



Welcome to the October 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, the CRPD in the Court of Protection and spotting the signs of abuse;

(2) In the Property and Affairs Report: two important cases about deputies and fixed costs and how to get financial deputyship applications right;

(3) In the Practice and Procedure Report: s.21A applications and interim declarations; the limits of the court's jurisdiction; contempt proceedings and when not to recognise a foreign order;

(4) In the Wider Context Report: new GMC consent guidance, Sir James Munby returns to the inherent jurisdiction, new CQC publications and relevant ECHR developments;

(5) In the Scotland Report: a new Chief Executive for the Mental Welfare Commission, MWC publications, and what COVID-19 has revealed about ageism and disability discrimination.

We thank Katherine Barnes for all her contributions to date, and wish her well as she steps down to focus her activities on other areas; we welcome Rachel Sullivan and Stephanie David as new contributors.

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. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [here](#), and Neil a page [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

### Editors

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

Updated DHSC MCA/DoLS Emergency Guidance ..... 2

The CPRD in the Court of Protection..... 3

Short note: spotting abuse..... 4

DNACPR notices – the danger signs..... 6

### Updated DHSC MCA/DoLS Emergency Guidance

The DHSC’s MCA/DoLS [guidance](#) has been further updated on 15 October, not least to make clear the circumstances under which face-to-face visits for DoLS assessment (and support purposes, by RPRs and IMCAs) should be taking place under the new tiered alert system. Alex has done a walkthrough of the guidance, available [here](#).

In this context, we note also the [letter](#) from Hayden J published on 15 October relating to visiting restrictions under the new tiered arrangements in force from 17 October. The letter, directed in the first instances to other judges of the Court of Protection, but published on an open basis, identifies that:

*Of particular concern to us, in the Court of Protection, is the impact the present arrangements may have on elderly people living in Care Homes. The extent to which this group has suffered during the course of the pandemic public health crisis is well known and documented. One of the limited number of positives, is that it was possible to establish*

*pragmatic and imaginative arrangements for contact with relatives during the course of what we have come to know as ‘Lockdown.’ This became known as ‘window contact’, though that phrase did not always do justice to the safe and creative measures devised. As restrictions were relaxed over the summer, contact arrangements also became much more flexible within the Care Homes.*

The letter then goes on to note that, even in Tier 3 – “very high” – level of restrictions:<sup>1</sup>

*This provision **permits** contact with relatives ‘staying’ in Care Homes, under the same arrangements presently assessed as Covid-19 compliant. It will undoubtedly be the case that the actual arrangements will have to be tailored to the particular individual and the circumstances within the home, during the course of what we have now recognised to be the second wave of the pandemic. What is important to emphasise is that these arrangements have been identified within the Regulations made by the Secretary of*

<sup>1</sup> These are discussed in this [post](#) by Alex.

*State and are therefore lawful.*  
(emphasis added)

## The CPRD in the Court of Protection

*Cornwall Council v NP and BKP* [2020] EWCOP 44  
(DJ Ian Taylor)

*Article 5 – DoLS authorisations – Article 8 – residence*

### Summary

These reconstituted s.21A MCA proceedings concerned a 69-year-old man who, married for 35 years, collapsed in the marital home and was hospitalised with diagnoses of neurological sequelae of herpesviral encephalitis and personality change. With incapacity not in dispute, the issue was whether it was in his best interests to be discharged a neuro-rehabilitation unit to a care home or the family home with a care package. He wanted to go home and, if he had capacity, it was likely that he would decide to do so.

At the hearing, the local authority no longer opposed a trial return home but had significant reservations about its sustainability and risks involved. NP's behavioural volatility could lead to unpredictable physical aggression and there were concerns for his wife as primary carer. But she was able and willing to meet his needs. Due to the pandemic, she had not been able to see him for six months. She said: "*Give [NP] and I time together, some of which would be private, which I believe would be overall good for both our mental health*" and "*enable us to have privacy of our relationship, a hug, a kiss goodnight and experience most of the lucid moments he has together.*"

In reaching its best interests decision, the court

took account of Article 19 CRPD, which provides the right to live in the community with choices equal to others. Consideration was also given to General Comment No.5 of the United Nation's CRPD Committee on institutions. Unsurprisingly, the court ordered that it was in NP's best interests to return home for a trial period of 3 weeks, with the care home bed kept open as a contingency.

### Comment

This decision is of interest in two particular respects. First, although arguments are often made on Article 19 CRPD, rarely do they then feature in a judgment. Secondly, on the nature of s.21A MCA proceedings, the judge rightly states:

*17. Once an application is made under section 21A, the court's powers are not confined simply to determining the question of whether P meets one or more of the qualifying requirements and the court has the power to make declarations under section 15 as to whether P lacks capacity to make any decision, and once such a declaration is made, the court has wide powers under section 16 to make decisions on P's behalf concerning his personal welfare or property and affairs (CC v KK [2012] EWHC 2136 (COP), Baker J at para 16, PH v A Local Authority [2011] EWHC 1704 (Fam), Baker J at para 15).*

This can be contrasted with para 38 of the *DP v Hillingdon* [2020] EWCOP 45 decision (discussed in the Practice and Procedure section) which refers to the "*discrete scope and ambit of a Section 21A application.*" Section 21A MCA provides that the court "may" determine any question relating to the four matters there referred to. As described by Baker J (as he then was), we suggest the s.21A power to consider those

questions are additional to, not discrete from, the court's general jurisdiction under MCA ss.15-16. In other words, the court is not precluded in a s.21A application from considering issues arising beyond the scope of the four matters identified in s.21A. To do otherwise would result in P losing non-means tested legal aid and require separate applications to be made for non-s.21A matters which would offend the overriding objective and result in litigious compartmentalisation.

### Short note: spotting abuse

In *Re LW* [2020] EWCOP 50, Hayden J was concerned with a 60-year-old woman, LW. She had been admitted to a specialist unit, initially detained under the MHA 1983, in a "truly parlous condition." She had then stayed in the unit for nearly 3 years, although the professional consensus had been for many months that it was not the right place for her. The professionals involved were seeking to identify the right way forward, in circumstances where the central challenge was that she had

5. [...] formed a relationship with a man, known as MG, whom she described to me as her "long term partner." It is important to say that even the most cursory analysis of the extensive evidence available points clearly to this relationship as being abusive, exploitative, coercive and wholly inimical to LW's welfare. As I have read the papers and heard the evidence, I have wondered how this has been permitted to continue for as long as it has. On a rational and objective analysis, LW derives nothing from this relationship at all. She expresses a strong wish for it to continue, though her behaviour often indicates that the relationship is stressful and

*disturbing to her. For reasons that I will identify below this relationship is corrosive of her welfare and significantly impedes her capacity to enjoy life which has been identified, historically, as intrinsic to her personality. I consider that some of MG's behaviour has a sadistic component to it.*

It was clear from the facts before the court that only a cessation of contact with MG would assist in terms of progressing LW's departure from the unit and her – slow – move towards independent living. As Hayden J noted:

13. [...] *It is the influence that MG asserts over LW's fragile personality that compromises her capacity to weigh and evaluate the questions relating to her care and where she should live. This is compounded by her inability to understand her own mental health needs. All this had led Dr N ultimately to come to the conclusion that LW lacks capacity to take key decisions. That is a conclusion with which everyone agrees. It is perhaps important to mention that in her earlier report Dr N had expressed herself more cautiously in relation to LW's capacity. This is because on so many levels LW is able to communicate her views eloquently and articulately. She is a charming lady who inspires affection. This was obvious even in the glimpse that I had of her with those caring for her. To some degree this masks the more pervasive factors Dr N has identified. In any event, I am entirely satisfied that she lacks capacity to take the interrelated decisions relating to contact with MG, where she should live and the nature and extent of the care she requires.*

Hayden J therefore set out the planning process thereafter, including as to how bring about MG's

eviction from LW's property. He emphasised that this was a:

*14. [...] sensitive situation. The pace of progress will very much depend on LW's reaction to this judgment. The timescales that Dr N indicated must not be regarded as "set in stone," progress must be at LW's own pace. It is LW's needs that should drive the timetable not the exigencies of the litigation.*

*15. What is envisaged is an order permitting the parties to return to court to submit a finalised care plan. I have no doubt the plan is contrary to LW's expressed "wishes." Whether it is contrary to her "feelings" though, remains to be seen.*

*16. Mr Hallin, acting for the NHS Social Care Partnership Trust, observes that neither the Official Solicitor nor the Court lightly goes against the clear and consistently expressed wishes and feelings of an incapacitated person, but here, were I to permit her to return to her flat with MG, I would be exposing her to a regime of insidious controlling and abusive behaviour which is both corrosive of her personal autonomy and entirely irreconcilable with her best interests.*

Hayden J also took the opportunity to highlight both the insidious nature of controlling and coercive behaviour and the extreme vulnerability of those lacking mental capacity in facets of their decision making. He drew attention to the definition of domestic violence abuse first published in 2012, as well as the [Statutory Guidance](#) pursuant to s.77(1) Serious Crime Act 2015, emphasising those features seen with

some frequency by those concerned with the welfare of vulnerable adults:

- **Isolating a person from their friends and family**
- **Depriving them of their basic needs**
- Monitoring their time
- Monitoring a person via online communication tools or using spyware
- **Taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep**
- Depriving them access to support services, such as specialist support or medical services
- Repeatedly putting them down such as telling them they are worthless
- **Enforcing rules and activity which humiliate, degrade or dehumanise the victim**
- Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities
- **Financial abuse including control of finances, such as only allowing a person a punitive allowance**
- Control ability to go to school or place of study
- Taking wages, benefits or allowances
- Threats to hurt or kill
- Threats to harm a child
- Threats to reveal or publish private information (e.g. threatening to 'out' someone)
- Threats to hurt or physically harming a family pet
- Assault
- **Criminal damage (such as destruction of household goods)**
- Preventing a person from having access to transport or from working

- Preventing a person from being able to attend school, college or University
- Family 'dishonour'
- Reputational damage
- Disclosure of sexual orientation
- Disclosure of HIV status or other medical condition without consent
- **Limiting access to family, friends and finances**

At paragraph 22, Hayden J emphasised that the list was not exhaustive:

*It does not, for example, include controlling intake of food and nutrition, which was such a striking facet of the evidence here. Abusive behaviour of this kind will often be tailored to the individual circumstances of those involved. The above is no more than a check list which should prompt questioning and enquiry, the responses to which should be carefully recorded so that the wider picture emerges. That which might, in isolation, appear innocuous or insignificant may in the context of a wider evidential picture be more accurately understood.*

### DNACPR notices – the danger signs

Solicitors working with clients in the Court of Protection working with clients in the Court of Protection would be well-advised to read the [quest post](#) on Alex's website written by Richard Charlton and Bharati Gidoomal, two very experienced Court of Protection solicitors, who set out the issues that their firm have been encountering as regards DNACPR notices, and also practical steps that solicitors should be taking in welfare cases in which they are instructed to make sure that they have identified potential danger signs.

---

## Editors and Contributors



**Alex Ruck Keene:** [alex.ruckkeene@39essex.com](mailto: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 Visiting Professor at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).



**Victoria Butler-Cole QC:** [vb@39essex.com](mailto: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), 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](mailto: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](http://www.lpslaw.co.uk). To view full CV click [here](#).



**Annabel Lee:** [annabel.lee@39essex.com](mailto: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. To view full CV click [here](#).



**Nicola Kohn:** [nicola.kohn@39essex.com](mailto: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 5<sup>th</sup> 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](mailto: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](mailto: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](mailto: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](#).

**Simon Edwards: [simon.edwards@39essex.com](mailto: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](mailto: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](mailto: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](#).

Jill Stavert's Centre for Mental Health and Capacity Law (Edinburgh Napier University)'s Autumn 2020/January 2021 webinar series will include contributions by Adrian Ward on 11 November at a webinar about Advance Care Planning: advance care and treatment planning, end of life, COVID-19, and by Alex on 2 December 2020 at a webinar about Psychiatric Advance Statements. Attendance is free but registration via Eventbrite is required. 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 edition 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](mailto:marketing@39essex.com).

**Sheraton Doyle**  
 Senior Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

**Peter Campbell**  
 Senior Practice Manager  
[peter.campbell@39essex.com](mailto: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](mailto: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](#)