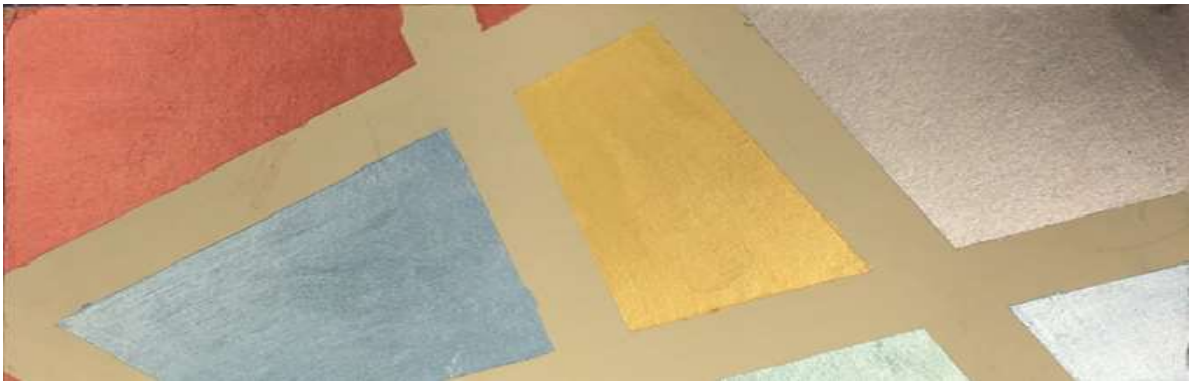
Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

November 2021 | Issue 117



Welcome to the November 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Sexual Offences Act, care workers, and paying for sex; and obligations that cannot be avoided in the context of decisions about serious medical treatment;

(2) In the Property and Affairs Report: an important consultation on a scheme to enable access to funds held by financial institutions; and guidance about disclosure of medical records to attorneys and deputies;

(3) In the Practice and Procedure Report: a new training video on communication and participation, the use of the inherent jurisdiction overseas, and a systemic approach to unblocking entrenched relationships;

(4) In the Wider Context Report: the CQC's State of Care report, vaccination and children, and a new research report on accessible legal information;

(5) In the Scotland Report: an important reversal of course by the OPG for Scotland in relation to remuneration of professional guardians.

We also say a – temporary – farewell to Annabel Lee as she goes on maternity leave, and welcome to Nyasha Weinberg as the newest member of the team.

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.

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.

Editors
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sulivan
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.

Contents

Communication and participation in the Court of Protection - new training video

Researchers on the AHRC-funded project, *Judging Values and Participation in Mental Capacity Law*, based at the ICPR, Birkbeck School of Law, have pioneered a training film for specialist lawyers who work in the Court of Protection, "Communication and Participation in the Court of Protection," now available on YouTube. The video, developed in association with VoiceAbility, utilises role-plays and roundtables with lawyers (including our very own Tor) and people with learning disability and autism to demonstrate how to enhance communication and achieve better quality evidence for the court.

The video is now available on YouTube here. The Judging Values and Participation in Mental Capacity Law project involves a team of academics from Birkbeck College, University of Bristol, and University of Oxford and the project is funded by the Arts and Humanities Research Council.

Contingency planning and the Court of Protection – what, if any, threshold has to be crossed?

North Middlesex University Hospital NHS Trust v SR [2021] EWCOP 58 (Katie Gollop QC, sitting as a Deputy High Court Judge)

COP jurisdiction and powers – other

Summary

What (if any) threshold needs to be satisfied before the Court of Protection can exercise its (relatively) newly discovered 'contingency' jurisdiction? This important question was before Katie Gollop QC, sitting as a Deputy High Court judge, in this case. The question arose in the question of birth planning for a woman, SR, with a number of mental health difficulties. At the point that the application came before the court, she had capacity to make decisions about her birth arrangements and (perhaps unusually in these case) there was agreement between her and the professionals involved that the right method of delivery was by way of caesarean section. There was, however, a concern that she might lose capacity on or before the point she was to come to hospital for a surgical delivery.

The application came before the court on an urgent basis, which led Katie Gollop QC to add her voice to the consistent judicial chorus of concern as to timing. As she noted:

> *27. The Guidance given by Keehan J in Re FG [2014] EWCOP 30, [2015] 1 WLR 1984 is not limited to pregnant women who lack capacity to make obstetric decisions as a result of a diagnosed psychiatric illness: it also applies to those with fluctuating capacity (see paragraph 9). It requires that application is made "at the earliest opportunity". In this case it was, or should have been, clear in September* [i.e. at least a month before the application was made] *that an application would be necessary because SR fell within two of the four categories identified in the Guidance. Those were and are that there was a real risk that she would be subject to more than forcible restraint, and a real risk that she would suffer a deprivation of her liberty which, absent a Court order, would be unlawful. It is necessary to draw attention to the Guidance again because it is still not as widely observed as it should be.*
>
> *28. Trusts and their advisors may be tempted to think that in a case where all concerned agree that P has capacity, and the medical treatment the clinicians propose to provide is in accordance with the patient's wishes and feelings, no harm is done by making a late application. That is not the case: the evidence may change, capacity may change requiring the involvement of the Official Solicitor who will struggle to assist if she has no time to prepare, points of complexity may emerge during the hearing, and a late application puts pressure on an already busy urgent applications list. Where, as here, an ongoing situation mandates an application, delay must be avoided.*

The matter being before the court, Katie Gollop QC was concerned to understand what the correct test was in law for making an anticipatory declaration or order. She was not in a position, she considered, to determine whether a threshold test was necessary nor, should it, be what the test was. Counsel for the Trust was unable to identify any authority that would assist, and the Official Solicitor was not involved (presumably because SR was considered to have litigation capacity), such that no submissions were received from that corner. However, Katie Gollop QC ventured some observations, as follows:

> *41.* […] *First, the making of contingent declarations will almost always be an interference with, or have the potential to interfere with, the Art 8 ECHR rights of the individual concerned to respect for their private and family life, including their autonomous decision making about what is done to them physically. That potential exists even where, as here, the contingent declaration made accords with, promotes, and facilitates the person's current, capacitous decisions, and thus their autonomy. It exists even in those circumstances because, whether capacitous or incapacitous, people have the right to reconsider their positions and change their minds. Indeed, in an evolving healthcare situation, the changing clinical picture may require reconsideration of previously made decisions. Ideally, everyone should have access to the full range of options when the time comes to put into effect a decision about their private and family life but a contingent declaration or order, restricts that full range. It is for this reason that such relief*

should only be granted where it is necessary, justified and proportionate, and why the power to grant relief should be used sparingly, or only in exceptional circumstances.

42. In addition, I remind myself that before deciding whether to make any declaration or order, the court must, in accordance with s1(6) MCA, have regard to whether the purpose for which it is needed "can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action".

43. Given these safeguards, it is unclear whether an additional threshold test which must be crossed before an anticipatory order can been made is needed. It is possible that without one, a general requirement of "exceptional circumstances" or "sparing use", may risk the corrosion of rights that the Vice President warned against. Here, I bear in mind in his observations in Guy's and St Thomas's NHSFT that: "This factual situation i.e. a capacitous woman who is likely to become incapacitous, during the course of labour is relatively unusual but it is not unprecedented" (paragraph 3). It could be that the situations requiring anticipatory relief occur more commonly than the small number of decided cases suggests. On the other hand, a threshold test may limit the court's power unnecessarily.

44. If a threshold test is required, then it seems to me that a balance of probabilities would be unduly restrictive. (I do not read the Vice President's use of the word "likely" in Guys and St Thomas' NHSFT (see paragraph 34 above) as an indication that a contingent declaration should only be made where it is more likely than not that P will lose capacity.) I also agree with Ms Powell that an anticipatory order being final, the existence of a risk, and not merely the reasonable belief that there may be one, is required. I would suggest that "a real risk" that P may lose capacity is the appropriate threshold, and I note that that is the language used by Keehan J in Re: FG. "Real" means more than theoretical (or "technically possible" as Dr B put it), based on credible evidence rather than speculation, and the risk must, of course, be person specific and present at the time the relief is granted rather than historical.

Applying this approach, Katie Gollop QC found that on the facts of the case there was a real risk that SR would lose capacity to make decisions about her labour and birth arrangements. She also found that it was necessary, justified and proportionate to make declarations which permit a caesarean section and restraint, and that SR's circumstances were exceptional. The decision in relation to the caesarean section itself was clear, not least because of SR's own (currently capacitous) wishes; the issue of restraint was more nuanced, but, ultimately, on the facts of the case, it was justified.

As a postscript, following judgment, the court was informed that despite some panic attacks during the process, SR's caesarean section delivery went ahead under a spinal anaesthetic, as planned on the morning of 25 October 2021. Mother and baby were both well.

Comment

Although the observations about whether – and if so – what test to apply in contingency planning cases were identified as obiter, they were undoubtedly more than just passing musings. A

"real risk" of loss of capacity must, I would suggest, strike the right balance for the reasons identified, in a curious world in which the Court of Protection is being invited to wade into decision-making about a person who currently has capacity in the relevant domains.

Two further points arise for comment. The first was expressly – and importantly – identified by Katie Gollop QC, and relates to communication and information sharing between healthcare professionals. As she identified at paragraph 25: "[a] *pregnant woman who is under the care of psychiatric services, whether as an in-patient or in the community needs, and is entitled to, joined up care*." Helpfully, and no doubt alive as a practitioner to the misunderstandings that sometimes arise here, she then read into the judgment the relevant extract from the GMC's 2018 guidance *Confidentiality: good practice in handling patient information*:

> *"Sharing information for direct care*
> *26*
> *Appropriate information sharing is an essential part of the provision of safe and effective care. Patients may be put at risk if those who provide their care do not have access to relevant, accurate and up-to-date information about them.[9] Multidisciplinary and multi-agency teamwork is also placing increasing emphasis on integrated care and partnership working, and information sharing is central to this, but information must be shared within the framework provided by law and ethics."*

The second point arises out of the unusual fact-pattern of this case (unusual in the sense that 'non-dispute' cases in this context do not often come before the courts). This was a situation where there was alignment between the wishes of SR and the advice of the teams caring for her. Why, then, was a court application required? On one view, and with sufficiently robust advance planning, it might be thought that SR could have (in effect) bound herself to accept the interventions that she might require to give effect to her will, even if her preferences closer to the time were in conflict with this. This raises ethical questions as well as legal ones (see, here, this work from the Mental Health and Justice project). It is unclear, but likely, that it was the prospect of having to use restraint to bring about SR's safe transfer to and undertaking of any caesarean section, that triggered the application to court. If so, it is perhaps of some interest no-one seems to have thought that SR could in effect give advance consent to any restraint to which she might be subject. This is particularly so given that the Government has said[1] in the context of the White Paper on Mental Health Act reform that it thinks that the law **already** provides that it is possible to give advance consent to admission to psychiatric hospital so as to circumvent the need to consider the use of either the MHA 1983 or DOLS if at the point of admission the person is to be confined and lacks capacity to consent. It will be interesting to see whether this position is rolled forward into the draft Code of Practice to the MCA (including the LPS) when it finally makes its way out for consultation.

[1] See Reforming the Mental Health Act (publishing.service.gov.uk) at page 64. The Independent Review of the MHA 1983 had considered whether or not to introduce such an idea, but could not agree.

Systematically unlocking an entrenched problem

Re W (A Child) [2021] EWHC 2844 (Fam) (Family Division (Hayden J))

Other proceedings – family (public law)

This case, in public law proceedings concerning a disabled 12 year old boy, is nevertheless of interest to Court of Protection practitioners as it concerns the familiar situation in which the parents of a person with significant care needs find themselves in conflict with the professionals. W required 1:1 care at all times because of his disabilities,. The care agency threatened to withdraw their services, saying that the parents had:

(i) insisted on having oversight of the training of carers at all times;

(ii) required the removal of two of the carers from their position on unreasonable grounds;

(iii) alleged, without proper foundation, serious misconduct by the paediatric nurse with oversight of W's care package and demanded her de-registration before their allegation had been investigated;

(iv) declined to co-operate with a review of W's care package despite having complained that he is not being adequately supported by trained health care staff; and

(v) refused to permit the emergency services to be called promptly even though W's oxygen saturation levels had dropped below 85% on a particular date.

As is common in public law proceedings involving children, the court ordered a psychological assessment of W's parents, focusing on their ability (or otherwise) to provide adequate parenting to him. The psychologist who prepared the report, Dr Hellin, found that neither parent had any mood disorder or other psychological problem, and, more importantly, that their emotional and strong responses to professionals were no more than to be expected given the circumstances:

> *12. Dr Hellin did not consider that either parent had any sign of mood related problems, personality disorder or serious mental illness. M was assessed as a "balanced, thoughtful woman with considerable psychological resilience". There was nothing to suggest that she has "health anxiety or abnormal illness behaviour" rather, her psychological state had deteriorated in consequence of W's health needs and the demands placed on her, particularly as those needs had become more complex. M's mental health had become acute when W had a crisis involving a bowel intussusception and brain haemorrhage, in December 2019. At that time Dr Hellin considered that M would have met the criteria for post-traumatic stress disorder, which she would no longer now meet. Nonetheless, this acute episode left a legacy of a "heightened level of resting anxiety". As Dr Hellin points out in clear and unambiguous terms, this anxiety is "rational" and based in the "cumulative reality of life-threatening medical events in [W's] life and the uncertainty of his condition and prognosis". M's response to the very challenging circumstances she faces are said to be "normal" and Dr Hellin would expect "a similar response in even the most psychologically robust person".*

> …
>
> *13.* […] *Dr Hellin goes on to describe how W's needs and extensive disabilities cast the parents own lives deep into the background:*
>
> > *"They live with ongoing intense chronic and acute stress, day-to-day anxiety about his survival, the uncertainty regarding his future and their limited sense of control, at times, in the face of complex commissioning and care/medical delivery systems."*

In the course of the judgment, Hayden J cited the following passage from *Re K and Ors (Children)* [2011] EWHC 4031 (Fam). an earlier case decided by Hedley J. Although again a case concerning children, the essential points about the role of the family in the care of a person with disabilities may be thought to apply to those children once they attain the age of 18.

> *"30. Cases of severely disabled children do not, as I have indicated, sit easily or conveniently within the scope of Part IV of the Children Act 1989... It seems to me that legal proceedings will often, at best, have a very limited contribution to make in cases like this. Whatever its deficits may be perceived to be, the family unit, if functional, is of central importance to the permanently disabled for it is the one fixed point in the constantly moving waters of state care provision. The welfare of such children over a lifetime is closely bound up with the ability of the family to remain a functioning and effective unit.*

In W's case, Hayden observed that similarly, "*the court would not be best assisted by evaluating the issues in terms of the parent's perceived failures or any mental health difficulties. It requires a recognition by the professionals that these are ordinary parents dealing with extraordinary circumstances. Dr Hellin considered that the entire aetiology of these challenging circumstances is better understood within 'a different paradigm' and should be considered from 'a systemic or organisational perspective'.*"

Hayden J summarised Dr Hellin's conclusions at paragraph 16:

> *"There are certain features of the system around W which make it more, rather than less, likely that problems will arise in it. First, it is a very complicated system.*
>
> *Second, the stakes are very high. Ultimately, this is about keeping a child alive and ensuring his best possible quality of life.*
>
> *Third, commissioners face what many would consider to be impossible decisions about resource allocation.*
>
> *Fourth, care work is intrinsically stressful, and the pressures on health professionals and care staff have been vastly increased by the Covid-19 pandemic.*
>
> *These factors all affect the emotional climate of the system around W and the relationships between those components of the system.*
>
> *The system around W has become sensitised and inflamed. Feelings have run high and perspectives have become polarised and entrenched.*
>
> *[M] and [F], individual professional staff and their organisations have become stuck in polarised beliefs about each other.*

It has become difficult for the parents and for professionals to respond moderately in ways that sooth rather than exacerbate the dynamic tensions between the different parts of the system.

I hope it will be apparent that this analysis does not apportion blame.

The family, commissioners and health and social care providers are all affected by the dynamic context in which they are trying to do their best.

Rather than looking to change the parents, I recommend a systemic intervention drawn from organisational psychology, psychodynamic psychotherapy, group analysis and systems theory.

The intervention would assist all agencies and the parents to understand the dynamic processes that have led to the current difficulties, to step back from mutual blame and recrimination, to establish working practices which will contain and diminish sensitivities and optimise collaboration between the different parts of the system. *(my emphasis)*

I recommend that an organisational or a systemic supervisor/consultant is employed to work with the system and facilitate systemic meetings within which the aims set out in the paragraph above would be addressed.

The involvement of the Court has radically shifted the dynamics of this system.

The involvement of their legal representatives and of the Court, a neutral authority, has diluted the emotional intensity of the polarised "them and us" dynamic which previously existed between the parents and the health/care providers."

Comment

It will be interesting to see whether this judgment is relied on by CoP practitioners, either to seek an independent psychology report in cases where there is longstanding or entrenched conflict between families and professionals, or to seek the involvement of an '*organisational or a systemic supervisor/consultant*' either instead of or alongside court proceedings. Most practitioners will be able to think of at least one case where proceedings were hugely protracted without the underlying problems being properly resolved, and this judgment may provide a template for alternative ways of approaching such cases.

Going with or against the grain of the MCA – the inherent jurisdiction overseas

AB v XS [2021] EWCOP 57 (Lieven J)

COP jurisdiction and powers – other

Summary

This case concerned XS – a 76 year old UK-Lebanese dual national – then resident in Lebanon. The applicant was her cousin AB, who wished XS to return to the UK. Lieven J had to decide whether it was in the best interests of XS, who had been diagnosed with Alzheimer's disease in 2013, to return to the UK six years after she had moved abroad to Lebanon. The

application was opposed by XS's nephews in the UK.

Habitual Residence

Lieven J firstly had to decide whether she had jurisdiction on the basis that XS was based abroad. She directed herself by reference to s.63 MCA 2005 which states:

> *"63. International protection of adults*
> *Schedule 3 –*
> *(a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (in so far as this Act does not otherwise do so), and*
> *(b) makes related provisions as to the private international law of England and Wales.*

Relevant provisions for the determination of jurisdiction in this case from Schedule 3 include:

> *7.*
> *(1) The court may exercise its function under this Act (in so far as it cannot otherwise do so) in relation to –*
> *(a) an adult habitually resident in England and Wales,*
> *(b) an adult's property in England and Wales,*
> *(c) an adult present in England and Wales or who has property there, if the matter is urgent, or*
> *(d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.* (emphasis added)

Lieven J reviewed the case-law on habitual residence (at paragraphs 22-5), and considered that the critical question was XS was now integrated into society in Lebanon (see paragraph 29). Lieven J considered that XS was habitually resident there on the basis of the evidence that:

> *28.* […] *she has now stayed for 7 years and is physically integrated into the nursing home and with the staff there. Her medical and therapeutic needs are being met in Beirut, and it has undoubtedly become her home. It is of some relevance that XS was born in Lebanon and has Lebanese citizenship, although on the facts of the case these are probably less weighty factors.*

Lieven J found that it followed that XS was habitually resident in Lebanon and, as a Court of Protection judge, she had no power under the MCA to make a return order.

The Inherent Jurisdiction

The second issue that the Lieven J had to consider in light of her conclusion above was whether she had could or should exercise her powers as a High Court judge under the inherent jurisdiction to order XS's return to the UK. In determining whether it would be appropriate to exercise the inherent jurisdiction Lieven J reviewed the case law, and in particular the decision in *Re QD (Jurisdiction: Habitual Residence)* [2019] EWCOP 56 where Cobb J declined to exercise the inherent jurisdiction in somewhat similar circumstances.

At paragraph 35, Lieven J concluded that it would be:

> *plainly inappropriate to exercise the inherent jurisdiction to make an order to return XS to England because it would cut across the statutory scheme for no*

> *principled reason. I have found that she is habitually resident in Lebanon, and therefore I cannot make an order for return under the MCA. However, the MCA has provisions in Schedule 3 for making welfare decisions in respect of incapacitated adults with an international dimension. To make such a welfare order under the inherent jurisdiction would be to cut across the carefully crafted statutory scheme applicable to precisely people in XS's situation, and as such would be a misuse of the inherent jurisdiction.*

Lieven J accepted that the nature of the inherent jurisdiction that meant that each case always needed to be considered on its own particular facts, and the court must always retain a element of flexibility. However, in this instance, she was clear that "*this case falls quite clearly on the wrong side of the line in relation to cutting across a statutory scheme"* (paragraph 37).

Best Interests

Although, strictly, she did not need to do so in light of her conclusions above, Lieven J analysed, separately, whether it would be in XS's best interests to return to England and Wales. She noted that the evidence from the specialist geriatric psychiatrist showed that XS was very frail, was in the advanced stages of dementia and could die at any time. She also considered (paragraph 39) that XS was familiar with her environment and carers in Lebanon with the resulting risk that to bring her to the UK would be "*extremely disruptive"*. The limits of the benefits of any such move were set out at paragraph 40 – with the evidence suggesting that "*she will be wholly unaware of the fact that she has moved to England and will not know either the Applicant or any of the other people she knew in England."*

In conclusion, and in finding it would not be in XS's best interests to return to the UK, Lieven J stated as follows:

> *Taking all these factors together, my view is that XS's best interests are served by her remaining in Lebanon and spending her days there. In reaching this conclusion I fully take into account the strong views of the Applicant and GH that XS would have wished to return to the UK. However, I have to judge the situation as it is now, and what is in XS's interests now.*

Comment

The case shows that a clear justification is required for cutting across the statutory regime of the Mental Capacity Act 2005 by invoking the inherent jurisdiction. It is perhaps of note that Lieven J felt it necessary to give specific – independent – consideration to XS's best interests notwithstanding the fact that she had reached a conclusion that she would not intervene on jurisdictional grounds. Even though not referred to the judgment, Lieven J was no doubt aware that Peter Jackson J (as he was then was) had accepted in *Re Clarke* [2016] EWCOP 46 that the High Court's nationality-based inherent jurisdiction existed in relation to those lacking the relevant decision-making capacity. Further, given her conclusions as to XR's habitual residence, it must logically have been the position that all of the previous directions in the case (for instance the instruction of the geriatric psychiatrist) were made under the High Court's inherent jurisdiction. There is, perhaps, no disconnect,

though: directions made to enable examination of the position and informing the court of the position were not cutting across the grain of the MCA; in XR's case, Lieven J considered that granting substantive relief requiring her return would be a step too far. The position might have been different, however, if Lieven J had been persuaded that XR's best interests in fact dictated a return home – at that point, it would be logical to see the use of the inherent jurisdiction as plugging a protection gap.

Experts in the Family Court

The President of the Family Division has published a brief memorandum that it is likely to be of assistance by analogy in the context of proceedings before the Court of Protection, given the alignment between the statutory tests applied in the two jurisdictions.

It repeats the reminder that experts should only be instructed when to do so is 'necessary' to assist the court in resolving issues justly. In summary, the memorandum provides as follows.

Admissibility: The court will consider whether the expert evidence is admissible, following the guidance of Lord Reed PSC in the Supreme Court in *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6.

Scope of expert evidence: Experts may offer evidence of both opinion and fact, including 'drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom they work.'

Governing criteria: 'There are four criteria which govern the admissibility of opinion evidence of an expert'….:

> *(i) whether the proposed expert evidence will assist the court in its task;*
> *(ii) whether the witness has the necessary knowledge and experience;*
> *(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and*
> *(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.*

Assisting the court: 'If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.'

The expert's knowledge and expertise: 'The expert must demonstrate to the court that he or she has the relevant knowledge and experience to give either opinion evidence, or factual evidence which is not based exclusively on personal observation or sensation.'

Impartiality: 'If a party adduces a report which on its face does not comply with the recognised duties of an expert witness to be independent and impartial, the court may exclude the evidence as inadmissible.'

Reliable body of knowledge or experience: The court will be easily satisfied of the reliability of the relevant body of knowledge where the expert is providing evidence in a recognised scientific discipline; *'[t]here is more difficulty where the*

science or body of knowledge is not widely recognised. The court will refuse to authorise or admit the evidence of an expert whose methodology is not based on any established body of knowledge.'

Necessity: Expert evidence 'will only be "necessary" where it is demanded by the contested issues rather than being merely reasonable, desirable or of assistance…This requirement sets a higher threshold than the standard of "assisting the court" set out above.

It should be noted that this requirement does not extend to proceedings under the High Court's inherent jurisdiction concerning a vulnerable but capacitous adult.'

To avoid delay, 'courts should continue to consider each application for expert instruction with care so that an application is granted only when it is necessary to do so.'

Duties to the Court and Professional Standards: The duties of an expert to a court 'include requirements to have been active in the area of work; to have sufficient experience of the issues; to have familiarity with the breadth of current practice or opinion; and if their professional practice is regulated by a UK statutory body…that they are in possession of a current licence, are up to date with CPD and have received appropriate training on the role of an expert in the family courts.'

Separate guidance exists for psychologists acting as experts.

Editors and contributors

Alex Ruck Keene: alex.ruckkeene@39essex.com

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 and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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.

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 December. 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