



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 Sullivan
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Reduction in guardians’ remuneration “off the table” 2

World Congress on Adult Capacity reminder 4

Reduction in guardians’ remuneration “off the table”

A predictable furore followed the publication in the October 2021 Journal of the Law Society of Scotland, under the “OPG: Update” item, of an immediate reduction in remuneration of professional guardians obliged to charge VAT on their rates of remuneration, by an amount equivalent to the VAT chargeable. The intimation was in the following terms:

“Professional guardians are asked to note that VAT should not be added to remuneration. Remuneration is calculated by OPG on the approval of an account and the amount set is the total amount that can be taken from the adult’s estate.

For accounts submitted from 1 November 2021 onwards, professional guardians charging VAT on their goods and services must take VAT from the total amount awarded.”

That intimation appeared without consultation or warning, and notwithstanding the existence of the professional guardians scheme was not intimated to professional guardians. Remarkably, it would have applied retrospectively to work already done from the beginning of the current accounting year onwards, and indeed would have applied to

remuneration for appointments already accepted on the basis of the previous arrangements for remuneration. Several financial guardians have reported that before accepting current appointments, and indeed in many cases long before, they had been explicitly advised by OPG that they should charge VAT on top of the allowed remuneration, and hitherto had always done so. Remuneration is allowed by OPG on a scale related to the value of the estate. Reducing remuneration by the amount of VAT would have reduced guardians’ annual remuneration on first accounts by up to £4,167 and on subsequent accounts up to £3,750. Any professional guardians not registered for VAT would not have been affected, but for all others their remuneration would not only have been reduced as stated, but it would by those amounts have been less than the remuneration for lay guardians doing the same work.

Many professional guardians have already reported that they were already considering whether it was economical for them to continue providing the service that they offered even at the previous rates, and because they already felt that the service that they provided was not valued, the latter impression having of course been greatly exacerbated by the proposed imposition of these reductions in remuneration without either consultation or direct intimation

and explanation to the professional guardians affected.

The consternation resulting from this move appears to have been even greater among some local authorities than among professional guardians themselves. Professional guardians can opt to do other work. Local authorities, however, effectively have no practicable option but to engage professional guardians in the cases where they are obliged under section 57(2) of the Adults with Incapacity (Scotland) Act 2000 to apply for an appointment with financial powers (whether or not welfare powers are also required). It is reported that their only source of suitable financial guardians for this purpose is known and trusted guardians operating under the professional guardians scheme.

Following upon representations made direct to the Public Guardian, she reported (by email to this writer) on 12th November 16.42 that she had that afternoon received formal legal advice which she stated to be lengthy and requiring her further consideration, but she intimated that: "I am however happy to concede that the proposed changes are now off the table".

Meantime, so far as this writer can see, whether to change rates of remuneration or to introduce differential effective remuneration on the basis of VAT status or otherwise is a matter of policy for the Public Guardian, not a matter of law, except for the constraints expressed in the leading case on relevant matters reported in GWD as *X's Guardian, Applicant*, 2010 GWD 32-654 and identified in the judgment available [here](#) by the case references of two conjoined cases (from different sheriffdoms) and the title "Remuneration of a financial guardian under

section 68 of the Adults with Incapacity (Scotland) Act 2000". The report at the link is the scotcourts report, which lacks the paragraph numbering which appeared in the original judgment and which is included in the replication of the judgment on Westlaw. At paragraph 41 of the judgment (for those who have access to the numbering) Sheriff Baird said that:

"No professional person would be willing to take on such an appointment unless he or she would be adequately remunerated for so doing, but it is vital that there exists a pool of suitably qualified people who are available to act in these cases."

In paragraph 47, in the context of the facts of that case, he commented that:

"... the Public Guardian is demonstrating a willingness to remunerate financial guardians appropriately, and the benefit to the adult's estate is that an appropriately qualified person continues in office as guardian."

Of principal relevance to the proposal to reduce remuneration even in relation to appointments as guardian already accepted are the comments of Sheriff Baird in relation to legitimate expectation. He narrated that it had been submitted to him that:

"... if a guardian did not have a legitimate expectation that he would be properly remunerated for doing this required work, appropriate persons would not be prepared to do it at all." (paragraph 58)

He concluded that:

"As to the reasonable expectation argument, it is clear that this applies to

the principal way in which a financial guardian is remunerated, because such a person knows that payment will be made on the basis of a percentage commission, and will therefore know the probable amount actually to be paid."

If the Public Guardian had opted to continue with her original proposal, reducing the effective remuneration of VAT registered professional guardians not only in relation to future appointments, but in relation to existing appointments, she would have to have been aware that on the basis of existing case law her action would be likely to have been challengeable by judicial review by any guardians holding existing appointments on the basis of the remuneration applicable when they accepted those appointments.

If "off the table" means that there will be no further repetitions of similar incidents, the task will still remain of retrieving the damage done, and if possible preventing or mitigating any substantial reduction in the pool of trusted and experienced professional guardians available to meet needs for their services, particularly where responsibility to meet those needs rests with local authorities, and to avoid an outcome which would appear effectively to amount to disability discrimination.

The last word on this can rest with the initial reaction of an experienced professional guardian to finding the original announcement:

"I am totally shocked at the way this has been done without any warning. We take on guardianships on the basis of the published rates. I really feel I go above and beyond for clients. A couple I deal with pro bono as they have no money to

spare. During lockdown I've arranged funerals, taken adult's relatives to funerals, delivered groceries, sat with a dying client, collected prescriptions, sorted GP appointments etc. The reason most have a professional guardian is they have no one else other than a few committed social workers. We wait months and months for remuneration as the OPG are so slow – their own fees are often disproportionate to the work involved. It seems the only way to run these now is an absolute bare minimum approach?"

Adrian D Ward

World Congress on Adult Capacity reminder

A reminder that the abstract submission deadline for the 7th World Congress on Adult Capacity is fast approaching and if you would like to submit an abstract, you have until Tuesday 7th December 2021 to do so. The Congress is to be held from Tuesday 7th to Thursday 9th June 2022 in Edinburgh.

Prospective authors for both papers and posters are invited to submit a title and a maximum 200 word abstract under the following topics:

- Achieving respect for the adult's rights, will and preferences
- Monitoring, regulation, remedies and enforcement
- Law, policy and practice review and reform
- Rights, ethics and the law during national emergencies
- The adult and research

Further information about each of the topics listed can be viewed on the Congress [website](#).

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](https://www.39essex.com) • [39essex.com](https://www.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

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[For all our mental capacity resources, click here](#)