



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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### Short note: a very sad case about a will

In *Clitheroe v Bond* [2020] EWHC 1185 (Ch) Deputy Master Linwood had to decide on whether either of two wills should be admitted to probate. He described the dispute as a bitter family dispute that involved the surviving son and daughter of the deceased.

The wills cut the daughter out of the estate and made the son the principal beneficiary.

The daughter contested the wills on the grounds that her late mother had been suffering from a complex grief reaction or other affective disorder as a result of another daughter’s death and that had led to her having insane delusions about the surviving daughter’s character and behaviour which resulted in her being cut out of the will.

In the result, the court decided in the daughter’s favour and the wills were not admitted to proof. On the way, the court rejected the daughter’s alternative claim that the wills had been the result of the son’s calumny. The court also made a ruling about the nature of the delusions required. The son had argued that the proper definition was that in *Williams on Wills*, 10<sup>th</sup> Edition at [4.15] namely:

*A delusion is a belief in the existence of something which no rational person could believe and, at the same time, it*

*must be shown to be impossible to reason the patient out of the belief.*

The daughter argued that the second requirement was unnecessary, not supported by authority and impractical and argued that it was not part of the law. The judge agreed with the daughter, see paragraph 160.

The court approached the matter on traditional *Banks v Goodfellow* lines. In particular, the burden of proof was on the son to show that the deceased was not suffering from a mental disorder, was not suffering from insane delusions and that any such delusions had not affected the will.

Under the MCA, of course, there is a presumption of capacity that recognises a very important human right, namely the right not to be deprived of the liberty to make decisions about your affairs without evidence that shows on the balance of probabilities that you are, by reason of a mental disorder, unable to make such decisions.

Should the fact that the testator is dead make a difference? The court is retrospectively depriving a testator of their right to make a will in the terms of their choice so logic and reason suggests that the burden should be on the person opposing the will. With the state of the law as it is, however, primary legislation will probably be needed to effect this reform.

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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](http://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](http://www.lpslaw.co.uk). 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.

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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](mailto:marketing@39essex.com).

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