centred on London when its work plainly affected people throughout the country. Now that this error has been corrected, we are seeing a substantial increase in the volume of welfare cases across England and Wales. In the South-West, for example – where, until recently, I was Family Division Liaison Judge for the Western Circuit and thus involved in decisions about the deployment of judges – the number of cases in the Court has increased by 50% in the second year of regionalisation, without any increase in the judicial or administrative workforce. The pressures caused by the dramatic increase in workload in the Court of Protection are being felt across the justice system, particularly in family and civil justice. The system of regional hubs, under regional lead judges, supported by a team of district judges responsible for allocation, is proving very successful but the judges and administrative staff are unquestionably feeling the strain. Perhaps for this reason, the planned devolution of responsibility for issuing welfare applications to the regions has been postponed, although apparently only for a few months.

It is important to note that the regionalisation programme does not extend to property and affairs applications, which numerically form by far the greater proportion of cases and which will continue to remain under the umbrella of the specialist team of judges and administrative staff at First Avenue House under the leadership of the Senior Judge, Carolyn Hilder. Amongst her many tasks is coordinating the recruitment of new judges for the Court across the country. There is an ongoing and urgent need for judges and plans to draw them from a wider cross-section of the existing judiciary, including tribunal judges, are in hand. I hope that in the near future suitably qualified deputy district judges will start sitting in the Court. There can surely be no reason for this not to happen. Part-time fee-paid judges hear about 20% of cases in other jurisdictions – family and civil. In the past year, selected deputy district judges have been authorised to sit in public law children's cases. The issues in such cases are no less important and difficult than those coming before the Court of Protection. Over the past year, I have sought to encourage lawyers specialising in the field of mental capacity law to consider applying for part-time judicial office, and I take this opportunity to do so again. There are comparatively few lawyers in that category currently on the Bench in any capacity, and their knowledge and experience would be an important addition to the expertise of the judiciary as a whole.

The past year has been notable for the consolidation of the changes introduced by the various 'pilot' schemes covering case management, the use of s 49 reports, and transparency. Of these, it was the last that caused the greatest controversy when it was first proposed, the change being significantly more radical than the incremental approach adopted towards transparency in the family courts. Although there is by no means unanimity on the merits of this reform, the consensus is that the changes have been successful. There remain practical difficulties – the requirement to sign in when attending court is cumbersome, and the listing arrangements have not always worked as smoothly as hoped. The media complain there is no national list of COP cases so those members of the specialist press are unable to find out about cases of public interest taking place outside London. It is clear, however, that the culture has

changed dramatically so that it is generally accepted that sitting in open court does not lead to any discernible diminution in the quality of justice.

Another notable development during the past year was the recasting of the rules and practice directions. For the most part, with one notable exception, this consisted of a consolidation and tidying up exercise, rather than radical reform. The exception was the complete abolition of Practice Direction 9E dealing with serious medical treatment. Henceforth, such cases fall under the same case management rules as other welfare applications. At a stroke, the special rules for serious medical cases were swept away. It remains to be seen how this change will work out in practice. It is anticipated that applications for orders concerning serious medical treatment of incapacitated adults will continue to be allocated to Tier 3 (ie in effect High Court) judges, although there is now no express requirement to that effect in the allocation rules. But the extent to which that jurisdiction will be engaged in future is open to question. In *NHS Trust v Y and another* [2017] EWHC 2866 QB, O'Farrell J, sitting in the Queen's Bench Division, following dicta of Peter Jackson J (as he then was) in *Re M (Withdrawal of Treatment: Need for Proceedings)* [2017] EWCOP 19, made a declaration that that it is not mandatory to bring before the court the withdrawal of clinically assisted nutrition and hydration from someone with a prolonged disorder of consciousness in circumstances where the clinical team and the family are agreed that it is not in his best interests that he continues to receive that treatment. At the time of writing, it is understood that this decision will proceed to an appeal in the Supreme Court. At this point, however, it seems that the determined campaign for reform in this area, led by Celia and Jenny Kitzinger, has achieved a remarkable success.

Other notable decisions in the past year include *N v ACCG and others* [2017] UKSC 22, in which the Supreme Court confirmed (albeit on a different basis than that adopted in the lower courts) that a decision as to what is in a person's best interests is a choice between available options. Of equal practical importance is the decision in *Director of Legal Aid Casework and others v Briggs* [2017] EWCA Civ 1169, in which the Court of Appeal overturned the decision of the judge at first instance that he could, within the scope of proceedings under s 21A (which were supported by non-means-tested public funding) consider whether life-sustaining treatment should be given to a man in a minimally conscious state who was being deprived of his liberty, on the grounds that challenging detention under s 21A relates to decisions about the deprivation of liberty and not the circumstances leading up to it.

Taken together, the developments described in the last two paragraphs will lead to a reduction in the number of cases coming before the Court. But the complexities of the law, and the ingenuity of the lawyers, will always result in new seams of work being discovered. It is always unwise to make predictions as to future legal developments, particularly in an area where case-law often evolves at a rapid pace so that the predictions may be out of date before they are published. It is fair to say, however, that all practitioners await with interest the government's response to the Law Commission Report on Mental Capacity and Deprivation of Liberty (Law Com no 372) and in particular to the Commission's proposals for a new scheme to replace the Deprivation of Liberty Safeguards (provisionally called the Liberty Protection Safeguards). The case for some reform of the DOLS is overwhelming, and the Law Commission's final model

seems eminently workable. Whether Parliamentary time can be found to accommodate amending legislation, given the focus on Brexit, remains to be seen.

Whatever happens, I hope that users of this book will continue to find it the essential guide to practice in the Court of Protection. I salute the efforts of the team of contributors, joined this year by James Beck and Lucy Series and supported by the editorial staff at LexisNexis. Through their hard work and scrupulous attention to detail, we hope that the high standards established by Gordon Ashton will be maintained in the years ahead.

Jonathan Baker
*January 2018*