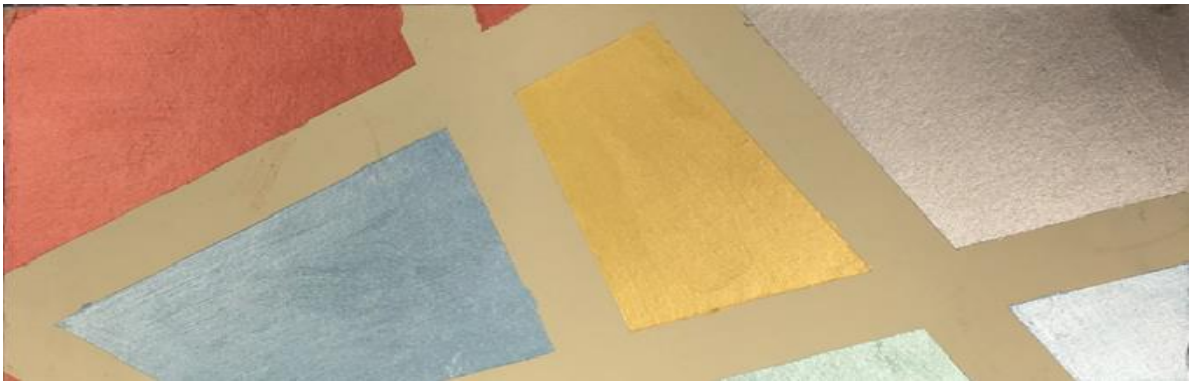
Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

March 2019 | Issue 92



Welcome to the March 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; capacity and social media; the limits of the inherent jurisdiction (again); and best interests at the end of life;

(2) In the Practice and Procedure Report: an important decision on when it is legitimate summarily to dispose of s.21A applications; litigation capacity in the Court of Protection, Brexit contingency planning; and the launch of the Court of Protection Bar Association;

(3) In the Wider Context Report: CQC guidance on sexuality, litigation friends in the immigration tribunal; Strasbourg on the obligations towards voluntary psychiatric patients; and the Special Rapporteur on the Rights of Persons with Disabilities on ending disability-based deprivation of liberty.

We do not have a Property and Affairs report this month as there are insufficient developments to warrant a standalone report (but see the Practice and Procedure report for an update on the OPG's mediation pilot). Nor do we have a Scotland report, in part because we are disappointingly unable so far to report further progress on reform of the Adults with Incapacity (Scotland) Act 2000.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. You can also find here an updated version of our capacity assessment guide, with the best interests guide also due a refresh in the near future.

Editors
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

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Brexit contingency planning in the Court of Protection

At the time of writing, we are days away from "exit day" which is currently set for 29 March 2019.

In preparation, and in the event of "no deal Brexit", a draft statutory instrument in the form of the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 has been prepared to make amendments to provisions in the FPR and COPR which relates to powers, processes and ordered under EU instruments or international agreement which will no longer be applicable after exit day.

The vast majority of the amendments are to the FPR in which EU instruments (such as Brussels IIa) feature more heavily than in the COPR. The amendments to the COPR 2017 are contained in Part 3 of Regulations and are rather more limited. Essentially, the provisions in the COPR relating to service of documents and taking of evidence under the Service Regulation (Council Regulation (EC) No. 1393/2007) and Taking of Evidence Regulation (Council Regulation (EC) No. 1206/2001) respectively will no longer apply. Certain transitional and saving provisions are made for documents were the relevant process was commended but not completed by exit day.

Beyond exit day, and whatever happens in relation to the EU, the general provisions in the COPR 2017 for service of a document outside of the jurisdiction (COPR 2017 rule 6.14) and taking evidence outside of the jurisdiction (COPR 2017 rule 14.23) will continue to apply. Furthermore, the practice and procedure under other international instruments, particularly the Hague Convention on the International Protection of Adults 2000, as incorporated into domestic law in Schedule 3 of the Mental Capacity Act 2005, will remain unaffected.

The need for careful scrutiny – summary disposal of s.21A applications

CB v Medway Council & Anor [2019 EWCOP 5 (Hayden J)

Article 5 – DoLS authorisations

Summary

This unusual appeal against dismissal of a s.21A application clarifies the (very limited) circumstances under which it could ever been appropriate to dismiss such applications on a summary basis.

The underlying case concerned a 91 year old woman CB who did not like living in a care home and wished to return to her own home with a package of care. This was an arrangement that had been tried previously, including by way of 24-hour live-in care, but which had broken down. A s.49 report was prepared during the proceedings which concluded that CB lacked capacity by reason of dementia to make the relevant decisions about where she lived and what care she received. The consultant psychiatrist also opined, not having been asked nor having been provided with all the relevant evidence, that CB required 24 hour care which was likely to be best provided in a care home.

HHJ Backhouse had previously made typical directions requiring the local authority to file evidence about the likely package of care at home that could be put in place - CB having assets in the region of £2.5million and thus being able to afford substantially more care than the standard 4 daily visits usually offered by a statutory body. At a round table meeting before the hearing in respect of which the appeal was brought, the local authority and CB's representatives agreed that further investigations about the potential home care package would be made and a proper best interests analysis carried out by the local authority. An application was made to vacate the hearing so that these agreed steps could be taken. The court refused to adjourn the hearing, the judge wanting to hear from CB's nephew (who had not been party to the agreed plan) and raising a query about some of the further evidence that was to be obtained.

At the hearing, HHJ Backhouse heard directly from CM, who described the serious problems that had arisen the last time care at home had been attempted. Despite not having indicated to the parties that the judge was considering summary disposal, during an ex tempore judgment, HHJ Backhouse decided that the application would be dismissed, saying:

> *The Official Solicitor is saying that as part of a belt and braces exercise, the court ought to see if it is possible for CB to go home as she would like to and in that sense, it would be in her best interests. It might be a less restrictive environment, although she would still have to be subject to restrictions on her liberty to prevent her wandering. 19. However, this is not the usual case which the court often sees where a return home with a live-in care package has not previously been tried and needs to be explored. In this case, such a privately funded package has been tried. If she returns home, there is a real risk the she will again not be properly cared for and will become aggressive or agitated, which carers will find very difficult to manage. ….22. All the evidence is that the care home is appropriate to meet her needs, and, indeed, CM says it is a very caring*

> *environment for her. Therefore, while I hear what the official solicitor says , I do not think that it is proportionate to make this Local Authority spend the time and cost of going through a balancing exercise which will tell me what I already know in terms of the difficulties, risks and cost of a package of care at home. In my judgment, the evidence is already there to show that the risks of returning home outweigh the benefits to CB of such a return. It is in CB's best interests to remain where she is, properly looked after and safe.*

The Official Solicitor appealed on behalf of CB. The local authority took a neutral stance. Hayden J allowed the appeal, deciding that:

1. The judge had been right not to vacate the hearing. CB had been in the care home for some 14 months.

> *I cannot see how the timescales taken to address these issues can possibly be reconciled with CB's own timescales. It is axiomatic that at 91 years of age CB does not have time on her side. Moreover, I feel constrained to say, that which I have already stated in several cases, delay is invariably inimical to P's welfare. Timetabling and case management must focus on a sensible and proportionate evaluation of P's interests and not become driven by the exigencies of the litigation. Whilst the Mental Capacity Act does not have incorporated in to it the imperative to avoid delay in the way that the Children Act 1989 does, the principle is nonetheless embraced by the Court of Protection Rules, which require the application of the "overriding objective". In any event the avoidance of delay is a facet of CB's Article 6 and Article 8 rights."*

2. In some cases, the possibility of giving summary judgment was a useful power that could avoid harm to P. However, notwithstanding these considerations, in CB's case HHJ Backhouse had gone beyond what was permissible. While it was theoretically possible that summary disposal might be appropriate in a case engaging Article 5, it was difficult to think of a factual scenario in which that would apply. In CB's case, "*what began as vigorous and robust case management tipped over…into summary disposal that* [was] *essentially unfair*." In particular, there had been no oral evidence and no opportunity for the Official Solicitor to cross-examine the author of the s.49 report or the attorney. "*Scepticism and 'doubt'* [about the prospects of success of a home care package] *is not sufficient to discount a proper enquiry in to such a fundamental issue of individual liberty*." Further, "*curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage any circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases*."

Comment

As the then-President, Sir Nicholas Wall, had observed in 2011 upon being invited summarily to dispose of a s.21 application that appeared on its face to be hopeless:

> *the Act has laid down stringent conditions for the deprivation of liberty,*

> *and that the court cannot simply act as a rubber stamp, however beneficial the arrangements may appear to be for the individual concerned. In the instant case, A wishes to challenge the authorisation, which deprives him of his liberty. Parliament has decreed that he should be entitled to do so, and has created safeguards to protect those deprived of their liberty against arbitrary action.*
>
> *A v A Local Authority* [2011] EWCOP 727 at para 15

For those who had forgotten this key message, this new case is a very helpful illustration of the seriousness with which Article 5 rights must be considered by the Court of Protection. It is common for P to seek less restrictive care arrangements or a return home even though the professional advice does not support P's wishes. Even where there have been failed attempts in the past, it does not follow automatically that further attempts should not be made, and it is not appropriate for parties or the court to deal with matters on a summary basis without full and proper investigation and consideration of the options.

All this should, however, be carried out in a timescale that is proportionate – where P objectd to the arrangements for his or her care or treatment, it cannot be right that 14 months later the court was still not in a position to determine matters. The reasons for the delay in this case are not apparent from the report, but was no doubt comprised of one or more of the following familiar features:

1. the initial DOLS authorisation being granted for a short period of say one or two months to allow alternative care planning to take place and the issue to be reconsidered;
2. when that does not result in any change to P's circumstances, a delay in applying to the court (particularly if the RPR is a person who supports the deprivation of liberty;
3. 8 weeks or more elapsing from the date of application to the obtaining of a s.49 report;
4. long delays in getting adequate alternative care plans prepared by the local authority, particularly where P is self-funding and so options other than a standard domiciliary care package can and should be investigated.

Short note: s.49 reports

We routinely get inquiries (often of the distinctively aggrieved variety) from public bodies, especially NHS trusts, asking whether they have to comply with directions for s.49 reports. The short answer is:

1. Yes, they do: see the decision in *RS v LCC & Ors* [2015] EWCOP 56, in which DJ Bellamy rejected on the facts of that case a number of the conventional reasons advanced not to comply with a request; but
2. Those seeking s.49 reports, and the court, should comply with the s.49 reports Practice Direction (14E), which is intended to make sure that appropriate requests are appropriately directed; and
3. Systemic "over-use" of s.49 in relation to any given NHS Trust is exactly the sort of thing which should be raised with the regional hub lead judge.

The inquiries that we receive really reflect the spreading thin of resource around the system now it is very much more difficult to instruct an independent expert, so the cost is being moved from the Legal Aid Agency to NHS bodies. In this context, we found it difficult not to raise our eyebrows when we read in the impact assessment accompanying the LPS that the expectation is that GPs will provide medical assessments for purposes of LPS authorisations without charge: see here at p11, para 8.6.

A delicate line – litigation friends and P asserting litigation capacity

DM v Dorset County Council [2019 EWCOP 4 (Roberts J)

Mental capacity – litigation

Summary[1]

This is a (relatively) rare decision about capacity to conduct proceedings. It concerns an application for permission to appeal a determination of HHJ Dancey that a man, DM, lacked capacity to conduct proceedings as to whether a property and affairs deputy should be appointed for him. Having heard evidence from a special visitor who had reported pursuant to s.49 MCA 2005, HHJ Dancey had declared himself satisfied that DM

> *2.* […] *lacked capacity to litigate on his own account in the context of these ongoing proceedings because he was suffering from an impairment of, or disturbance in, the functioning of his mind or brain arising out of a persistent delusional disorder, as diagnosed by Dr Barker. The judge's principal concern, as explained in his judgment, was DM's inability to use and weigh information in the context of decision-making. The judge specifically identified what he perceived as an incapacity to engage in the overall decision-making process inherent in the litigation in terms of DM's lack of ability to see the various aspects of the arguments and to relate the one to the other in a rational and considered manner.*

The rather complex procedural history of the case reveals one important feature noted by Counsel then acting (via his litigation friend) for DM at the hearing before HHJ Dancey:

> *The appointment of a litigation friend where P asserts that he has capacity to conduct proceedings and no final determination of litigation capacity has been made is unusual, and the role of that litigation friend at a hearing which will determine that sole issue is therefore complex.*

At the hearing at which the court determined that DM lacked capacity to conduct the proceedings, his litigation friend had made clear that he:

> [Has] *come to the conclusion that he cannot advance that positive case [i.e. that DM has capacity to conduct these proceedings without the imposition of a litigation friend]; does not consider that he can or should advance a positive case contrary to the one which [DM] wishes: if his appointment is upheld, he will have an ongoing duty to present [DM's] case fairly and it will as a practical*

[1] Simon having acted for Dorset, he has not contributed to this report.

> *matter be harder to secure any engagement with [DM] if he feels those acting for him have already acted against him over this issue."*

Not least as DM then sought to bring his own appeal, acting in person, against the determination that he lacked litigation capacity, his litigation friend then felt sufficiently compromised that he did not wish to continue in the role. Although he had not formally been removed from the court record, the Official Solicitor was then invited to take over the role. The Official Solicitor made a similar evaluation of the position to the former litigation friend, and confirmed that no positive case could be advanced on DM's behalf in support of DM's application.

On the facts of the case, Roberts J had little hesitation in finding that there was no prospect of overturning the decision of HHJ Dancey (and indeed certifying the application as entirely without merit). Although DM was a highly intelligent and articulate individual, who had for many years had a successful practice as a solicitor in a London law form, it was clear (for reasons that we do not reproduce here as we see no reason to share more details of his life than necessary) that he suffered from persistent delusional disorder rendering him incapable of using and weighing the information necessary to conducting proceedings.

Comment

Roberts J did not directly comment upon the approach that was taken by DM's litigation friend and then the Official Solicitor, but appears implicitly to have endorsed it. We suggest that this must be the only appropriate approach that can be adopted where the individual concerned wishes to maintain that they have capacity to conduct proceedings, but the litigation friend genuinely believes that they do not.[2]

On a nerdy procedural point, it is not obvious on the face of the judgment why Roberts J felt that she was governed by the CPR in terms of the test to apply for permission to appeal or the making of anonymity orders, as both of these are matters covered within the Court of Protection Rules 2017 (in the case of the former, COPR r.20.8).

OPG Mediation Pilot

The OPG issued an update on their mediation pilot scheme which can be seen here.

The pilot is for use in cases where there is an LPA or an EPA in place. OPG investigators initiate the mediation in disputes which have not reached the court. The OPG is bearing the cost of the mediation (including the cost of the independent mediator).

The rationale for the pilot is to investigate whether mediation can:

1. ensure issues are addressed in the best interests of the vulnerable person;
2. be potentially cheaper than going to the court of protection;
3. help ensure the current attorney or deputy can retain their responsibilities

[2] See, for further discussion of what litigation friends can and should do, the article by Alex, Neil and Peter Bartlett on Litigation Friends or Foes? Representation of 'P' before the Court of Protection.

4. offer more flexibility to OPG investigators or
5. prevent further concerns coming to OPG

The aim is to test if an OPG mediation service can reduce any risks to donors resulting from poor family dynamics

So far 20 cases have been sent for mediation. The pilot is to be extended until the summer of 2019. If the results of the evaluation suggest that the OPG could offer a meaningful mediation service, they would look to procure a long-term service.

Updated precedent orders

Ahead of the publication of the third edition of the LAG Court of Protection Handbook, and with the assistance (very gratefully received by Alex!) of Hannah Nicholas of Hill Dickinson, the precedent orders on the Court of Protection Handbook website have had a spring-clean, and are now entirely up-to-date as regards references to the Court of Protection Rules 2017. In some cases, notably the transparency order, they are more up-to-date than the model order on the Judiciary website, which still refers (wrongly) to the transparency pilot.

Short note: missing persons guardianship

We had understood that the Court of Protection would be charged with responsibility for appointing guardians for missing persons under the Guardianship (Missing Persons) Act 2017. In fact, Lord Chancellor, following the required statutory consultation with the Lord Chief Justice, has confirmed that applications are to be made to the High Court – for the details as given in Parliament on 12 February 2019, see here.

Understanding Courts

On 25 January 2019 JUSTICE, the law reform and human rights NGO launched its latest report, *Understanding Courts*, produced by a working party chaired by Sir Nicholas Blake.

The problem

In circumstances where many lay users of courts and tribunals find themselves unrepresented as a result of cuts to legal aid, there is mounting evidence of a "*disconnection between professionals and lay users in court, with the at-times chaotic nature of proceedings creating a culture that marginalises the public using our courts*." Put more strongly, "*there are repeated examples of lay people being confused, distressed and overwhelmed by how our justice system operates*."

The Report makes a compelling argument that this problem undermines the rule of law:

> [a]*ny… legal system may only claim to be effective, and thereby legitimate, if it is designed in a way which allows for the participation of lay people, whether they are victim, witness, juror, defendant or litigant, or someone attending court to observe. A lay person must be able to understand the court processes and the language and questioning of the legal professionals working within it.*

As such, the Report examines ways in which lay users of the courts can be relocated to the centre of the process and therefore feel, even if they disagree with the substantive outcome, that the system has treated them fairly and allowed them to have their say.

Vulnerability of users

In order to identify ways in which court users could be better supported, the Report first considers users' vulnerabilities. Importantly, the Report identifies as a starting point that "*everyone is inherently vulnerable when faced with a legal problem, whether represented or not*." The Report goes to identify more specific – but not uncommon – vulnerabilities such as unrepresented people left to navigate the legal system alone when their opponent is a lawyer. Further difficulties arise for those with a disabilities. While, the disabled already benefit from protection under the Equality Act 2010, in theory at least, it is clear that much more could be done to support this group.

The Report also stresses that court users are not limited to the parties themselves. Rather, witnesses and observers also need to be catered for. In the authors' experience this is especially relevant in Court of Protection matters where often it is not only P that has additional vulnerabilities but also P's family and friends. Clearly, for justice to be served it is vital that careful consideration is given to facilitating the participation and understanding of all of these court users, not just P.

The recommendations

The Report acknowledges that significant attempts have been made in recent years to demystify the court process. Nonetheless, these efforts are said to be piecemeal and targeted at certain categories of lay users. Instead, the Report argues that "*a change in approach is required by HMCTS, lawmakers and court professionals to place all lay users at the heart of legal process, so that every effort is taken to enable lay people – according to their role – to understand and take part in legal process*."

In an effort to achieve this the Report makes 41 recommendations structured around three broad themes:

1. Understanding the process at courts and tribunals: before, during and after a hearing and the way that hearings are organised, managed and conducted by professional court users;
2. Communicating effectively with lay users, in the language court professionals adopt, the manner of evidence taking, and by adjusting legal professional culture through training and self-regulation; and
3. Providing consistent support and making reasonable adjustments to enable lay users to give their best evidence and make their arguments.

To achieve this the Report advises: informing lay people about what will happen at their hearing through advance information provided in different modes; court professionals adapting their approach to recognise that lay people should be their main focus; case management that checks for and assists understanding; the use of plain English instead of legal jargon and confusing modes of address; a change in culture that is more inclusive, appropriate adaptations to facilitate participation for children and those with disabilities; and, support for all users who need it.

As the report acknowledges, some of these much needed changes can come about by way of conscientious effort by legal professionals and the judiciary. A good example of this is

recommendation 16 (which many practitioners would no doubt argue represents best practice in any event):

> *Advocates in all jurisdictions should make sufficient time for introductions to significant witnesses and lay parties, as this is an important way of facilitating participation. Similarly, judges should introduce themselves to significant witnesses, particularly where they are or may be vulnerable, in order to get a sense of the vulnerabilities that may exist and how they can best to accommodated*

In contrast, other recommendations are more ambitious since they require direction and funding from Government. For example, recommendation 2 would prove particularly helpful but, one fears, is unlikely to be implemented for the foreseeable future:

> *HMCTS should provide one central source, promoted to appear as the top result when a user types key words, such as 'going to court', into a search engine. The source may be hosted on gov.uk webpages also built according to Government Digital Service principles, which aim to provide user-centric platforms. However, it should have a different look and feel to emphasise constitutional independence from Government departments against which people are bringing or defending claims.*

Conclusion

While the Report undoubtedly constitutes valuable research and real efforts should be made, by practitioners and Government, to implement its recommendations, there is no escaping the fact that cuts to legal aid are responsible for a great number of the difficulties faced by vulnerable lay people trying to navigate our court system. While improved provision of information and court support will mitigate some of these problems, they are not a panacea. The reality is that access to justice, particularly for those with additional vulnerabilities, requires legal representation.

Court of Protection Bar Association

The Court of Protection Bar Association was formally founded at a meeting on 4 March 2019, with Vikram Sachdeva QC as the first chair, and David Rees QC as vice-chair.

Membership of the Association, which is by subscription, is open to any member of the Bar of England and Wales interested in Court of Protection Law (with the possibility for honorary membership to be offered by the Committee)

Its objects are:

1. to promote the interests of those who through lack of mental capacity or other vulnerability are unable to take decisions for themselves and to facilitate and promote their ability to participate as fully as possible in any act done for them and / or any decision affecting them.
2. to provide a forum for discussion of common interests among its members;
3. to promote the interests of the Court of Protection Bar;
4. to ascertain and represent the views of its members on matters relating to and affecting their professional interests;
5. to protect and promote the interests of justice, in particular with reference to the Court of Protection;
6. to further the study, understanding and development of the practice and procedure of Court of Protection and of the Mental Capacity Act 2005;
7. to promote and enhance the legal education and training of those practising or intending to practice at the Bar in Court of Protection Work.

For further details, and to join, please contact Aidan Briggs, CPBA Membership Secretary at: aidan.briggs@newsquarechambers.co.uk.

Editors and Contributors

Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He 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 Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole QC: 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. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view 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 2019). To view full CV click here.

Editors and Contributors

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.

Katherine Barnes: Katherine.barnes@39essex.com

Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view 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: adw@tcyoung.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; 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

Conferences at which editors/contributors are speaking

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, 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 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.

Michael Kaplan
Senior Clerk
michael.kaplan@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
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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