



Welcome to the October 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: serious medical treatment cases and the involvement of the CoP, family members and Rule 3A and DoLS before the European Court of Human Rights;

(2) In the Property and Affairs Report: financial abuse at home and tools to combat financial scamming;

(2) In the Practice and Procedure Report: a transparency update, a guest article on welfare cases in practice before the CoP and a problematic case on capacity thresholds and the inherent jurisdiction;

(3) In the Wider Context Report: the LGO and the MCA 2005, an update on the assisted dying challenge, the Mental Health Act review and guidance for enabling serious ill people to travel;

(4) In the Scotland Report: the Scottish Public Guardian on powers of attorney problems and a sideways judicial look at the meaning of support.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

We also take this opportunity to welcome Katie Scott to the editorial team!

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
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

Financial Conduct Authority Proposes Online LPAs	2
Vulnerable individuals and their money – at risk of abuse in their own homes?	2
Financial scamming resources	3

Financial Conduct Authority Proposes Online LPAs

On 21 September the Telegraph reported on the FCAs paper concerning improving financial services for the elderly, Occasional Paper 31 Ageing Population and Financial Services. The paper concentrates on the financial services industry but in a section headed “Improving the consumer journey around third party access” we find the following suggestion:

“This could include development of a secure, end-to-end digital LPA registration system and database that is fit for purpose now and as LPA numbers continue to grow supported by an appropriate arrangement to facilitate paperbased alternatives for those reliant on them.”

Not everyone is so keen on this idea as the Telegraph’s article relates. The concern is that the requirement of a paper application with a “wet” signature is a valuable deterrent to fraud.

This issue is of particular interest given Denzil Lush’s recently reported views on the lax supervision of LPAs generally. The difficulty we face, though, is the ever-increasing numbers of people who may need an LPA and, in this instance, the increasing expectation that the

process, like so many others, can be accessed exclusively online.

Vulnerable individuals and their money – at risk of abuse in their own homes?

[We are very pleased to be able to publish this guest article by Dr Gillian Dalley, Visiting Research Fellow, Brunel University, and lead author of an important report: Financial Abuse of People Lacking Mental Capacity]

Recent research has begun to shine light on an under-investigated aspect of family life: the financial abuse of people lacking mental capacity. In a project funded by the Dawes Trust, a team from Brunel University has been searching widely for data on this difficult subject. Their search ranges from nationally-collected safeguarding statistics produced by local authorities, to the experiences of health, social work and legal professionals working in councils, the law, financial institutions and the voluntary sector, and finally to cases heard in the Court of Protection, by way of the OPG. All in all, it reveals an extent of intra-family financial abuse that some might find disturbing.

Many of the findings are clear and well-founded: analysis of safeguarding referrals shows that financial abuse is the third most commonly reported form of abuse (after neglect and physical abuse); over 40% of abuse is committed

within the domestic setting, and at least half of it is committed by people known to the victim, often from within the family. A fair proportion of the subjects in these referrals were assessed as lacking capacity (over two thirds, in the case study undertaken of one London borough). Anecdotal accounts from professionals describe the sorts of financial abuse they encounter in the course of their daily work, and analysis of 34 cases heard by the Court of Protection provides both an in-depth – and sobering – illustration of the extent of financial abuse experienced by vulnerable individuals. It also identifies ‘suspicion triggers’ – crucial indicators of such abuse possibly occurring within families.

But data sources are also scarce and scattered. Questions remain: are the subjects of safeguarding referrals to councils ever – or never – the same individuals who are the donors of LPAs in cases heard by the Court of Protection? Is there one system of protection for poor individuals lacking mental capacity and another for those with more substantial financial and material assets? Is the OPG a protective bridgehead for both, or neither?

A significant problem widely acknowledged by professionals (police, lawyers, social workers) stands out – the difficulty of bringing perpetrators to book, often revolving round the question of evidential proof and the different standards required by the civil and criminal justice systems. Family members with LPAs are, too often, insufficiently cognisant of their duties and obligations towards the donor. Even when cases reach the public domain, chances of redress and restitution are rare. Victims may be unaware of the abuse and, often, may have died.

Inter-professional differences exist, abstract as much as practice-related – usually between social work and the law. Dichotomies, apparent in other areas of theory and practice governed by the Mental Capacity Act 2005, arise here, too: between notions of safeguarding and autonomy; protection and risk-taking. What place for “unwise decisions”, “undue influence” and “best interests”? The debate carries on.

Dr Gillian Dalley,
Visiting Research Fellow,
Brunel University
gdalley@btopenworld.com

Financial scamming resources

The indefatigable team at Bournemouth University led by Keith Brown has recently added to their extensive range of materials relating to financial (including cyber) scamming in relation to vulnerable adults. These include a financial scamming [resource page](#), a booklet on [scamming, definitions](#), and specific materials relating to [cyber-scamming](#).

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. 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](#).

**Victoria Butler-Cole:** 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 contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), 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 human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click [here](#).

**Annabel Lee:** annabel.lee@39essex.com

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. She sits on the London Committee of the Court of Protection Practitioners Association. 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 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).

Editors and Contributors

**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, and is chair of the London Group of the Court of Protection Practitioners Association. To view 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](#).

**Adrian Ward:** adw@tcyoung.co.uk

Adrian is a Scottish solicitor and a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *"the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,"* he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click [here](#).

**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, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. 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

Conferences at which editors/contributors are speaking

Adults with Incapacity: the Future is Now

Adrian is speaking at this half-day LSA conference on 18 October in Glasgow. For more details, and to book, see [here](#).

'Taking Stock'

Neil is chairing and speaking at the 2017 Annual 'Taking Stock' Conference in Manchester on 19 October. For more details, and to book, see [here](#).

International Congress on Vulnerabilities, Law and Rights

Adrian is speaking on 7 November 2017 at the International Congress on Vulnerabilities, Law and Rights, in Coimbra, Portugal, organised by Coimbra University. For more details, see [here](#).

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see [here](#).

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 8 December which looks both at the present and potential future state of the law in this area. For more details, 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 Report will be out in November. 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.

Michael Kaplan

Senior Clerk

michael.kaplan@39essex.com**Sheraton Doyle**

Senior Practice Manager

sheraton.doyle@39essex.com**Peter Campbell**

Senior Practice Manager

peter.campbell@39essex.com

International
Arbitration Chambers
of the Year 2014
Legal 500



Environment &
Planning
Chambers
of the Year 2015

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

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 OC360005) 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.