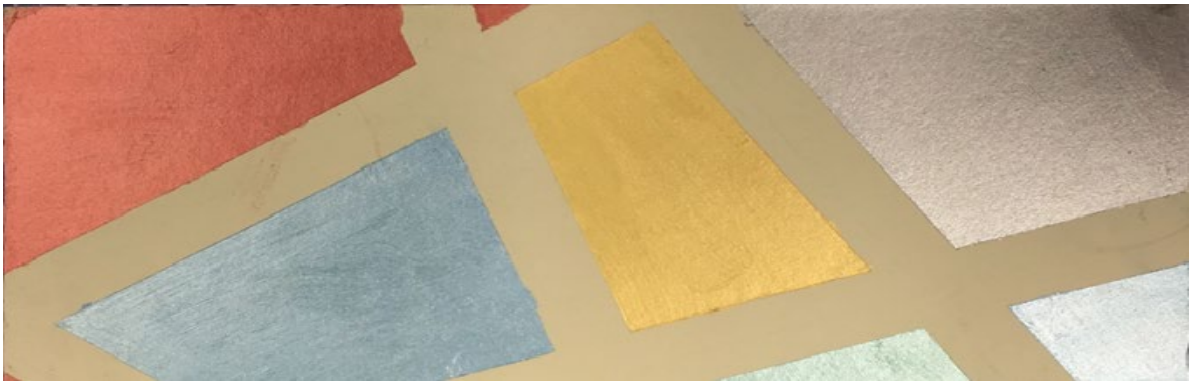

Welcome to the May 2025 Mental Capacity Report. It is our 150th issue, and, to mark this, Tor and Alex have recorded a discussion reflecting on how the report (then the newsletter) came to be back in 2010, and on how the law and practice have evolved since then. The first issue of the newsletter they discuss can be found here.

Highlights:

(1) In the Health, Welfare and Deprivation of Liberty Report: new and updated guidance notes;

(2) In the Practice and Procedure Report: naming clinicians (and other professionals), and cross-border deprivation of liberty;

(3) Section 63 MHA 1983 and diabetes, and the Mental Health Bill progresses to the Commons;

(4) In the Children's Capacity Report: the Court of Appeal explains why local authorities cannot consent to the confinement of children in their care;

(5) In the Wider Context Report: the other party's interest in litigation capacity, how far landlords are supposed to go in hoarding cases, and a new Convention on the rights of older adults on the cards?

(6) In the Scotland Report: AWI reform update and cross-border deprivation of liberty – Scottish reflections what is appealable in the AWI context.

As there were no developments meriting specific reporting in the property and affairs field this month, we do not have a Property and Affairs report.

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 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: Serious medical treatment cases and naming clinicians – the Supreme Court decides

In the conjoined appeals of *Abbasi* and *Haastrup* [2025] UKSC 15, the Supreme Court has grappled with the questions of (1) the jurisdiction of the High Court to grant orders providing for the anonymity of professionals involved in treating children involved in serious medical treatment cases; and (2) the circumstances under which such orders should continue after the death of the child. Whilst the decisions under challenge in the two cases related to proceedings relating to children, the same broad principles apply in relation to proceedings before the Court of Protection in respect of adults unable to make their own decisions about medical treatment.

Lords Reed and Briggs gave the lead judgment (Lords Hodge and Stephens agreeing with them); Lord Sales gave a concurring judgment.

As a terminological point, Lords Reed and Briggs noted at paragraph 51 that, although conventionally the orders in questions have been called "reporting restrictions orders," the injunctions in question:

> *are wider in scope than reporting restriction orders as ordinarily understood, which restrict the reporting of court proceedings (for example, by prohibiting the publication of the name of a witness). They are also different in that they are made in proceedings that are usually held in private. In other words, unlike reporting restriction orders, they do not necessarily make inroads upon the open justice principle* […]. *For all these reasons, it appears to us to be confusing and potentially misleading to describe these injunctions as reporting restriction orders.*

Lords Reed and Briggs noted at paragraph 7 that resolution of the issues that arose had led the court "*into the need to review from first principles the practice of the making and continuation of injunctions of this kind*." Having conducted that review, they ultimately dismissed the appeal, but for rather different reasons to that of the Court of Appeal. Helpfully, they summarised their reasons at paragraph 182 thus:

> *(1) The High Court has jurisdiction, in proceedings concerned with the withdrawal of life-sustaining treatment of children, to grant injunctions protecting the identities of clinicians and other hospital staff involved in that treatment, where and for so long as that is necessary to protect the interests of those children. That jurisdiction arises under the court's inherent parens patriae powers, and under its inherent jurisdiction to protect the administration of justice. Such injunctions can be granted against parties who will not themselves act wrongfully, where that is necessary in order to protect the*

children's interests or the administration of justice, and they can be granted contra mundum.

(2) The High Court also has jurisdiction to issue such injunctions where that is necessary in order to prevent interference with hospital trusts' performance of their statutory functions, as explained in Broadmoor.

(3) The High Court also has jurisdiction to issue such injunctions where that is necessary in order to protect the rights of clinicians and other hospital staff, in proceedings brought or continued by those individuals in reliance on their rights. In principle, such proceedings can (in an appropriate case) be brought in a representative capacity.

(4) These grounds of jurisdiction are not mutually exclusive. In particular, the need to protect the interests of the children, to secure the administration of justice, and to prevent interference with the trusts' performance of their functions are likely to co-exist and to be mutually reinforcing.

(5) Such injunctions are not incompatible with the open justice principle where, as in the Haastrup proceedings, the application is made under the parens patriae jurisdiction and the substantive hearing is held in private. It is also possible to avoid any incompatibility with the open justice principle where the hearing is held in public, as was intended in the Abbasi proceedings.

(6) Applications for such injunctions should be based on the relevant cause of action under domestic law (such as the parens patriae jurisdiction, or the Broadmoor principle, or the rights of the clinicians under the law of tort), rather than simply on section 6(1) of the Human Rights Act and section 37(1) of the Senior Courts Act.

(7) In principle, the powers of the High Court under the latter provisions are wide enough to enable it to issue injunctions to protect the Convention rights of clinicians and other hospital staff in proceedings brought by hospital trusts, if that is the only way in which those rights can receive practical and effective protection. However, those circumstances do not exist where such protection can be afforded under parens patriae powers or under the court's power to protect the administration of justice, or on the basis explained in Broadmoor, or where it is practical for the clinicians (or a representative) to be joined to the proceedings and to assert their own claim.

(8) Notice of an application for such an injunction should be given to media organisations. Notice of the grant of such an injunction, and of any application to vary or discharge such an injunction, should be given to the clinicians affected.

(9) In deciding whether to grant such injunctions at the outset of such proceedings, where the court is being asked to exercise its parens patriae powers, the interests of the child in question, and the need to secure the administration of justice in the proceedings, are likely to justify making an order in circumstances where there is a significant risk that publicity will result in interferences with the child's right to confidentiality and privacy, and in damage to the continued care being provided by the hospital. An order is also likely to be justified under the Broadmoor principle, and, where the clinicians (or a representative clinician) are joined, in order to protect the rights of the clinicians.

(10) Such injunctions should be of limited duration. A reasonable duration would be until the end of the proceedings and, in the event that they terminate with the child's death or the grant of the declaration sought, for a subsequent cooling-off period. The length of that period will reflect the court's assessment of the continued risk of interference with the trust's performance of its statutory functions, and in particular with its continuing treatment of other patients, and the time reasonably needed for clinicians to take advice about their personal rights, but is likely to be measured in weeks rather than months or years.

(11) The individuals whose identities are protected by such injunctions should be identifiable by reference to the court's order.

(12) Such injunctions, being contra mundum, should include liberty to any person affected by their terms to apply on notice to vary or discharge any part of the order.

(13) In the event that a fresh injunction (or the continuation of the existing injunction) is sought after the cooling-off period in order to protect the rights of clinicians or other hospital staff, the application should be made by those individuals (or one or more representatives of them), relying on the relevant cause or causes of action. It should be supported by specific evidence.

(14) The court should begin its assessment of any application for such an injunction, or for the continuation of such an injunction, by considering the relevant domestic law.

(15) When the court considers whether the grant or continuation of such an injunction is compatible with the Convention rights protected by article 10, or whether its refusal or discharge would be compatible with article 8, it needs to consider (a) whether there is an interference with the relevant right which is prescribed by the law, (b) whether it pursues a legitimate aim, ie an aim which can be justified with reference to one or more of the matters mentioned in article 10(2) (or article 8(2), as the case may be), and (c) whether the interference is necessary in a democratic society.

(16) In answering the last of those questions in relation to article 10, the need for any restriction of freedom of expression must be established convincingly. It must be justified by a pressing social need, and must be proportionate to the legitimate aim pursued. This consideration applies with particular force to preventive restraints on publication, and is reflected in section 12(3) and (4) of the Human Rights Act.

(17) In assessing proportionality in a situation where there are competing rights under articles 8 and 10, the court should consider the criteria established in the case law of the European court, so far as relevant.

(18) The court should also consider how long the duration of any restriction on freedom of expression needs to be, and whether the reasons for the restriction may be affected by changes in circumstances. A permanent restriction would require compelling circumstances.

(19) Weight can be given to the importance of protecting the medical and other staff of public hospitals against unfounded accusations and consequent abuse. However, the court should also bear in mind that the treatment of patients in public hospitals is a matter of legitimate public interest,

> *and that the medical and other staff of public hospitals are public figures for the purposes of the Convention, with the consequence that the limits of acceptable criticism are wider than in the case of private individuals.*

Lord Sales gave a concurring judgment, "*to emphasise that it is important to remember that in cases of this sort the clinicians have rights as well, which also require respect and protection*." He focused in particular on the initial phase of events when the child is being treated and made a particular point of noting at paragraph 185 that:

> *cases of this sort can arise very suddenly, and hospital trusts and clinicians will naturally look to the decision in this case for guidance as to how they should proceed. I do not think the trusts in the Abbasi and Haastrup cases can be criticised for taking the action they did in the initial phase, nor for taking it upon themselves to assert the rights of the clinicians in their employment. I think they proceeded in a laudable and appropriate manner.*

At paragraph 188, he observed that:

> *In those cases and more generally it seems strange to say that a claim for an injunction to protect the clinicians' rights could only be justified indirectly by invoking the child's best interests. In my view, it would be appropriate for the court to respond directly to the claim actually brought in such cases, as they did in the Abbasi and the Haastrup cases, namely by identifying the rights of the clinicians themselves and granting relief to protect those rights. In all these cases, the rights of the clinicians have legal significance in the same way as do the rights of the children. A court should not disregard legal rights, wherever they exist and are properly invoked. Also, analytically, since in such cases the impact on the best interests of the child is an indirect consequence of the impact of the harassment on the clinicians, the rights of the clinicians are implicated more directly and are, so to speak, in the front line of the rights requiring protection from the courts rather than in some way a subsidiary matter of concern or irrelevant.*

Lord Sales expressed the view that, in the initial phase:

> *194.* […] *the clinicians are concentrating on caring for the child and cannot be expected to have to worry about taking legal advice and protecting their own rights. If their rights are to count for something in that period – and they should – someone needs to be able to act on their behalf to assert their rights by commencing or participating in legal proceedings.*
>
> *195. In my view, the hospital trust is the obvious appropriate person who can take on that role and act on behalf of the clinicians to assert their rights. This is what the trusts purported to do in the cases before us. I do not think this court should be shy of saying that they acted appropriately in doing so.*
>
> *196.*[…] *in the pressurised circumstances of the initial phase, the clinicians do not have a fair opportunity to consider, seek legal advice about and take legal proceedings to protect their rights. Their attention is understandably elsewhere, directed to providing care for the child. They should not be distracted from that. It would be completely unreasonable to expect them to have to worry about their own legal position and about taking legal steps to protect themselves and (as may be the case) their families from harassment, assault and so on. If in this phase their Convention rights are to be practical and*

> *effective rather than theoretical and illusory, as is required by the Convention (see Airey v Ireland (1979-1980) 2 EHRR 305, para 24, and "[t]his is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial"), someone has to step in to assert those rights on their behalf in legal proceedings. The law has to be pragmatic about this. A limited departure from the usual position set out at para 193 above [i.e. that the clinicians themselves should be taking their own steps to protect themselves] is required.*

However:

> *202. Outside the initial phase and a suitable cooling-off period which is long enough to allow clinicians time to collect their thoughts and seek legal advice about their position, the justification for departing from the usual position (para 196 above) disappears and the standard procedural requirement that the clinicians, as adults with capacity, should act on their own behalf is applicable.*
>
> *203. Lord Reed and Lord Briggs do not rule out the possibility that in some circumstances it will be appropriate for the court to grant injunctions to protect the article 8 rights of clinicians in proceedings commenced by a hospital trust: para 98 above. In my opinion, the initial phase in these cases was in this category.*

Comment

The Supreme Court have laid out a very clear route map for what needs to be done in future cases; as noted at the outset, that route map will apply just as much in serious medical treatment cases involving incapacitated adults. That will no doubt be taken into account in any future revision of the transparency orders made by the Court of Protection (including those provide for protection of other professionals, such as social workers).

It is also of some importance, we would suggest, that – unlike the Court of Appeal – the Supreme Court accepted that it was, in principle, to take account of the concerns expressed by the interveners as to the "*about the potential impact of attacks on clinicians and other hospital staff on morale and recruitment are irrelevant. Account can be taken of the importance of protecting the medical and other staff of public hospitals against unfounded accusations and consequent abuse.*" Even if the limits of acceptable criticism may be wider than in the case of private individuals, that does not give carte blanche to those who wish to criticise clinicians and other hospital staff who may – in many cases – not be in a position to be able to respond.

Alex discussed the implications of the judgment in a webinar held together with Hannah Taylor of Bevan Brittan on 9 May, the recording of which is available here.

Cross-border capacity

A new protocol regulating communications between judges in Scotland, England & Wales, and Northern Ireland has been agreed for cases involving adults who lack capacity.

Published on 7 May 2025, the protocol for cases involving adults who lack capacity was agreed on 4 April 2025 following a series of meetings of members of the judiciary from each jurisdiction between 2021 and 2025.

It sets out that direct judicial communications are to be conducted using a request form sent to the relevant office.

The protocol is supported by supplementary information in the form of a Handbook on law

relating to Adults Who Lack Capacity in England & Wales, Scotland, and Northern Ireland (full disclosure, I led on the English & Welsh section, alongside Francesca Gardner, Thomas Jones, and Kriti Upadhyay.

A protocol regulating communications between judges in Scotland, England & Wales, and Northern Ireland in children's cases can also be found on the judicial website, where updates to the accompanying handbook can also be found.

The protocol, request form and accompanying handbook can be found below:

- Judicial Protocol regulating direct judicial communications between Scotland, England & Wales and Northern Ireland, in cases of adults who lack capacity (PDF)
- Request form – Capacity Cases Protocol (Word doc)
- A handbook on adult capacity law in Scotland, England & Wales, and in Northern Ireland – April 2025 (PDF)

Cross-border deprivation of liberty

Argyll And Bute Council v RF [2025] EWCOP 12 (T3) (Theis J)

International jurisdiction of the Court of Protection – recognition and enforcement

Summary[1]

RF was habitually resident in Scotland but had been residing in England for a number of years. The issue was whether the Court of Protection under Schedule 3 MCA 2005 should recognise a Scottish guardianship order that authorised RF's deprivation of liberty for 3 years (although the local authority ultimately sought a recognition period of 1 year only). RF had been subject to a previous guardianship order which granted the local authority wide powers. A further application was made for one in 2025, Theis J noting that, in the lead up to the application, RF had no advocate, was not consulted about the application, "*was not joined as a party, nor was a safeguarder or other representative appointed to represent him in the proceedings*." She also noted the extensive powers granted to the Guardian under the 2025 order, which included the power to re decide where RF should live, to require him to live at that location, to convey him to that location and to return him there, as well as to decide and approve the appropriate level of care and supervision to be provided to RF and to authorise, where necessary and appropriate for the safety and protection of RF and others, any physical restraint including environmental restraint.

In considering whether or not the court should recognise and enforce the 2025 Guardianship application, the parties agreed that the relevant test was set out in paragraph 19 of Sch 3 Part 4 MCA 2005, which provides that a court may refuse to recognise a protective measure taken by the country in which the person is habitually resident, on a number of grounds, including sub-paragraphs (3) and (4), which provide that:

> *(3) But the court may disapply this paragraph in relation to a measure* [i.e. not recognise it] *if it thinks that*
>
> *(a) the case in which the measure was taken was not urgent,*
>
> *(b) the adult was not given an opportunity to be heard, and*
>
> *(c) that omission amounted to a breach of natural justice.*

[1] Note: Alex having been involved in the case, he has not contributed to this note.

(4) It may also disapply this paragraph in relation to a measure if it thinks that

(a) recognition of the measure would be manifestly contrary to public policy,

(b) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or

(c) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult.

The Official Solicitor argued that both of these grounds applied.

The key requirements for Article 5 compliance were summarised at paragraph 56:

(a) A process for the initial detention which ensures that there is sufficient evidence before the court that the proposed detainee is suffering from a mental disorder, and that this is of a nature and degree necessitating the actual confinement proposed (Art 5(1));

(b) Accordingly, evidence to enable the court to consider whether the proposed restrictions are proportionate to the risks to the detainee and/or others if they are not imposed (Art 5(1));

(c) An effective opportunity for the proposed detainee to be heard on the application, which may require independent representation (Art 5(1));

(d) An opportunity for speedy review of the confinement by a court, which again may require independent representation for the detainee (Art 5(4));

(e) Provision for further regular review by the court at such intervals as is necessary to provide sufficient safeguards for the detainee (Art 5(4));

(f) Those reviews should not be dependent on the goodwill of the detaining authority, and should be conducted with up to date medical evidence (Art 5(4));

(g) The availability of effective independent representation for the detainee throughout the period of confinement, as an independent check on whether their circumstances may have changed such that the restrictions in place are no longer required to the same degree of intensity, and to support an application to court if one is needed (Art 5(4)).

Theis J concluded that the 2025 Guardianship Order should not be recognised because (addressing each of the relevant parts of paragraph 19):

(a) RF was not joined as a party to the application and no independent advocate or safeguarder was appointed to represent him, despite the draconian nature of the orders being sought. RF depended on third parties (a combination of family members, social workers and clinicians) to ensure the Sheriff court had all the relevant information about his circumstances and his views. This procedure was not compatible with Article 5 (1) which required that an adult who is being deprived of his liberty to be afforded sufficient effective opportunity to be heard in the course of those proceedings. As a consequence, the process by which the 2025 Guardianship order was made was not compatible with RF's Article 5(1) rights, making it unlawful under s6(1) HRA 1998.

(b) The previous order lapsed over six months earlier, with no urgency for the present one; not giving RF an effective opportunity to be heard breached natural justice.

(c) Separately, and through the prism of the public policy exception under paragraph 19 of Schedule 3, Theis J was concerned that the Guardianship order was to last 3 years with no provision for reviews within that period. Although RF could apply to the court under s71(1) AWI 2000, or RF or someone on his behalf could raise his case with the Commission, RF's Article 5 rights would be *'theoretical and illusory'* not *'practical and effective'*. There was no mechanism in place to give practical effect to those provisions for RF bearing in mind the basis for the proceedings regarding RF's mental capacity and the lack of any effective review process. That meant that the Guardianship order did not comply with Article 5(4) ECHR. Theis J expressly noted that she reached this conclusion in the context of the maximum one year period in the MCA 2005 for the authorisation of a deprivation of liberty pursuant to Sch A1, para 29(1).

Therefore:

> *93.* […] *whilst respecting the importance of comity and acknowledging the differences in the legal framework as between Scotland and England and Wales, in circumstances where I have found that the 2025 Guardianship order was made in breach of natural justice and recognition of it would be manifestly contrary to public policy I should exercise my discretion to refuse recognition of the order."*

Comment

This decision follows that of Poole J in *Aberdeenshire Council v SF, EF and Sunderland City Council* [2024] EWCOP 10. In the Scottish section of the report, Adrian Ward discusses the implications in Scotland. In respect of applications for recognition and enforcement of Scottish orders in England & Wales, applicants would be well advised to ensure that the application complies with Article 5 ECHR in that:

(a) The subject matter of the application is properly consulted prior to the application being made.

(b) The subject matter of the application is represented on the application.

(c) The application is only granted for a maximum 12 month period.

(d) The subject matter of the application has practical and effective (as opposed to "theoretical and illusory") access to a court to challenge any deprivation of liberty imposed upon him/her as a result of the Guardianship order.

Short note: taking intermediaries seriously

In *M (A Child: Intermediaries)* [2025] EWCA Civ 440, the Court of Appeal took the opportunity to correct observations made obiter by High Court judges who appeared to be perceiving that intermediaries are being appointed too frequently. Whilst there is, as yet, no statutory provision / Practice Direction governing the appointment of intermediaries in cases before the Court of Protection, we set out the summary of the judgment as it applies by analogy. At paragraph 7, Peter Jackson LJ identified that, in deciding whether and, if so, for what purpose to approve the appointment of an intermediary:

> *(1) The court will exercise its judgement within the framework of Part 3A of the Family Procedure Rules 2010 ('the FPR') and Practice Direction 3AA. These provisions are not*

complex, and they require very little elaboration. Their relevant parts appear in the Annex below. By following them, the court will steer a path between the evils of procedural unfairness to a vulnerable person on the one hand, and waste of public resources on the other.

(2) The test for the appointment of an intermediary for any aspect of proceedings is that it is necessary to achieve a fair hearing. Decisions are person-specific and task-specific, and the introduction of other tests upsets the balance struck by the FPR and may draw attention away from the circumstances of the individual case.

(3) Efficient case management will assist sound decision-making in this area. There must be early identification of vulnerability where it exists. Intermediaries are not experts, but applications for intermediary support should be approached with similar procedural discipline. Different considerations may apply to different elements of the proceedings, and the court should normally require an application notice and/or a draft order that specifies the exact extent of the requested assistance.

(4) Correctly understood, the court's powers are wide enough to permit it to authorise intermediary assistance for legal meetings outside the court building. However, support that is necessary in the courtroom may be unnecessary in a less pressured setting. Accordingly, the court should give separate consideration to any application of that kind.

(5) The Family Court is accustomed to using checklists when making procedural and substantive decisions. The mandatory checklist in FPR rule 3A.7 is an essential reference point to ensure that the factors relevant both to the individual and to the proceedings are taken into account. The weight to be given to them is a matter for the court, making a broad and practical assessment.

(6) An application for an intermediary must have an evidential basis. This will commonly take the form of a cognitive report and, if authorised, an intermediary assessment. Other evidence may come from the social worker or the Children's Guardian. The court can also take account of submissions on behalf of the vulnerable person, and from the other parties, as they may have their own perspectives on the overall fairness of the proceedings. This reflects the collaborative nature of the task of identifying and making adjustments for vulnerability. Whatever the evidence and submissions, it is for the court, and not others, to decide what is necessary to achieve a fair hearing in the individual case.

(7) When considering whether an intermediary is necessary, the court will consider other available participation directions. In some cases they will be effective to secure fairness, so that an intermediary is unnecessary, or only necessary for a particular occasion, while in other cases they will not. The court is entitled to expect specialist family lawyers to have a good level of understanding of the needs of vulnerable individuals in proceedings and an ability to adapt their communication style. It will consider what can reasonably be expected of the advocates, and in particular of the vulnerable party's

advocate in the individual case, bearing in mind that professional continuity may not be guaranteed. Intermediaries should clearly not be appointed on a 'just in case' basis, or because it might make life easier for the court, but equally advocates should not be required to stray beyond their reasonable professional competence to make up for the absence of an intermediary where one is necessary.

(8) The rules provide that the reasons for a decision to approve or refuse participation directions for a vulnerable person must be recorded in the order. That can be done very briefly, and it is a further useful discipline.

(9) The approach described should ensure that intermediaries are reliably appointed whenever they are necessary, but not otherwise.

The broader observations made by Peter Jackson LJ as to "vulnerable persons" in family proceedings at paragraphs 9 to 17 apply equally by analogy to proceedings before the Court of Protection, although we are very mindful of how charged the term "vulnerable" is.

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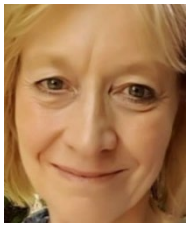

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Conferences

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

Alex also does 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.

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 June. 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.

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