



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the least worst option as regards compulsory feeding, putting values properly into the mix and the need for a decision actually to be in contemplation before capacity is considered;

(2) In the Property and Affairs Report: relief from forfeiture in a very sad case;

(3) In the Practice and Procedure Report: counting the costs of delay, guidance on termination cases, and a consultation on increasing Court of Protection fees;

(4) In the Wider Context Report: forgetting to think and paying the price, the cost of getting it wrong as litigation friend, Wales potentially striking out alone on mental health reform, and a review of Arianna's book on social care charging;

(5) In the Scotland Report: reduction of a Will: incapacity and various vitiating factors, and an update on law reform progress.

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

We will be taking a break in January, so our next Report will be out in February 2024. For those who are able to take a break in December, we hope that you get the chance to rest and recuperate. For those of you who are keeping the systems going in different ways over that period, we are very grateful.

#### Editors

Alex Ruck Keene KC (Hon)  
Victoria Butler-Cole KC  
Neil Allen  
Nicola Kohn  
Katie Scott  
Arianna Kelly  
Nyasha Weinberg  
Simon Edwards (P&A)

#### Scottish Contributors

Adrian Ward  
Jill Stavert

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

## Contents

Short Note: relief from forfeiture ..... 2

### Short Note: relief from forfeiture

When a person unlawfully kills another, the “forfeiture rule” prevents that person from benefitting from the deceased person’s estate. This rule is grounded in obvious public policy.

The Forfeiture Act 1982 was enacted to allow the court to grant relief from that rule if it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified or excluded in that case.

Helpful guidance is provided in the judgment of Mummery LJ in the case of *Dunbar v Plant*, which guidance has been applied subsequently in a number of cases, and what Mummery LJ there said is that the following list of factors may be relevant in the exercise of the court’s discretion:

*The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the Estate and the value of the property in dispute; the financial position of the offender, and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule.*

Further guidance is given in the case of *Ninian (Deceased)*, a decision of Chief Master Marsh. In that case the Chief Master regarded it as helpful to have regard to the DPP’s policy statement relating to prosecution in relation to assisting a suicide, which was the matter with which he was concerned in the *Ninian* case, and decisions on whether or not to prosecute. The Chief Master pointed out that, although the decisions whether to prosecute and whether or not to give relief under the Forfeiture Act are different, they both involve consideration of moral culpability and the offender’s motivation.

In *Withers Trust Corporation v The Estate of Hannah Goodman* [2023] EWHC 2780 (Ch) Master McQuail had to consider an application for relief where a husband had assisted in the suicide of his terminally ill wife and then, wracked with remorse, took his own life. The wills of husband and wife, who had no children, left residuary gifts to similar charitable objects though, for reasons connected with inheritance tax law, the wife’s gift would have led to an inheritance tax charge (£200,000) but the husband’s would not. Hence the application.

The Master considered the above guidance and found that the evidence demonstrated that the wife had a clear wish to end her own life. The Master considered the recently amended CPS guidelines on prosecution in such cases and found that a prosecution would have been very unlikely. The Master then went on to find a very low (almost no) moral culpability and, therefore, granted the relief sought.

---

## Editors and Contributors

**Alex Ruck Keene KC (Hon): [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)**

Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).

**Victoria Butler-Cole KC: [vb@39essex.com](mailto:vb@39essex.com)**

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click [here](#).

**Neil Allen: [neil.allen@39essex.com](mailto:neil.allen@39essex.com)**

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website [www.lpslaw.co.uk](http://www.lpslaw.co.uk). To view full CV click [here](#).

**Arianna Kelly: [Arianna.kelly@39essex.com](mailto:Arianna.kelly@39essex.com)**

Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click [here](#).

**Nicola Kohn: [nicola.kohn@39essex.com](mailto:nicola.kohn@39essex.com)**

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click [here](#).

**Katie Scott: [katie.scott@39essex.com](mailto:katie.scott@39essex.com)**

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



**Nyasha Weinberg: [Nyasha.Weinberg@39essex.com](mailto:Nyasha.Weinberg@39essex.com)**

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click [here](#)

**Simon Edwards: [simon.edwards@39essex.com](mailto:simon.edwards@39essex.com)**

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

**Adrian Ward: [adrian@adward.co.uk](mailto:adrian@adward.co.uk)**

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

**Jill Stavert: [j.stavert@napier.ac.uk](mailto:j.stavert@napier.ac.uk)**

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

## Conferences

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

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

Adrian will be speaking at the World Congress of Adult Support and Care. This event will be held at the Faculty of Law of the University of Buenos Aires from August 27-30, 2024. For more details, see [here](#).

### **Advertising conferences and training events**

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

---

Our next edition will be out in February. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: [marketing@39essex.com](mailto:marketing@39essex.com).

**Sheraton Doyle**  
Senior Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

**Peter Campbell**  
Senior Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)

Chambers UK Bar  
Court of Protection:  
Health & Welfare  
*Leading Set*

The Legal 500 UK  
Court of Protection and  
Community Care  
*Top Tier Set*

[clerks@39essex.com](mailto:clerks@39essex.com) • [DX: London/Chancery Lane 298](#) • [39essex.com](http://39essex.com)

**LONDON**

81 Chancery Lane,  
London WC2A 1DD  
Tel: +44 (0)20 7832 1111  
Fax: +44 (0)20 7353 3978

**MANCHESTER**

82 King Street,  
Manchester M2 4WQ  
Tel: +44 (0)16 1870 0333  
Fax: +44 (0)20 7353 3978

**SINGAPORE**

Maxwell Chambers,  
#02-16 32, Maxwell Road  
Singapore 069115  
Tel: +(65) 6634 1336

**KUALA LUMPUR**

#02-9, Bangunan Sulaiman,  
Jalan Sultan Hishamuddin  
50000 Kuala Lumpur,  
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.