



Welcome to the February 2017 Mental Capacity Report. You will note a new look, and also a new title, which reflects the fact that over the years we have evolved to carry material that goes considerably wider and deeper than in a conventional Newsletter. We have also retitled the individual sections of the Report (which you can continue to get in compendium and screen-friendly forms).

Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: positive obligations under Article 5, deprivation of liberty in the intensive care setting, and best interests in the context of childbirth and anorexia;
- (2) In the Property and Affairs Report: common mistakes in making LPAs;
- (3) In the Practice and Procedure Report: costs in medical treatment; an important case on time-limits in HRA cases, frustrating the Court of Protection and the end of era marked for the Court of Protection Practice;
- (4) In the Wider Context Report: a new MCA/DOLS resource, capacity and the MHT, restraint in the mental health setting, mental health patients in general hospitals and truth and lying in dementia;
- (5) In the Scotland Report: solicitors claiming an interest and the *nobile officium* comes to the rescue.

### Editors

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Anna Bicarregui  
Simon Edwards (P&A)

### Scottish Contributors

Adrian Ward  
Jill Stavert

You can find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#). 'One-pagers' of cases of most relevance to social work professionals will also appear on the SCIE website.

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him, his family, and [The Autism Trust](#) to permission to use his artwork.

## Contents

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Office of the Public Guardian’s top tips for LPAs..... **Error! Bookmark not defined.**  
 Patricia Wass ..... 2

### Office of the Public Guardian’s top tips for LPAs

On 6 January 2017, the OPG revealed that of the LPA forms the office receives from solicitors 15% have errors. In the OPG’s [blog](#), the OPG sets out ten of the most common mistakes. Some of these are elementary (for instance forgetting their client’s name halfway through), and some more subtle. Perhaps the most interesting are the examples of the words that the OPG will most often to apply to have severed by the Court of Protection (or will refuse to register) are:

- instructions telling attorneys to make gifts which do not comply with Section 12 of the Mental Capacity Act 2005. Only the CoP can authorise these;
- instructions to assist with suicide or criminal activity;
- instructions in a property and finance LPA that relate to health and welfare and vice versa (the OPG notes that they appreciate that sometimes there is an overlap);
- instructions to follow the decision of someone else who is not an attorney.

The list ends with a helpful suggestion, rather than an example of a mistake, and that is to use the dedicated lawyer to lawyer enquiries email address. The email address is

here: [legal\\_enquiries@publicguardian.gsi.gov.uk](mailto:legal_enquiries@publicguardian.gsi.gov.uk).

### Patricia Wass

We congratulate Patricia Wass TEP, of Foot Anstey LLP, on her appointment as the worldwide chair of STEP.

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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 Trust Research Fellow at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). He is on secondment to the Law Commission working on the replacement for DOLS. To view full CV click [here](#).



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

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. 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 2009), 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](mailto: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](mailto:annabel.lee@39essex.com)

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click [here](#).



**Anna Bicarregui:** [anna.bicarregui@39essex.com](mailto:anna.bicarregui@39essex.com)

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click [here](#).

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## Editors and Contributors



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

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



**Adrian Ward:** [adw@tcyoung.co.uk](mailto:adw@tcyoung.co.uk)

Adrian is a Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*" he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. To view full CV click [here](#).



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

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy 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, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. 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

#### Royal Faculty of Procurators in Glasgow

Adrian will be speaking on adults with incapacity at the RFPG Spring Private Law Conference on 1 March 2017. For more details, and to book, see [here](#).

#### Seminar on Childbirth and the Court of Protection

39 Essex Chambers is hosting a seminar in conjunction with the charity Birthrights about caesarean-section cases in the Court of Protection. The seminar aims to take a critical look at these cases, with a distinguished multi-disciplinary panel. The seminar is at 5pm-7pm on 8 March 2017, and places can be reserved by emailing [beth.williams@39essex.com](mailto:beth.williams@39essex.com).

#### Hugh James Brain Injury conference

Alex will be speaking at this conference aimed at healthcare professionals working with individuals with brain injuries and their families on 14 March. For more details, and to book, see [here](#).

#### Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. 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 Mind 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 Newsletter will be out in early 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 Newsletter in the future please contact: [marketing@39essex.com](mailto:marketing@39essex.com)

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