



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: sexual and contraceptive complexities and an important light shed on DoLS from Northern Ireland;
- (2) In the Property and Affairs Report: the obligations on the LPA certificate provider, telling P their damages award, and dispensing with notification in statutory will cases;
- (3) In the Practice and Procedure Report: when it is necessary to go to court in serious medical treatment cases, and a Scottish cross-border problem;
- (4) In the (new) Mental Health Matters Report: medical evidence, mental disorder and deprivation of liberty, and the approach to propensity evidence;
- (5) In the Wider Context Report: when not to try CPR, developments in the context of assisted dying / assisted suicide and with Martha's Rule, and news from Ireland;
- (6) In the Scotland Report: a Scottish take on the *Cheshire West* anniversary and a tribute to Karen Kirk.

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.

Finally, we should note March 2024 contains three ten year anniversaries. One is national – indeed international – significance: the decision in *Cheshire West*; one is of national significance: the House of Lords Select Committee [post-legislative scrutiny report](#) on the MCA 2005; and the third is of personal significance to Alex: the launch of his [website](#).

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

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### Reminder: visiting arrangements in care homes and hospitals from April 2024

On the basis that our experience is that the changes coming into force in April 2024 in England appear not to be on the radar of many, we remind people of the important changes coming in through the prism of an amendment to the regulated activities regulations applying to care homes, hospitals and hospices. See our [February 2024 report](#) for more details.

### When NOT to attempt CPR

NHSE has published [Guidance to support the decision-making process of when not to perform cardiopulmonary resuscitation in prisons and immigration removal centres](#). The short document states that it has been prepared due to inappropriate resuscitation attempts being made in these settings as well as some failures to attempt CPR when it was appropriate, evidenced in Prison and Probation Ombudsman investigations. The focus of the document is on attempts at CPR when the patient is already dead. Seven conditions where CPR is clearly futile are identified, including the presence of rigor mortis. Where any of these conditions is present, there is no chance of success in terms of survival. If staff who first come upon the patient are not able to recognise rigor mortis, they should start resuscitation until advised otherwise by someone who is competent to give

that advice, and prison or immigration staff are not to overrule a decision by a health professional not to attempt CPR.

Whilst expressly aimed at those working in prisons / removal centres, the principles set out in the guidance are equally applicable elsewhere. A robust decision-making process around (1) making recommendations about CPR; and (2) carrying out CPR must provide for situations where CPR should not be carried out as well as those where it should.

### Assisted dying / assisted suicide developments

The House of Commons Health and Social Care Committee has published the [report](#) of its inquiry into assisted dying / assisted suicide ('AD / AS').

The report does not make any recommendations for or against changing the current law in England & Wales, but rather seeks to inform debate covers Parliament and the current law, the Government's role in the debate, international examples of jurisdictions where AD/AS is available in some form, the involvement of physicians and assessments of eligibility and capacity to give informed consent, and palliative and end-of-life care.

The Committee identified the pursuit of high-quality compassionate end-of-life care as a common theme in the evidence it received. Also

important was agency and control for the person dying.

AD/AS is currently being considered in both Jersey and the Isle of Man, and the Committee concludes that the Government should be “actively involved in discussions” on how to approach possible divergence in legislation between jurisdictions.

During the course of its inquiry, the Committee visited Oregon, which became the first US state to legalise the practice, and collected both written and oral evidence from international witnesses. The report concludes that many of the jurisdictions which have legalised AD/AS did so recently, with still much to learn as time passes.

Despite the UK being a world leader in palliative and end-of-life care, the report concludes that access to such care is patchy.

The report recommends that the Government ensures universal coverage of palliative and end-of-life services, including hospice care at home, and more specialists in palliative care and end-of-life pain relief. The report urges the Government to commit to guaranteeing that support will be provided to any hospices which require funding assistance.

The report also calls for new guidance from the GMC and the BMA to provide clarity to doctors on responding to requests for medical reports for applicants seeking AD/AS abroad.

Amongst the many who submitted evidence was Alex, who led on [work](#) by the Complex Life and Death Decisions research group on the considerations that arise in relation to models

that base themselves upon the capacity of the person.

For an ‘informer’ about assisted dying / assisted suicide, some might find useful this [shedinar](#) from Alex.

The report came shortly after news that the author and campaigner Wendy Mitchell has died. Her [last blog](#) sets out her reasons for deciding to voluntarily stop eating and drinking (VSED), rather than waiting for her dementia to run its course. There is more information on VSED on the Compassion in Dying website, along with a [call for clearer guidance](#) to be available as to the obligations on medical professionals where a person expresses a desire to stop eating and drinking.

### Martha’s Rule developments

NHSE has [published](#) further information about the scope of ‘Martha’s Rule,’<sup>1</sup> ahead of its implementation in England from April 2024.

The three proposed components of Martha’s Rule are:

- All staff in NHS trusts must have 24/7 access to a rapid review from a critical care outreach team, who they can contact should they have concerns about a patient.
- All patients, their families, carers, and advocates must also have access to the same 24/7 rapid review from a critical care outreach team, which they can contact via mechanisms advertised around the hospital, and more widely if they are worried about the patient’s condition.

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<sup>1</sup> We note that, strictly, it is not a ‘Rule,’ in the sense of a legal requirement, at least at this stage.

- The NHS must implement a structured approach to obtain information relating to a patient's condition directly from patients and their families at least daily. In the first instance, this will cover all inpatients in acute and specialist trusts.

As to implementation, the NHS will take a phased approach, beginning with at least 100 adult and paediatric acute provider sites who already offer a 24/7 critical care outreach capability. The focused approach at the initial provider sites will inform the development of wider national policy proposals for Martha's Rule that can be expanded in a phased way across the NHS from 2025/26. NHSE notes that it will also identify ways to roll out an adapted Martha's Rule model across other settings including community and mental health hospitals where the processes may not apply in the same way.

## IRELAND

In this issue I discuss two recent High Court decisions. The first, *EF*, is likely to be of interest to probate practitioners in determining when an application pursuant to the ADMCA is required in place of a section 27(4) application to appoint an administrator *ad litem*. It may also be helpful to consider the decision of *In The Matter of The Estate of Mary Moore* [2023] IEHC 607 wherein Ms. Justice Stack held that an administrator *ad litem* appointed for the limited purpose of substantiating proceedings has 'no substantive duties or obligations to the estate or beneficiaries' and that it is 'open to them not to take active steps in the defence of the proceedings'. Given the summary in *EF* outlined below, one might conclude that an ADMCA application is required where a party to intended probate proceedings 'stands to lose' from the proceedings and lacks the capacity to defend them. The second, is one for those who enjoy statutory interpretation and the novel issues

recently enacted legislation, such as the ADMCA, presents. The decision in *MC* considers whether the review of a ward of court who is the subject of a detention order is required pursuant to Part 10 of the ADMCA even if (s)he does not have a responsible consultant psychiatrist and never had a mental disorder.

### *The interaction of probate law and the ADMCA*

*In The Matter of The Estate of E.F., Deceased* [2023] IEHC 720, Ms. Justice Stack refused to appoint an administrator *ad litem* pursuant to Section 27(4) of the Succession Act 1965 where the executor, who now lacks capacity to conduct her affairs, is a beneficiary of the estate and there is a challenge to the will.

Three siblings made an application to grant liberty to an independent solicitor to extract letters of administration in place of the named executor, 'G', who was stated to be of 'unsound mind not so found'. G was the sole executrix and sole beneficiary of the main asset in the estate of her late mother, namely a substantial dwelling house situate in a major city. The three siblings intended to challenge the will on the grounds of testamentary capacity, and on this basis the court distinguished the circumstances from the ordinary non-contentious situations. The court appointed a *guardian ad litem* (GAL) to convey G's will and preference to the court, and from the statements made by G to the GAL the court formed the view that 'G does not understand the significance of the application or the proposed challenge to the 2014 Will'. The court ultimately found that the proposed administrator *ad litem* was not 'asked to represent the executrix or to act in her best interests' and that it was 'G alone who stands to lose from the institution and possible success of' the intended proceedings, and for those reasons the procedures envisaged by O.79 R.27 ought to be followed i.e. the appointment of a DMR for G to administer the

estate and defend the proceedings in her interest.

*Lex non cogit ad impossibilia*

*("The law requires nothing impossible")*

In *The Matter of M.C., A Ward of Court* [2024] IEHC 47, President Barniville considered Part 10 of the ADMCA and whether a ward of court's detention had to be reviewed pursuant to section 108 if the ward neither suffered from a mental disorder nor had a responsible consultant psychiatrist. One might recall that the ADMCA impacts existing adult wards of court in two ways. Firstly, Part 6 requires that the capacity of all adult wards of court must be reviewed, and they must be discharged from wardship by 25<sup>th</sup> April 2026. Secondly, Part 10 provides for the review of the detention of wards who are the subject of detention orders whether in approved or non-approved centres.

This case did not fall foul of the issues identified, and previously discussed in this report, in *K.K. (No. 1)* and *K.K. (No. 2)* because MC was the subject of a detention order at the time the ADMCA was commenced.

The court ultimately favoured a plain or literal interpretation of the legislation and found that it was required to review the ward's detention pursuant to Part 10 despite the ward did not have a 'mental disorder' and did not have a 'consultant psychiatrist responsible for their treatment and care'. The court found that it was not precluded from reviewing the wards detention under Part 10, despite section 108 stating that the court 'shall' hear from the responsible consultant psychiatrist. The two options provided to the court under Part 10 are to continue the ward's detention where the ward continues to suffer from a mental disorder, or if the court is satisfied that the ward is 'no longer suffering from a mental disorder' the ward must be discharged

from detention. The court found that having reviewed the ward's detention it was satisfied that no order was required pursuant to Part 10 because the ward did not have a 'mental disorder' such would warrant a continuation of her detention, but similarly a discharge order was not required because it could not be said that the ward was 'no longer suffering from a mental disorder' in circumstances where she did not have a 'mental disorder' to start with.

The significance of this decision is that *all* detained wards of court must have their capacity reviewed 'as soon as possible', instead of only those detained wards who have a 'mental disorder' and 'consultant psychiatrist responsible for their treatment and care'. This is significant because, as President Barniville pointed out (at par 117), '*many, if not most, wards the subject of detention orders made by the High Court before the enactment of the ADMCA, who met and continue to meet the test for wardship, do not have a "mental disorder" within the meaning of that term in s. 3 of the 2001 Act*'.

*Emma Slattery BL*

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



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

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## Conferences

Members of the Court of Protection team 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 following open events: the Royal Faculty of Procurators of Glasgow Private Client Conference (14 March, details [here](#)), the World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details [here](#)) and the European Law Institute Annual Conference in Dublin (10 October, details [here](#)).

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.

### **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.

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

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