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MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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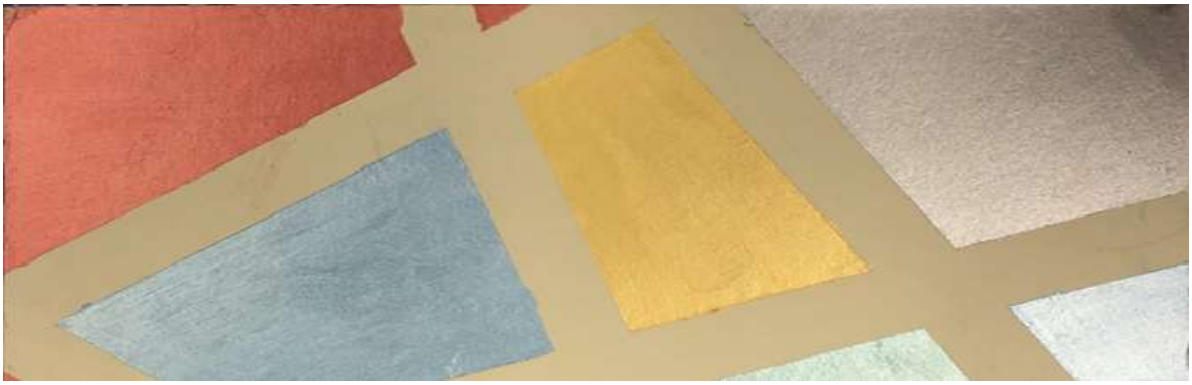

Welcome to the June 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal presses the reset button in relation to capacity and sexual relations, and three difficult medical treatment decisions;

(2) In the Property and Affairs Report: the impact of grief on testamentary capacity;

(3) In the Practice and Procedure Report: a remote hearings update, and a pragmatic solution to questions of litigation capacity arising during the course of a case;

(4) In the Wider Context Report: DoLS and the obligations of the state under Article 2 ECHR, the Parole Board and impaired capacity, and recent relevant case-law from the European Court of Human Rights;

(5) In the Scotland Report: the interim report of the Scott Review critiqued.

You can find our past issues, our case summaries, and more on our dedicated sub-site here. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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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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Remote hearings update

The Civil Justice Council Rapid Review

The Civil Justice Council, at the request of its Chairman the Master of the Rolls, Sir Terence Etherton, has undertaken a rapid review entitled "The impact of COVID-19 measures on the civil justice system" designed to: (i) understand the impact of the arrangements necessitated by COVID-19 on court users; (ii) make practical recommendations to address any issues over the short to medium term; (iii) to inform thinking about a longer-term review.

Of particular relevance to CoP practitioners is that, whilst the response rate to the consultation was excellent, especially given the short timescales, the report identified as a serious omission the failure to gather data from lay users (only 11 complete responses were received), including vulnerable and disabled court users. The need for urgent further research in this area was identified.

In terms of recommendations, respondents recommended maximising the use of remote hearings in preliminary matters, interlocutory hearings and trials without evidence, particularly where both sides were represented. The majority of costs disputes were also felt to be suitable for remote determination. Practical suggestions to improve the conduct of hearings included improving the equipment provided to judges and developing the functionality of platforms used to conduct remote hearings to enable better document sharing.

Particular concerns were noted in respect of the backlog of housing possession claims which will require a comprehensive strategy for effective management going forwards. This was identified as a matter of priority by Sir Terence in his comments on the publication of the report.

Observing remote hearings in the Court of Protection – practical assistance.

Celia Kitzinger, an academic based at Cardiff University, has published an article which highlights the importance of Court of Protection hearings remaining open to the public in the age of remote justice. In this regard, she observes the importance of ensuring that the court's recent work on improving transparency is not undermined by measures necessitated by COVID-19.

Based on her experience of observing 19 hearings during May 2020, she concludes that while it is certainly the intention of the Court of Protection to maintain transparency, "that is more aspiration than reality", with a series of practical barriers making it difficult, but not impossible to observe hearings in practice.

She ends by encouraging members of the public to engage with the administration of justice in the Court of Protection and provides a step-by-step guide for doing so.

Professor Kitzinger, together with Gillian Loomes-Quinn, has subsequently established the Open Justice Court of Protection Project, providing practical assistance for those wishing to observe hearings before the court.

Remote hearings guidance from the Transparency Project

The Transparency Project has published a practical guide to remote hearings in the Family Court. Its focus is practical, covering matters such as "What will happen at the remote hearing", "What if I am worried I won't be able to work the technology?", "What if I need to speak privately with my lawyer or supporter during the hearing?" The guide will be especially valuable for litigants in person, but should also prove helpful to all lay users of the Family Court who are unfamiliar with remote hearings. It is also largely applicable by analogy to proceedings before the Court of Protection.

Guidance from Sir Andrew McFarlane – "The Family Court and COVID 19: The Road Ahead"

The President of the Family Division has provided guidance "*which seeks to establish a broad framework for the Family Court* […] *over the next six months of more*" in light of COVID-19. This is in the context of the challenge he describes as follows: "*The reality to be faced is that the Family Court must now, for a sustained period, seek to achieve the fair, just and timely determination of a high volume of cases with radically reduced resources in sub-optimal court settings*."

The key message is that unacceptable delay in the administration of justice can only be avoided if hearings are significantly shorter, which in turn requires impeccable time management facilitated by "clear, focussed and very robust" case management by judges.

Many of the pressures on the family courts are different to those on the Court of Protection (for instance, there are very many fewer cases in which considerations of the credibility of a witness are going to be key). However, the guidance provides the following "COVID Case Management Checklist," many of whose principles may well be equally applicable before the Court of Protection:

A Narrowing the Issues:

i. *What issues are or can be agreed?*
ii. *Which of the remaining issues in the case is it necessary for the court to determine?*
iii. *Can those issues be determined without an oral hearing?*
iv. *If not, for which issues is an oral hearing necessary?*
v. *What oral evidence is necessary to determine those issues?*
vi. *The time estimate for each witness (including cross-examination) is to be reduced to the likely minimum necessary for the court to determine the issues to which it relates.*

B Hearing Format:

i. *Can the issues be determined fairly and justly at a fully remote hearing (having regard to the measures set out at C below)?*
ii. *Is it necessary to conduct all or part of the hearing with some of the parties in attendance at court ['a hybrid hearing']?*
iii. *Where a remote or hybrid hearing is to be held, it should be undertaken by video link, unless*

the court determines that a telephone hearing will be sufficient or a video link is not available;

iv. *Where a telephone hearing is to take place, it should be undertaken via BT MeetMe Dolby Plug-in, if available;*
v. *Consideration should be given to access to the hearing by media or legal bloggers [FPR 2010, r 27.11, PD27B and PD36J];*
vi. *Where in ordinary circumstances arrangements would be made for a child to meet the judge, the court should strive to establish a means by which the judge and the child may 'meet', albeit that this may, in some circumstances, have to be via a video link rather face-to-face;*
vii. *The court should give at least 3 days notice of the platform that is to be used for any remote or hybrid hearing.*

C Optimising fairness of remote hearings:

i. *The court should consider what options are available to support lay parties and enhance their ability to engage in a remote hearing. The options may include:*
    a. Attendance at a venue away from the party's home (for example a room at court, solicitor's office, counsel's chambers or a local authority facility);
    b. Arranging for at least one of the party's legal team to accompany them (whilst observing the need for social distancing);
    c. Establishing a second channel of communication between the lay party and their lawyers (for example by email, communication app or telephone during the hearing);
ii. *Cases should be clearly timetabled with a start and planned finish time - where a witness template has been completed by the advocates and approved by the judge, it must be complied with save in exceptional circumstances;*
iii. *Regular short breaks should be provided in a hearing of any length;*
iv. *The overall length of the hearing should be reasonable, taking account of the need for breaks and of the acknowledged additional pressure of engaging in a remote court process;*
v. *Prior to the start of the hearing, all advocates should have communicated with their clients and with each other in an advocates meeting;*
vi. *All participants should be logged in and ready to start at the appointed hearing time;*
vii. *Advocates should ensure that they are available not only for the proposed length of the hearing but also for a reasonable period thereafter to de-brief their client and communicate with other advocates over the drafting of the order and any ancillary matters;*
viii. *At the start of each hearing the judge should make a short statement explaining the ground rules for the remote hearing;*
ix. *The judge should ensure that there is a means for a party to give instructions to their advocate during the hearing;*
x. *Where the hearing involves a litigant in person the judge should 'check in' regularly with any litigant in person to ensure that they are hearing, understanding and following the proceedings;*
xi. *At all times a remote hearing should be conducted with the degree of seriousness and respect that is evident at a fully attended hearing;*
xii. *The court should consider how best to arrange for the involvement of any interpreter or intermediary in the hearing;*
xiii. *The court should ensure that lay parties have access to the electronic bundle (unless this is not necessary, for example by reason of the hearing being an interim hearing where a party is represented and not required to give evidence).*

The impact of the guidance is already possible to see in family case management decisions,

including *Lancashire CC v M & Ors (COVID-19 Adjournment Application)* [2020] EWFC 43, reflecting also the Court of Appeal decision in *C (Children: Covid-19: Representation)* [2020] EWCA Civ 734, in which the Court of Appeal noted that:

> [25], *the means by which an individual case may be heard is a case management decision over which the first instance court will have a wide discretion based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. For specialist judges, these are becoming routine decisions, and as time goes on a careful evaluation of the kind made in this case is no more likely to be the stuff of a successful appeal than any other case management decision.*

Short note: pragmatism and litigation capacity

In *CS v FB* [2020] EWHC 1474 (Fam), Mostyn J was confronted by what to do where it appeared that one of the parties to proceedings between parents concerning a child lacked capacity to conduct those proceedings. The Official Solicitor had been contacted, and in light of the matters put to her office noted that the court might wish to direct that the capacity of the party – the mother – to conduct the proceedings be assessed by an independent psychiatrist. However, the Official Solicitor's letter continued:

> there is the question of how this assessment can be funded. Whilst I understand that FB should be financially eligible for legal aid, FB is not willing to instruct a solicitor, and *so an application for legal aid cannot be made at this time. So, this does not provide a route for funding the assessment. I have asked the local authority if it is able to provide funding, but it has said that this is not possible. The assessment is for the purpose of these proceedings and they are not a party to them. The Official Solicitor is not in a position to meet the capacity assessment. I do not know if it is possible for the assessment to be funded by the applicant's legal aid. I have raised this with Dawson Cornwall, who represent the father, and they were going to look into whether this was possible. I hope that Dawson Cornwall will be able to inform the court of the outcome of their enquiries. If funding can be secured by this route or if another means of funding is identified the Official Solicitor is willing to assist by identifying an expert, drafting the letter of instruction, and liaising with the local authority about arranging for FB to meet with the expert.*
>
> *Possible further steps: should the experts assess FB as lacking capacity to conduct the proceedings and the court determines that FB is a protected party, the Official Solicitor would propose instructing Brethertons to apply for legal aid to be able to represent FB, and if legal aid is granted the Official Solicitor should be in a position to consent to act as FB's litigation friend'.*

Dawson Cornwall representing the father made the enquiries suggested by the Official Solicitor. The answer from the Legal Aid Agency was "*a flat categorical no.*" As Mostyn J identified:

> *13.* […] *The court is, therefore, left in a curious Catch-22 situation. It is suggested that the court cannot determine that the mother lacks capacity to conduct these proceedings unless*

> *there has been expert evidence to that effect. However, that expert evidence cannot be funded until she has been declared to lack capacity. One can, therefore, see that the argument is entirely circular.*

If FB did, indeed, lack capacity to conduct the proceedings, then the operation of FPR Part 15 meant that, effectively, there was a complete bar to any steps taking place until she had a litigation friend. As Mostyn J noted:

> *15. Therefore, to declare on a final basis that a party does not have capacity to conduct the proceedings is unquestionably a very serious matter, intruding into the freedom of a person to conduct litigation in the manner in which they think fit. It is for this reason that the threshold of incapacity is set relatively high.*
>
> […]
>
> *16. In the case of Baker Tilly v Makar [2013] EWHC 759 (QB) Sir Raymond Jack emphasised how momentous it was a for a court, without the benefit of expert evidence, to make a final determination of incapacity.*

Luckily, however, there was a solution proposed by Counsel for the applicant (not considered in *Baker Tilly*), namely that:

> *this court should on the available evidence make an interim declaration of lack of capacity thereby enabling for the Official Solicitor to be appointed as the mother's litigation friend and legal aid secured. Once that has happened it would then be possible and appropriate for the Official Solicitor, with the benefit of legal aid, to investigate for final determination the mother's capacity to conduct these proceedings. Under FPR 20.2(1)(b) the court has power to make an interim declaration; and, indeed, under its general powers the High Court has power to make final declarations, but that latter power is not necessary in this case at the present time.*

Mostyn J gave a 'clear yes' to the question whether an interim declaration was justified on the evidence before him, and did so.

The solution adopted by Mostyn J is a pragmatic one, equally applicable in proceedings before the Court of Protection, the COPR giving the court the power to make an interim declaration (r.10.10(b)), and proceedings under the CPR, which also gives the court the power to make interim declarations (CPR r.25.1(b). In the context of proceedings before the Court of Protection the issue is likely to arise not in relation to P, but rather another party: in relation to P, the structure of the Rules is such that P can only be joined as a party if they either (1) have capacity to conduct the proceedings; or (2) an accredited legal representative or litigation friend is in place (see COPR 2017, r.1.2(4)).

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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 Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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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.

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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.

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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.

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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.

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

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

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Conferences

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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 July. 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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