MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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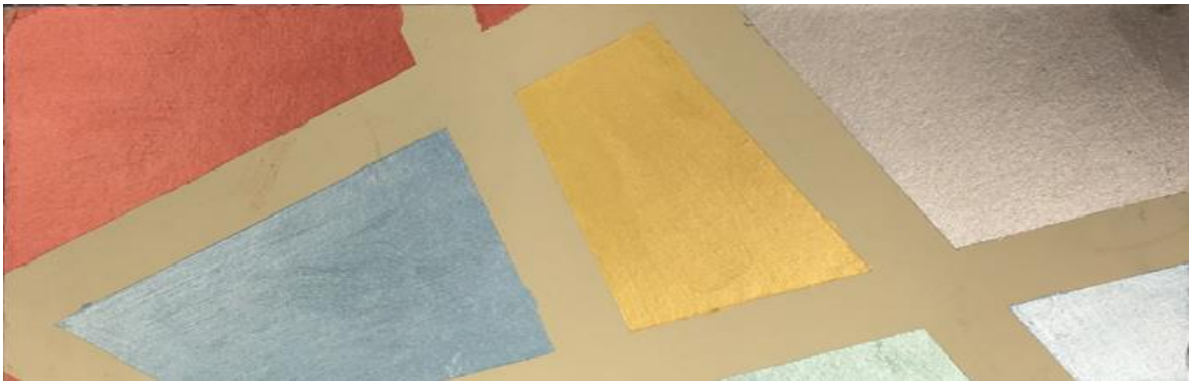

Welcome to the May 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; reproductive rights and the courts; capacity to consent to sexual relations; and one option in practice.

(2) In the Property and Affairs Report: an attorney as witness; barristers as deputies and a range of new guidance from the OPG;

(3) In the Practice and Procedure Report: the need to move with speed in international abduction cases; executive dysfunction and litigation capacity, and a guest article on meeting the judge;

(4) In the Wider Context Report: new capacity guidance; a fresh perspective on scamming the Irish *Cheshire West* and the CRPD and life-sustaining treatment;

(5) In the Scotland Report: two judgments in the same case relating to anonymity and the 'rule of physical presence' in the context of the Mental Health Tribunal.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our capacity assessment guide), and as promised, an updated version of our best interests guide is now out.

We trust we are also allowed to with some pride that no fewer than 5 of the editors have recently been appointed or reappointed to the Equality and Human Rights Commission panel of counsel, along with 3 other members of Chambers: see here.

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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.

Contents

LPS update

The Mental Capacity (Amendment) Bill passed its final legislative stage in the House of Lords on 24 April and was given Royal Assent on 16 May. The debate in the House of Lords, although not giving rise to any substantive votes, was noteworthy, amongst other things, for a trenchant speech from Baroness Murphy about the potential implications of the failure to give a statutory definition of deprivation of liberty. Rather astonishingly, we still do not have an up-to-date version of the Bill on the Parliament website, nor do we have any details of the timescales through to implementation, although we very strongly suspect that it will not now be "spring" 2020 as had been anticipated, but somewhat later in the year. Along with an overview, Alex has created a LPS resources page on his website, and will fill it as resources become more available – one highlight so far being this summary by Tim Spencer-Lane, who led the project at the Law Commission which led to the Bill and was then involved in the passage of the Bill itself.

Much flesh remains to be put on the bones, although it is possible for organisations now to start implementation work, above all by conducting local impact assessments to understand what demands will be placed upon them by the LPS.

As the Code of Practice and regulations are developed, areas of particular concern for us as regards compliance with Articles 5 and 8 ECHR are going to be:

1. how the guidance in the Code of Practice being produced as to the meaning of deprivation of liberty in lieu of a statutory definition seeks to shape the meaning of the term;

2. how the Code seeks to shape the test in paragraph 14(b)(ii) of Schedule AA1 for when a responsible body can properly determine that the authorisation should be determined under the provisions assigning responsibility for coordinating assessments and consulting to a care home manager;

3. what the Code says as to the circumstances under when it could ever be lawful not to provide an advocate where one should be provided, paragraph 39 of Schedule AA1 placing the responsible body only under a duty to take "all reasonable steps" to appoint an advocate. It is not immediately obvious how Article 5(4) compliance can be secured in such circumstances;

4. what the Code says as to the length of time for which reliance can be placed on the 'interim' authority to deprive contained in the new s.4B(7)(b), given that this is not time-limited. Will this differ if (a) the person or the body doing the detaining has in its possession medical evidence that the cared-for person has a mental disorder; and/or (b) the cared-for person is supported by an appropriate person/advocate from the outset of the process (the safeguard provided by the Law Commission in its draft Bill, but which, as set out above, may not now be guaranteed)?

5. whether non-means-tested legal aid will be available to challenge a deprivation of liberty authorised under the 'interim' s.4B(7)(b). The Government has confirmed that it will be available to challenge authorisations when granted under the new s.21ZA MCA 2005, but not having so far made any public commitment in relation to the period prior to that point, which is open-ended, and during which time the person is, by definition, deprived of their liberty for purposes of Article 5;

6. what the regulations will say in terms of the requirements that will be required for assessors and independent reviewers, and will (in the context of the medical assessment) will they address the Grand Chamber decision in *Ilnseher v Germany* [2018] ECHR 991 that: *"in certain specific cases,* [the Court] *has considered it necessary for the medical experts in question to have a specific qualification, and has in particular required the assessment to be carried out by a psychiatric expert where the person confined as being 'of unsound mind' had no history of mental disorders"* (para 130);

7. what the Code says as to the appropriateness of an appropriate person: will it, for example, include Care Act advocates and will it require face-to-face contact with the cared-for person?;

8. what appropriate action will AMCPs be able to take before determining whether the authorisation conditions are met.

Reproductive rights and when is it 'right' to go to court?

University Hospitals of Derby And Burton NHS Foundation Trust v J (Medical Treatment: Best Interests) [2019] EWCOP 16 (Williams J)

Best interests – medical treatment

Summary

This case concerned the question of whether it was in the best interests of a woman, identified as 'Anne,' to undergo a hysterectomy and bilateral salpingo-oophorectomy and a colonoscopy, including a transfer plan including sedation and a level of deception to ensure her presence at hospital for the procedures to be undertaken.

Anne had a diagnosis of autistic spectrum disorder and a severe learning disability. The evidence before the court was that when she started menstruating as a teenager her monthly cycle had affected her behaviour and mood, which had in turn restricted her lifestyle. She was very upset at the sight of blood, and her distress manifested itself in various forms which the judge did not set out in the judgment as being highly personal and sensitive. In addition, the

hormonal changes (linked to the production of progesterone) prompted an increase in her aggressive and challenging behaviour. Anne lived at home with her mother and father.

Over the years, her treating consultants had tried a range of treatments, including oral contraceptives, and an IUD. These helped stabilise the problem but ultimately failed, and Anne had experienced severe crises in her mental health in 2010 and 2012. She was said to remain fearful about this experience. She had been started in 2012 on 3 monthly injections of Decapeptyl which suppresses normal hormonal activity including menstruation. It is licensed for 6 months' use, but Anne had been on it far longer. As Williams J noted, it is known to cause osteoporosis and the effects of its long-term usage are unknown. Because of that risk Anne was tried on an alternative medication following a minor operation, and this was drastically unsuccessful, with Anne experiencing severe side effects including psychosis and violent aggression, as well as vertigo. She returned to Decapeptyl use. This involves injections being given every 3 months by her GP at home. These had been reasonably successful in preventing menstruation (and so the linked distress that Anne experienced) and have moderated her behavioural difficulties, albeit her parents believed that when the medication was starting to wear off, she became more aggressive. However, Anne was said to find the injections extremely distressing, both in advance and during their administration. In addition to these symptoms, Anne was also found to have endometriosis, and severe abdominal pain related to going to the toilet. This might be indicative of large bowel upset, although it could be linked to endometriosis. Testing had suggested an inflammation of the bowel which might be caused by a disease such as Crohn's or ulcerative colitis, requiring further investigation.

Since about 2015 Anne had been unwilling or unable to travel out of her home save on very rare occasions, for instance when she was in such pain from a tooth that she willingly travelled to hospital. However, she suffered from vertigo, which appeared to be exacerbated by travel. On one occasion she struck her father and attempted to leave the moving car, and her distaste for travel by vehicle had now become more embedded. She would not willingly go on a journey in a vehicle, whether car or ambulance. Shortly prior to the application, when she was experiencing severe abdominal pain, she did agree to an ambulance being called, and thus it is possible that, if in sufficient pain, she might agree to travel by vehicle, but otherwise it was likely that she would not. On one occasion she insisted on walking 9 miles home from hospital because of her aversion to travel in a vehicle.

An issue of a hysterectomy has been discussed at various times over the years; it had initially been rejected by her parents and her treating doctors for various reasons, including the effect on her fertility. Anne's consultant obstetrician and gynaecologist since 2014 had ultimately concluded that a hysterectomy is the last realistic option given that Decapeptyl injections could not be used long-term.

There was unanimity between all before the court as to the order to be sought, the Official Solicitor noting that:

> *23* […] *this is significant life changing surgery which will impact profoundly upon Anne's personal autonomy, bodily*

integrity and reproductive rights. Nevertheless, he supports the gynaecological intervention (and other interventions) as being in her best interests and thus lawful. They are necessary and proportionate interferences with her rights. The medical and other evidence in support of these conclusions on best interests is clear. In relation to Anne's ability to bear children, the Official Solicitor notes that this is a theoretical rather than real loss, because as a result of her lack of capacity to consent to sexual relations she will not bear children and is most unlikely ever to be able to parent a child. The Official Solicitor notes that Anne is herself unable to express a clear view about the operation. She has indicated that she does not want to have menstrual bleeding or a child.

Williams J noted that:

39. Section 4(6) requires that in evaluating 'best interests' I consider past and present wishes, beliefs and values that would be likely to influence Anne's decision if she had capacity and the other factors she would be likely to consider if she were able to do so. The evidence demonstrates that Anne approves of medical treatments which relieve her of pain and distress; her overcoming her dislike of travel to attend to her dental problems and her support for an ambulance being called when recently in severe pain illustrate her approach.

Williams J concluded that:

43. The overall balance in the evaluation of Anne's best interests is overwhelmingly in favour of the proposed HBSO, the colonoscopy and the care plan which will facilitate those surgical procedures being undertaken. The medical evidence both from the treating clinicians and also, and highly significantly, from one of the country's leading experts in the field is compelling. That it happens to be aligned with the views of Anne's parents is fortunate but no coincidence. The parents' experience - and they know their daughter best of anybody - is of course the human perception or experience of matters which are ultimately rooted in medical science, as confirmed by the treating clinicians and Professor O'Brien.

In terms of sedation and deception, Williams J had already noted that:

iv) Given Anne's aversion to leaving her home and travelling by vehicle and the distress and behavioural challenge that getting her to hospital would present, it is plainly in her best interests that a plan is implemented which both enables her to undergo the HBSO and the colonoscopy and which minimises the impact on her of so doing. If that requires both a level of deception and the use of sedation, that is clearly in her best interests; the means is completely justified by the end.

Williams J continued:

44. As Anne's parents noted, it is unfortunate (to say the least) that it has taken so long to reach this point for Anne. The statement prepared by Anne's mother and endorsed by her father provides a vivid picture of the consequences for Anne and those around her, most particularly her parents, of the difficulties associated with her menstrual cycle. That Anne and her parents have had to contend with those

> *difficulties for so long and with such consequences for Anne and for those around her is profoundly regrettable. The pressure which the family have been living under is plainly taking its toll on Anne's parents but their devotion to her is self-evident and remarkable. Many might have succumbed but they have put their daughter's interests above any other; particularly their own. Anne and her family live every day with the consequences of her severe learning disability and autism and any step which makes life better for her and thus for her family should be implemented as rapidly as possible. If there is any lesson to be learned for the future from Anne's case, it seems to me it is that the human cost to the individual and their family should never be underestimated, even when dealing with what for the vast majority of the female population is part and parcel of womanhood. For an individual such as Anne, that biological reality has translated into a truly debilitating and distressing condition. The true welfare of the particular individual (which encompasses not just medical welfare) must not be obscured by other considerations, which might be fundamental to the vast majority of women but which are displaced by other considerations for that individual.*

In terms of whether the application had to have been brought to court, Williams J noted that:

> *45. It is entirely right that cases such as this, where medical decisions and the plan for their implementation impact so profoundly on P's personal autonomy, bodily integrity and reproductive rights, should be considered by the Court of Protection at High Court level, and as this case demonstrates, once in the hands of the court and the Official Solicitor they can be dealt with rapidly.*

Comment

Decisions concerning reproductive rights are always – rightly – intensely sensitive, and fact-sensitive. In this instance, Williams J had before him a clear body of evidence establishing that, in this case, it was in her best interests to undergo the procedures, including by way of sedation and deception.

It is, perhaps, unfortunate that, whilst Williams J identified that it was "right" that Anne's case and those such as it should come to court, he did not specify what "right" meant. In *NHS Trust v Y* [2018] UKSC 46, the Supreme Court made clear that obligations to bring cases to court have to be spelled out of either common law, statute or the ECHR; considerations (for instance) of "good practice" cannot suffice. In *Re P* [2018] EWCOP 10 Baker LJ came closer to spelling out an obligation in a closely related area, namely the covert insertion of a contraceptive device, on the basis that:

> given the serious infringement of rights involved in the covert insertion of a contraceptive device, it is in my judgement highly probable that, in most, if not all, cases, professionals faced with a decision whether to take that step will conclude that it is appropriate to apply to the court to facilitate a comprehensive analysis of best interests, with P having the benefit of legal representation and independent expert advice.

However, not least to assist the revision of the Code of Practice to the MCA, it would be of huge assistance were either the Official Solicitor to

argue or the Court of Protection of its own motion to address in the next case on what legal basis it is "right" (as it undoubtedly is) to require such a case to come to court. It would undoubtedly be possible to identify such a requirement out of the implied procedural protections contained in Article 8 ECHR, construed (if necessary) by reference to the CRPD;[1] it would undoubtedly be very helpful if this could be made express in domestic case-law.

Short note: sexual relations, rights and capacity

The judgment in *Re NB* [2019] EWCOP 17, has just appeared on Bailli of a hearing on 7 May 2019 at which Hayden J considered the position of a married couple where doubts had been raised as to the wife's capacity to sexual relations. There had been a previous directions hearing in March 2019 following which there had been extensive press coverage which centred around remarks reported of Hayden J as to a husband's "right to sex" with his wife. Hayden J observed that it appeared that in consequence of the publicity the husband had become frightened, had gained the impression (apparently in consequence of poor advice given by a local solicitor) that he was likely to be sent to prison, had left the flat he shared with his wife, and had disengaged with the proceedings.

The hearing before Hayden J therefore only involved Counsel for the applicant local authority and Counsel for the Official Solicitor as the wife's litigation friend. Hayden J's recitation of the arguments, his concerns, and his proposed course of action was as follows:

> *12. During the course of today, I have listened to detailed, helpful and very interactive submissions on behalf of the Official Solicitor and the Local Authority, considering the case law and seeking to evaluate the reach and ambit of the relevant test. Mr Bagchi submits that the test articulated by Sir Brian Leveson in Re: M (an Adult) (Capacity: Consent to Sexual Relations) [2014] EWCA Civ 37 should properly be construed as a general test in which the Court of Protection has, prospectively, to assess an individual's capacity to have a sexual relationship with any other individual. In other words, he submits it is a 'general' or 'issue-specific' test rather than a partner-specific one. If Mr Bagchi is correct, the difficulty that presents in this case is that there is only one individual with whom it is really contemplated that NB is likely to have a sexual relationship i.e. her husband of 27 years. It seems entirely artificial therefore to be assessing her capacity in general terms when the reality is entirely specific.*
>
> *13. On the facts of the case, for example, it may be that her lack of understanding of sexually transmitted disease and pregnancy may not serve to vitiate her consent to sex with her husband. There is no reason to suggest that AU has had sexual relations outside his marriage. There is no history of sexually transmitted disease. There is one child who, as I have said, is 20 years old.*
>
> *14. As I said on the last occasion, these issues are integral to the couple's basic*

[1] See, by analogy, the discussion in Alex's article on "*Powers, defences and the 'need' for judicial sanction*."

human rights. There is a crucial social, ethical and moral principle in focus. It is important that the relevant test is not framed in such a restrictive way that it serves to discriminate against those with disabilities, in particular those with low intelligence or border line capacity. See: Re: E; Sheffield City Council v E and S [2005] 1 FLR 965.

15. Mr Bagchi has accepted that if a person-specific test were applied here then the outcome, in terms of assessment of NB's capacity may be different. However, he says for the law to impose a person-specific test would be to render a state of uncertainty of outcome in every case, which is, he submits, essentially inimical to the effective administration of the Court of Protection in these cases. It seems to me, the consequence of this approach may be to give insufficient priority to the individual in a legislative framework which prioritises the vulnerable.

16. In the context of the criminal law, it is entirely clear that consent is and can only ever be a person or partner-specific test. As Baroness Hale said in R v Cooper [2009] 1 WLR 1786 'it is difficult to think of an activity which is more person and situation specific than sexual relations.' *I am bound to say I find this to be a very forceful point. Mr Bagchi submits that the test for consent in the Criminal Law and that which applies in the Court of Protection is different. In this Mr Bagchi is plainly right. However, as I have indicated in exchanges with counsel, I do not necessarily consider that the applicable test in the Court of Protection necessarily excludes the 'person specific approach'.*

17. I am reserving my Judgment in order that I can take the time to look carefully and in some detail at the case law and its applicability to the facts of this case. It would appear, that it requires to be said, in clear and unambiguous terms that I do so in order to explore fully NB's right to a sexual life with her husband and he with her, if that is at all possible. I have delivered this short interim ex-tempore Judgment in order that AU may receive a copy of it and better understand the focus of the Court's enquiry. I also want to afford him the opportunity to make submissions, through counsel, if he wishes to do so.

As Hayden J seeks to navigate the way through, it is of importance to note that the Court of Appeal was considering its judgment in the case of *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3, the hearing having been on 14-15 May and including consideration of the judge's findings in relation to B's capacity in relation to sex, along with residence and access to social media.

Short note: one option in practice

In *Harrow Clinical Commissioning Group v IPJ & Ors* [2018] EWCOP 44, SJ Hilder considered a classic situation of "only one option" in relation to a young man of 24, AJ, who lived in his family home with his parents and sister. AJ had learning disabilities and sometimes challenging behaviour. He had been in receipt of a substantial package of CHC funded care paid directly to his parents (on a long-term interim basis since July 2014). Neither the family nor the CCG were happy with this interim arrangement. AJ's father pursued various avenues of complaint, including to the Ombudsman. The CCG commenced

proceedings, and, after a protracted period of time, they reached a final hearing. The CCG proposed an extensive package of care at the family home, with (most of) the financial arrangements managed by a third-party broker. His parents did not agree the proposals and sought dismissal of the application. As SJ Hilder identified:

> *48.* [a]*lthough the CCG has identified alternatives to its proposal for funding care – care at home with no support package, or residential placement - it is manifestly obvious that both of those "options" carry significant risk of failing to meet AJ's extensive needs, and neither scenario has been set out in any detailed form for the court's consideration. No party actively promotes either of them; and the history of his parents' commitment to AJ to date gives grounds for concluding that they would not be likely to conduct themselves so as to bring either of them about.*

Directing herself by reference to *N v ACCG* [2017] UKSC 222, SJ Hilder considered that:

> *49. Continuation of existing arrangements is not an option which the CCG is prepared to fund and is therefore not an option open to the court to consider. If, when he asks the court to "dismiss these proceedings," IPJ is assuming that the absence of proceedings would mean the continuation of existing arrangements, unfortunately he has not taken on board the CCG's position.*
>
> *50. Where* [AJ's parents] *have raised objections to the CCG's current proposals, I am satisfied that full and proper consideration has been given to their objections in the sense that the process of "independent investigation…coupled with negotiation … in which modifications are made to the care plan and areas of dispute are narrowed" has been fully pursued. Within these proceedings, it is apparent that IPJ and IJJ have been offered as much opportunity for discussion and contribution as in reality they were willing to take up. Appropriate efforts to facilitate concord between the parties have been made, including even line by line consideration of the PBSP* [*Positive Behaviour Support Plan*] *at the last hearing and today inviting (and being given) from the CCG explicit assurances of their intentions in respect of collaborative working with AJ's family.*

SJ Hilder pronounced herself satisfied that:

> *56.* [t]*aking all the circumstances of this matter into consideration, I am satisfied that the care arrangements proposed offer extensive support for AJ, calibrated to meet his needs as far as they have been ascertained after multi-disciplinary assessment, and offering scope for further provision as issues arise. Notwithstanding the dissatisfaction of AJ's parents with various aspects of the care package, the CCG's submission that it can operate the package is plausible in the light of arrangements to date. Of the narrow range of options available, it is very clearly the approach which is in the best interests of AJ.*

SJ Hilder declared herself satisfied it was in AJ's best interests to continue to live at his family home with a package of care as set out in the framework, the PBSP and the oral evidence at the hearing, and authorised the deprivation of liberty to which AJ was subject in consequence.

This case therefore gives a good example of how *MN* works out in practice, as well as a reminder that the court will want to see that there really has been stress-testing before simply accepting that there really is only one option for it to consider.

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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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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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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.

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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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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.

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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; 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

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.

Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information 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 June. 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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