MENTAL CAPACITY REPORT: SCOTLAND

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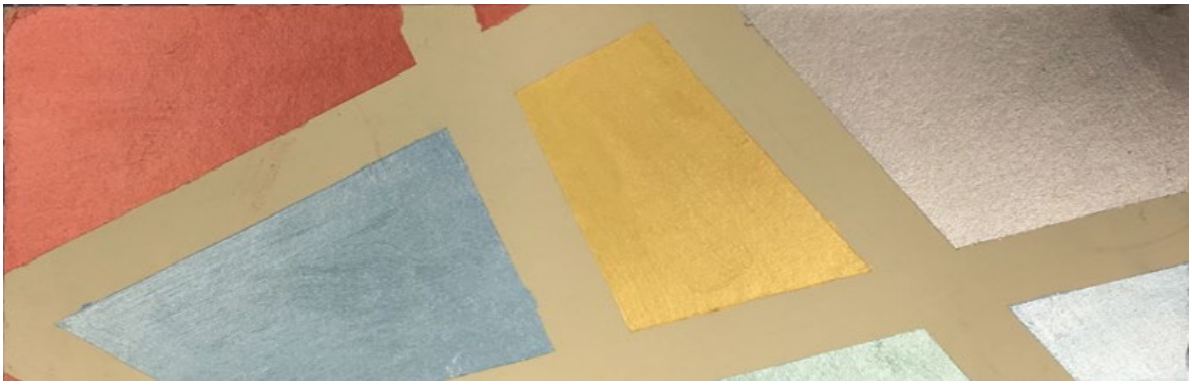

Welcome to the February 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: religion and the burdens of treatment; vaccine case law update; and making the decisions the person would have made;

(2) In the Property and Affairs Report: the scope of the powers under an LPA, and updated safeguarding guidance from the OPG;

(3) In the Practice and Procedure Report: vulnerable parties and witnesses, and covert recordings;

(4) In the Wider Context Report: blood transfusions for teenage Jehovah's Witnesses, s.117 ordinary residence and a new capacity guidance website.

(5) In the Scotland Report: DNACPRs and the relationship between medical decision-making and guardians' decision, cross-border deprivations of liberty of children and guardians' remuneration.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides.

Editors
Victoria Butler-Cole QC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sullivan
Stephanie David
Nyasha Weinberg
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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Scotland moving further away from human rights compliance?

In the December 2021 Scotland newsletter, we reported the outcome of the first of two actions brought by PKM's Guardians ("the Guardians") against Greater Glasgow Health Board ("the Board"). At the end of that article, we mentioned the possibility of early consideration by the Inner House of a second action between the same parties. Events moved quickly. An interim order in the second action was appealed direct to the Inner House and the appeal was decided there on 16th December 2021.

In both actions, the Guardians sought orders under section 70 of the Adults with Incapacity (Scotland) Act 2000. In the first action, the sheriff at first instance refused the two orders sought in that action. Upon appeal to the Sheriff Appeal Court, the terms of an amended order were agreed and the order granted; agreed, that is to say, between the Guardians and the Board, neither the adult, PKM, nor the Safeguarder appointed by the court having participated in the proceedings before SAC. The order required PKM "*to comply with the joint guardians' decision to consent to medical treatment by behaving in a manner that allows kidney dialysis treatment to occur and to attend whenever is required for that purpose*".

In the second action the Guardians seek an order requiring the Board to revoke and remove from PKM's health records (to include computer records) any Do Not Attempt Cardio-Pulmonary Resuscitation (DNACPR) "directions". At first instance, the sheriff initially refused to grant an interim order in those terms, then at a subsequent hearing granted the interim order. The Board appealed that decision to SAC, which in turn acceded to a request to remit the matter to the Court of Session. The Inner House refused the appeal and confirmed the grant of the interim order. PKM again did not participate in the appeal proceedings. The Safeguarder is narrated as having been present, but no contribution by the Safeguarder to the proceedings is narrated.

The second action remains live. It is understood that Mental Welfare Commission has entered, or is about to enter, the process.

A central feature of both actions is that PKM refused, and continued to refuse, to consent to, or cooperate with the administration of, dialysis treatment; and he had stated that should he suffer cardiac arrest he would not wish to be resuscitated. The treating doctors assessed him as having capably made both decisions, and had taken the view that in consequence they were bound to respect them. It appears that in none of the proceedings to date in either action has there been any assertion by any party that the relevant decisions of PKM were other than capably made. Nevertheless, in the first action his decision was overruled, and as matters stand in the second action that decision by PKM has also been overruled *ad interim*.

The decision of the Inner House in the second action took the form of a Statement of Reasons dated 16th December 2021 ("the Statement"). Unusually, the Statement has not been published on the scotcourts website. After a delay of more than a month, I was advised that it was not going to be so published as no orders had been made regarding the anonymity of the parties and of the adult. It was considered that the Statement was better than risking identification of the adult. I was permitted to use the Statement subject to considering sufficient protection of the identity of the parties and of the adult. In fact, the Statement contains no more identification of them than did the published decision of SAC in the first action. The Statement may accordingly be accessed here.

This decision by the Second Division of the Inner House is not easy to reconcile with the decision of the First Division in *MH v Mental Health Tribunal for Scotland* [2019] CSIH 14; 2019 SLT 411, on which we commented in the May 2019 Report, in which the Inner House stressed the importance of the principle of open justice, but having initially refused to anonymise, the First Division then agreed to do so upon submission of a medical report which justified anonymising the appellant's name in those proceedings (which we reported in the June 2019 Report). Nowhere is it narrated that any evidence was produced in the second action warranting disapplication of the principle of open justice.

The Statement raises fundamental questions about the rights and status of people with mental and intellectual disabilities. Supplementarily to those fundamental issues, it raises issues of importance arising upon the facts and decision-making processes in both actions. Views have already been expressed that each of those fundamental issues is of such importance, in conjunction with those supplementary issues, that it would be in the public interest if each and all of them were to be referred to, and determined by, the Supreme Court; with resort thereafter, if need be, to the European Court of Human Rights.

However, those fundamental questions were not introduced to any substantial extent by the parties appearing before the Inner House. In a "postscript" to the Statement (paragraph [18]) the Inner House noted that parties had proceeded on the basis that "transaction" in section 67 of the 2000 Act included decisions about healthcare. The Inner House alluded to the possibility of a different interpretation. It is clear from the remainder of the Statement that the litigation, and in particular the proceedings before the Inner House, has been conducted as a bilateral dispute between doctors and guardians, with the adult himself a passive non-participant, rather than as primarily the prime party whose rights to self-determination, capably exercised according to the only available evidence, should or should not be respected, whether by doctors or by guardians. The Inner House determined the appeal on the basis of the submissions by the parties, and did not address the more fundamental issues raised by the litigation. The postscript perhaps indicates unease that the proceedings were so limited. The more fundamental issues cannot escape comment, but first it is appropriate to consider some of the implications of the Statement itself, which – so far as they go – are valuable.

There has been a history of unresolved tensions between decisions by guardians, and also attorneys, on the one hand, and medical practice generally, including in particular practice under Part 5 of the 2000 Act and practice under the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The 2003 Act in particular does not take adequate account of the role of guardians and attorneys, and the status of their decisions. Remedying that will be a matter for the Scott Review. Beyond that, however, ever since the passing of the 2000 Act there have been failures to recognise that Part 5 is one element of the integrated scheme of the Act as a whole, and cannot be read in isolation as if it were the starting-point for all medical decision-making. This difficulty can be traced back to the Bill for the 2000 Act having been allocated to the Justice Committee, and having been dealt with

by the Justice Department of Scottish Government, but with input from the Health Department on Part 5 only. Lack of coordination can be seen from the outset in the preparation of codes of practice and other guidance, dealt with by the Justice Department with the exception of Part 5, which was dealt with by the Health Department. See for example the section "Error in Code of Practice" at paragraph 14-16 of "Adult Incapacity" (Ward, W Green, 2003). The Statement helpfully redresses the balance by in effect emphasising the status of guardians and their decisions, and by reasonable extension (though not mentioned) of attorneys. It is narrated that the Board's appeal proceeded solely by reference to provisions of Part 5 of the Act: the Board's "*argument was supported by reference to sections 47 – 50 of the Act, both of which appear in Part 5 of the Act, rather than Part 6 where the guardianship provisions appear*". This is an appropriate correction to much that occurs in practice, and should be respected by all concerned.

Secondly and importantly, the Inner House pointed towards the need for a better understanding of the function of a DNACPR form, and the position generally of medical practitioners as such in paragraph [13]: "*… a guardian cannot force a doctor to resuscitate someone or provide treatment which he does not think it appropriate to give. In the present case, whether to attempt resuscitation will be a clinical decision to be made at the time that such an assessment is called for*."

The Inner House rejected an argument that "*an interpretation which gave a degree of priority to the guardianship order created risk to an adult who had, or had recovered, de facto capacity*". The court summarised the potential remedies available to an adult or a person interested in the adult's welfare, and referred with approval to the decision of SAC in *K v Argyll and Bute Council*, 2021 SLT (Sh Ct) 293 as regards decisions whether to grant orders under section 70, quoting from that decision the passage that includes: "*The adult has the opportunity to participate in this process (section 70(3))*". (paragraph 14) However, the Statement does not narrate how the adult was given that opportunity in reality, rather than in theory, in the present case.

The Inner House gave short shrift to an argument that the sheriff had erred in granting interim orders on 1st December 2021, having refused to do so on 24th November 2021. It is narrated that on the second occasion the sheriff had before him additional evidence in the form of affidavits from the guardians and oral evidence from a care home manager. The court commented at paragraph 17 that:

> *The powers of the sheriff under section 3 are properly drawn in the widest terms, to enable the sheriff to do what is most appropriate in the circumstances of the case. It cannot be said that the respondents did not have a prima facie case, or that the sheriff was not entitled to conclude that the balance of convenience favoured the making of an interim order*.

One could say that this endorsement of how the sheriff proceeded, and impliedly of the guardians' actions in returning to the sheriff with relevant evidence not previously before the sheriff, could be seen as important practice guidance where – as often in this jurisdiction – an interim order may frequently be granted in an urgent and rapidly developing situation, with more evidence becoming available. One might venture to say that not only is it proper in such circumstances to go back to the sheriff a second time; it might sometimes be the duty of the applicant's agent to do so. Moreover, just as the sheriff considered the matter *de novo* on the basis of what was before him a week after the initial refusal, likewise he will require to do so for final disposal, which is why this litigation remains of considerable interest and significance.

An oddity of the Statement is that instead of quoting the terms of section 1 of the Act it quotes a version which for some reason lists those

provisions as "Table 1" and inserts headings above each of sections 1(2) – (5). Those headings represent a rather narrow view of the relevant provisions, as well as not appearing in the Act. They are unlikely to have influenced the limited scope of the decision reflected in the Statement, though such limitations would require to be discarded when, as is hoped, the litigation proceeds to address those issues prior to final determination.

In an action that is still *sub judice*, the issues that might be identified include the following (1 – 6 being of wide-ranging and fundamental importance; 7 – 9 being more focused upon the particular facts of both actions):

1. *Did the decisions in each action properly take account of the exceptional status of all interventions under the 2000 Act; of the difference between incapacity and incapacitation; and of the position in Scots law of physical interventions, and in particular medical interventions?*

   Tellingly, the court, in the last paragraph of the Statement, recorded that it had not been addressed on the question that was central in the SAC appeal of whether the provisions of section 67 of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") apply to decisions in matters of personal health and welfare, as opposed to matters of entering transactions in terms of the words of that section. It therefore appears that this and subsequent questions were not addressed by the Inner House. Interventions under the 2000 Act are predicated upon the incapability of the adult, and provide a mechanism for the adult's legal capacity to be exercised for the adult when the adult cannot do so. The 2000 Act equates "incapacity" with "incapability", a completely different concept from "incapacitation" which has been rejected by all human rights-orientated jurisdictions, remaining only in a few jurisdictions with which one would not imagine that Scotland would wish to be aligned. Scots law is particularly strong on recognising the right of any patient, if acting capably, to refuse consent to physical interventions, and particularly medical interventions, which if inflicted without consent – whether benignly or not – and without some other express justification in law, are potentially assaults in both civil and criminal law. Section 82 of the 2000 Act limits the liabilities of those exercising powers under Parts 2, 3, 4 and 6 of that Act, but not medical practitioners acting under Part 5.

2. *Were the interventions sought in each action competently granted in terms of the 2000 Act?*

   Prima facie the 2000 Act in terms of its long title is concerned with matters of which an adult is incapable, and it is arguable that the Act and its procedures simply do not apply where an adult has, or has regained, capability.

3. *If competent, were the decisions of SAC in the first action and the Inner House in the second action "interventions" requiring to comply with section 1; and if so did they comply?*

   One would suggest that both decisions were clearly "interventions", but at least in the Statement it is not narrated whether the Inner House considered that point, and whether it in fact satisfied itself that it was complying with the section 1 principles.

4. *To what extent, if at all, does the 2000 Act permit incapacitation, and in particular does it do so in any personal welfare matters?*

   It is clear from the Scottish Law Commission 1995 Report that led to the 2000 Act, if indeed not from the Act itself, that the purpose of section 67 is to ensure commercial certainty

by giving effect to transactions entered into by guardians within their powers. The section does potentially limit the rights of the adult, and for that reason, as well as securing compliance with international obligations, requires to be strictly construed. It is difficult to see any basis on which, instead, the provisions could be extended, from the validation of transactions entered, into the personal health and welfare field. Consenting to a proposed medical intervention is not "entering a transaction". Going further than that, there is nothing in the 2000 Act authorising the overriding of a capable decision by the adult.

5. *Can a question whether, and if so how, to intervene in a matter in which the adult has clearly expressed current views ever properly be determined by a court unless the adult is represented and/or personally interviewed by the judge, or one of the judges, asked to determine the matter?*

   There would appear to be an argument that representation or such interview is required both to comply with section 1(4)(a) of the 2000 Act, and also to comply with Article 6 of the European Convention on Human Rights, and in particular the requirement for "equality of arms".

6. *What is the nature, status and effect of a DNACPR form?*

   The case does not appear to have explored the nature of DNACPR forms. The official guidance with which the forms are published stresses that the form is not legally binding. It is evidence that an advance clinical assessment and decision have been made and recorded to guide immediate clinical decision-making in certain future events. It stresses that healthcare staff cannot be obliged to carry out interventions that they judge are contra-indicated or possibly harmful. The guidance in England & Wales is even more explicit that a DNACPR form is not legally binding, and that if a patient wishes to make a DNACPR decision legally binding, the patient should execute an advance decision to refuse treatment.

7. *Were the powers conferred by the Guardianship Order properly and competently so conferred?*

   The relevant power is in the following terms: "*… to make decisions regarding his healthcare, to consent to any healthcare that is in his best interests, to refuse consent to any proposed healthcare that is not in his best interests or does not accord with his known wishes and feelings …*". A "best interests" test is incompetent, having been rejected for the purposes of the 2000 Act in favour of the section 1 principles. The "benefit" principle in section 1 is the gateway which if closed does not allow an intervention to proceed any further. I am not aware of any disagreement with my suggestion, originally in the Current Law Statutes Annotations to the 2000 Act and subsequently repeated, including in "Adults with Incapacity Legislation" (Ward, W Green, 2008), that: "*With due caution, 'benefit' can reasonably be interpreted as encompassing overcoming the limitations created by incapacity, so as to permit something which the adult could reasonably be expected to have chosen to do if capable, even though of a gratuitous or unselfish nature*". Section 1(2) closes the door to any proposed intervention under the Act "*unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention*". The decisions addressed of PKM addressed in both actions were

competently made and were decisions to which medical practitioners were willing to accede. The matters were determined by the adult's competent decisions. Whether or not anyone else agreed with them, that was the end of the matter and there was no need to substitute anyone else's decision, because no further benefit to the adult could thus be conferred.

8. *Esto those powers were properly and competently conferred, were the decisions of the Guardians within the scope of those powers?*

   Even if the above comment at 7 were incorrect, it is difficult to see that by overriding a competent decision of the adult in a healthcare matter the guardians were complying with the section 1 principles. The section 70 order sought in the second action can only be granted if within the powers held by the guardian – see the decision of SAC in *JK v Argyll and Bute Council*, 2021 SLT (Sh Ct) 293. Moreover, a section 70 order may only be granted in respect of a decision that the adult, and/or another person to whom it is addressed, "might reasonably be expected to comply with". Neither legally nor ethically can doctors "reasonably be expected" to enforce treatment in the face of a capable refusal by the adult.

9. *What are the effects of the Safeguarder not having actively participated in the proceedings before the Inner House, so far as is narrated in the Statement?*

   The provisions regarding safeguarding before the sheriff, and in the Court of Session, are the same. Safeguarding includes "*conveying [the adult's] views so far as they are ascertainable to the court*". There is no narration in the Statement of the participation of the safeguarder. That, like other unanswered questions, may emerge from further procedure.

Adrian D Ward

Deprivation of liberty of children in cross-border situations

In the December 2021 Scotland section, we reported the case of *Lambeth Borough and Medway Councils, Petitioners*, [2021] CSIH 59; 2021 SLT 1481, in which the Inner House of the Court of Session issued a Note providing guidance to practitioners as to the appropriate procedure to follow, pending remedial legislation, in petitions to the *nobile officium* seeking orders to render lawful in Scotland the deprivation of liberty of vulnerable children from England & Wales who are placed in Scotland, in accordance with orders of the High Court of England & Wales.

There have been two further developments. Scottish Government has launched a paper entitled "Cross-border placements of children and young people into residential care in Scotland: policy position paper" ("the SG paper"). In the meantime, an application by City of Wolverhampton Council for exercise of the *nobile officium,* in similar circumstances to those of the petitions by Lambeth Borough and Medway Councils, was determined by the Inner House on 23rd December 2021 ("the Wolverhampton petition").

The SG paper has not been launched as a formal consultation, but comments were invited on it by 28th January. Rather disappointingly, the paper does not acknowledge that the difficulty that has arisen arises from the long-standing failure of Scottish Government to implement its obligation under Article 5 of the European Convention on Human Rights to make appropriate provision to regulate situations of deprivation of liberty in Scotland. Recommendations and draft legislation were issued by Scottish Law Commission as long ago as 2014. The High Court in England & Wales operates under

statutory provisions which came into force in England & Wales in 2009, with a revised scheme of provision due to come into force this year. We have frequently highlighted in this Report the serious and discriminatory violations of the rights of elderly and disabled people in Scotland which can reasonably be attributed to (a) the lack of an appropriate regime to govern deprivations of liberty in Scotland and (b) the related widespread failure to recognise deprivations of liberty when they are proposed or occur, and the need for them to be lawful. Disappointingly, the most that Scottish Government has done so far is to adopt an apparent policy, likely to be an inefficient use of resources in the long term quite apart from the harm done, of looking for "sticking plaster" for particular consequences of the lack of provision which hit the headlines (for example, the widespread unlawful discharge of patients from hospital into care homes, or retention of them in hospital also in situations of unlawful deprivation of liberty), or which result in something close to a clear demand by the courts that a particular consequence be remedied (as in the matter of cross-border placement of children). In the latter case, it is clear from the SG paper that Scottish Government propose a two-step approach, firstly – explicitly as an interim step – by making regulations under section 190(1) of the Children's Hearings (Scotland) Act 2011. For the envisaged content of the regulations, see the SG paper. At the same time, Scottish Government is exploring "how non-statutory administrative agreements could be used alongside the regulations to set out procedures around the cross-border DOLS placing process".

As further steps, Scottish Government will continue to urge the UK Government to take prompt and effective action to resolve the issues of lack of capacity of provision in England & Wales; and also to continue to review the legal framework applying to children and young people in secure and residential care in Scotland. Disappointingly, there is no undertaking to take action so long overdue, and so urgently required, to remedy the underlying problem of lack of a deprivation of liberty regime in Scotland. The curious outcome of the proposals is that children and young people in Scotland, and in particular those transferred into Scotland from England & Wales, will benefit from safeguards not available to Scottish adults.

The Wolverhampton petition is *City of Wolverhampton Council v The Lord Advocate*, 2021 CSIH 69; 2022 SLT 1. While it must be stressed that everything in this article focuses on children and young persons, and the relevance to adult capacity law is by way of comparison only, Scottish practitioners might be interested to note the terms of the decision, including the role accorded to the Cross-border Judicial Protocol Group, established in terms of the Judicial Protocol Regulating Direct Judicial Communications between Scotland and England & Wales in Children's Cases, and the limitation of the order issued by the court to a period of three months.

Adrian D Ward

Guardians' remuneration

In the November 2021 Scotland section we were able to report that the immediate reduction in remuneration of professional guardians obliged to charge VAT, intimated in the October 2021 Journal of the Law Society of Scotland and resulting in a predictable furore, was "off the table". A further intimation in that matter was posted on the OPG website, under "News", on 10th January 2022. The item is headed "Attention all professional financial guardians". That item narrates that there have been discussions via the Law Society's Mental Health and Disability Sub-Committee, and that OPG have agreed to retract that original decision. Professional financial guardians can continue to claim VAT in addition to the sum of remuneration awarded, and that will be approved by OPG. The note acknowledges that the role of a professional financial guardian is "slightly different" from that of lay guardians such as relatives, and acknowledges the valuable work done by professional guardians "for incapable adults across Scotland, who have no

family members able to step into this important role". OPG plans to work with professional guardians to review their "uplifts" process this year. The leading case on the subject of guardians' remuneration, *X's Guardian, Applicant*, referred to in our November article, was in fact concerned with uplift payments claimed by that particular guardian. It is perhaps an under-used process to ensure fair and reasonable remuneration in particular cases. The note concludes with an apology for any confusion or inconvenience caused, whilst the matter was investigated further.

Puzzlingly, the note of 10th January includes the statement that: "We will seek a remedy to this lacuna around VAT and professional appointments, when the legislation is reformed". To date, that reference has not been clarified. The fees chargeable by OPG are fixed by regulation (see sections 7(2), 86 and 87(1) of the Adults with Incapacity (Scotland) Act 2000). However, the only provision in relation to the fixing of guardians' remuneration is section 68(6) of that Act, providing that any remuneration or outlays for guardians "shall be fixed by the Public Guardian", who is required to "take into account the value of the estate". That is not subject to any power to Scottish Ministers to make regulations: discretion rests entirely with the Public Guardian, who must if necessary (of course) be able to demonstrate that it has been properly exercised. However, under section 68 the Public Guardian has power already simply to fix the remuneration payable, which can be different for different guardians and allows the Public Guardian to take account of the VAT situation as she judges appropriate, provided that she does "take into account the value of the estate". The value of the estate is thus one of the factors to be taken into account, not the sole or determining factor.

A practical issue brought to light by discussion among professional guardians, following upon the original attempt to reduce their remuneration, is a concern that people who are often those who most need the services of a professional guardian are at risk of not receiving those services because there is insufficient money in the estate to allow them to be remunerated anywhere near adequately. Typically, these are cases where the local authority looks for a solicitor to act as financial guardian; where the work of the financial guardian is likely to involve very considerable support and interaction with the adult and/or family; but funds are meagre. It is not uncommon for professional guardians (like other professionals) to do a reasonable amount of work pro bono, but it appears that the number of such guardianships for which local authorities seek guardians is tending to exceed what professional guardians may reasonably be expected to do on a pro bono basis, and it is reported that a number of them are beginning to decline to accept such appointments. Obviously, resolution of that matter is not within the competence of OPG, beyond the possible relevance of the function under section 6(2)(f) of that Act to consult the Mental Welfare Commission and local authorities on matters relating to the exercise of functions under the Act "in which there is, or appears to be, a common interest". The issue is one of funding specialist professional services necessary to ensure that particularly vulnerable adults (whose vulnerabilities include financial vulnerabilities) are not seriously and discriminatorily disadvantaged.

Adrian D Ward

Editors and contributors

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 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 ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

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.

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.

Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

Arianna Kelly: arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click here.

Nyasha Weinberg: **Nyasha.Weinberg@39essex.com**

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here.

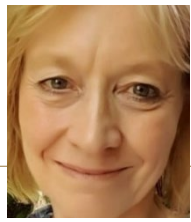
Simon Edwards: **simon.edwards@39essex.com**

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

Scotland editors

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; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



Jill Stavert: **j.stavert@napier.ac.uk**

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

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

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085