



Welcome to the February 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: medical treatment dilemmas of different hues, how risky can the court be, and capacity in context;

(2) In the Property and Affairs Report: useful guides for those creating LPAs and an Australian take on balancing risk and (false) hope in the context of scamming;

(3) In the Practice and Procedure Report: medical evidence, mental disorder and deprivation of liberty, and the approach to propensity evidence;

(4) In the Wider Context Report: the new framework for care home visiting in England, an important consultation on capacity in civil litigation, new core ethics guidance from the BMA, and the Circuit Court rolls up its sleeves in Ireland;

(5) In the Scotland Report: discrimination narrowly avoided, and a case posing questions about compensation for unlawful detention.

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.

The sharp-eyed amongst you will have noticed that there was no third edition of the informal Court of Protection Law Reports series at the start of this year: this is because there will shortly be announced exciting news about their future – watch this space.

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

Mencap Trust Company guides to LPAs..... 2

Short note: an Australian approach to managing the risk from scammers 2

Mencap Trust Company guides to LPAs

The Mencap Trust Company has published a suite of guides to various aspects of the making and operation of LPAs. Some cover ground which is contained in OPG guidance but in respect of others (such as guidance to certificate providers) no OPG guidance is available.

This makes the suite especially useful as it provides a one stop (free) shop aimed at lay users (but useful for professionals as aides memoire too). It is also very helpful for those wanting to support those who might be on the cusp of having capacity to make an LPA.

The topics covered are:

- Easy Read Guide and Record to health & welfare LPA
- Easy Read Guide to SECTIONS 8 and 9 of health and welfare LPA
- Certificate provider's guidance for health and welfare LPA
- Guidance for a health and welfare attorney
- Supporters Guide on property and financial affairs LPA
- Easy Read Guide and Record on property and financial affairs LPA
- Easy Read Guide to SECTION 8 of property and financial affairs LPA

- Certificate provider's guidance for property and financial affairs LPA
- Guidance for a property and financial affairs attorney

Short note: an Australian approach to managing the risk from scammers

With thanks to Piers Gooding for flagging this, we note the very interesting decision of the Victorian Civil and Administrative Tribunal in *Re EAD (Guardianship)* [2023] VCAT 1129. The case concerned a woman who (in English terms) lacked capacity to make decisions about her property and affairs. She spent all her (minimal) allowance “on persons who are deceiving her into believing that there are intense personal relationships or friendships to be established or maintained by the regular provision of funds to them” (paragraph 23), and continued to do so despite sustained efforts to explain, distract or rehabilitate her to other activities. However, as the Tribunal noted (at paragraph 26).

EAD appears to derive some actual joy and feelings of validation from her interactions with scammers. The evidence is that she would experience emotional pain if restricted from social interaction with them. I am aware that her disability means that she does not perceive and understand the deception and makes herself vulnerable to the silver-tongued techniques of grifters. On the other hand, her contact with these persons injects a level of (false, but

possibly pleasurable) excitement or romance in her life.

Under the relevant law in Victoria,¹ the Tribunal had to apply the principle that:

e) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person.

...

In EAD's case, the Tribunal found that:

26. [...] Her incapacity to weigh this up does not affect my responsibility to take into account her will and preferences, nor an administrator's responsibility to act in accordance with her will and preferences, except where there is serious harm. I find that EAD's will and preference is to continue to participate in discussions with these scammers - even after she has been informed that they are deceiving her and having been offered alternative forms of social contact.

The Tribunal noted:

28. In these circumstances, I was impressed that the administrator has taken time to observe and consider EAD's will and preferences. The administrator has also considered what the impact of acting contrary to her will and preferences would be. I accept their evidence in the absence of any direct evidence from her. Certainly, there is no evidence that she has ever expressed a wish to be rid of the scammers from her life. After observing her will and preferences, the administrator has adopted a practice - over the life of the administration orders - of maintaining an allowance of \$150 [roughly £80] per fortnight that she may spend how she

wishes, even if that means it is deposited to the benefit of scammers. The balance of her income is expended on her needs and the development of healthy savings. Requests that EAD might make for larger expenses are scrutinised by the administrator as to whether they are genuine expenses or likely to also be diverted to nefarious persons. Unless satisfied that it is a genuine expense for EAD's benefit, the administrator refuses the expense.

29. I find that in adopting these practices, the administrator is giving all practicable and appropriate effect to her will and preferences, avoiding serious financial harm and acting in such a way as to protect from abuse and exploitation by avoiding more serious financial losses.

Comment

The Victorian law in question is undoubtedly much closer to the CRPD than is the MCA in terms both of its requirement to consider 'will and preferences,' and its steer that they should (nb, not 'can') only be overridden where necessary to do so to prevent serious harm. There is, of course, no reason why deputies in England & Wales cannot adopt a similar approach to best interests, and this case provides a useful worked example of balancing (even if – others – false) joy against (to others, obviously real) risk of harm.

¹ The Guardianship and Administration Act 2019.

Editors and Contributors



Alex Ruck Keene KC (Hon): 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. To view full CV click [here](#).



Victoria Butler-Cole KC: 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

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. To view full CV click [here](#).



Arianna Kelly: 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

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



Katie Scott: 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

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

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

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



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](#).

Peter Edwards Law has announced its spring training schedule, [here](#), including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

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 March. 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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
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 • **DX: London/Chancery Lane 298** • 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.