MENTAL CAPACITY REPORT:
THE WIDER CONTEXT
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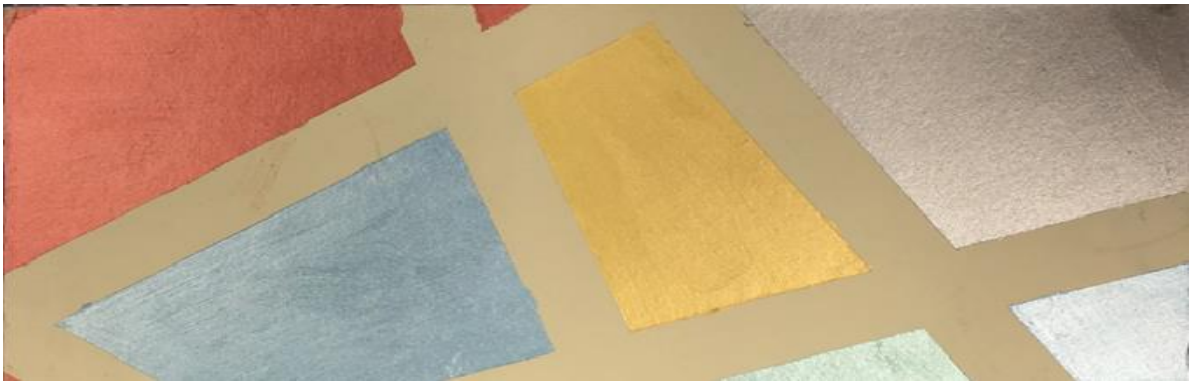

Welcome to the October 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Capacity to make decisions regarding hoarding, parental consent for deprivations of liberty, and Article 2 and informed consent.

(2) In the Property and Affairs Report: A new guidance notes on selling properties;

(3) In the Practice and Procedure Report: The Court of Appeal weighs in on the test for injunctions in the Court of Protection, and a new Civil Justice Council working group considers litigation capacity in civil proceedings;

(4) In the Wider Context Report: Withdrawal of treatment; jurisdiction of the Ombudsman; mental capacity and Article 14 status; and 'Shedinars' galore.

(5) In the Scotland Report: An update on the Mental Health Law Review.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also subscribe to this Report, and where you can also find updated versions of both our capacity and best interests guides.

Editors
Victoria Butler-Cole KC
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 autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Withdrawal of treatment

Guy's And St Thomas' NHS Foundation Trust v A & Ors [2022] EWHC 2422 (Fam) (28 September 2022) (Poole J)[1]

Medical treatment – treatment withdrawal

Summary

Following *Re: A (Withdrawal of Treatment: Legal Representation)* [2022] EWCA Civ 1221, a second full hearing was held in the of the tragic case of baby 'A' who at the age of 9 weeks had been found floppy and unresponsive at home. By the time the paramedics had arrived he was in cardiac arrest. He was admitted to ICU and provided with mechanical ventilation after suffering a catastrophic brain injury.

Brain stem testing was performed on 17 to 19 June 2022 and death was declared on 19 June 2022. Baby A's parents did not consent to the discontinuance of mechanical ventilation and so the matter was brought before the Court. The first trial was heard by Hayden J. This judgment was overturned by the Court of Appeal and the summary can be found here. The matter was listed back in the Family Division of the High Court and came before Mr Justice Poole.

The Judge identified three unusual features of the case:

(i) First that A had been found in June 2022 to have met the tests for brain stem death but in early July 2022 he started to breathe intermittently. The tests for brain stem death were from that time therefore no longer met but had the court determined the Trust's initial application on the evidence available before 1 July 2022, it may well have declared that A was dead.

(ii) Secondly that legal proceedings had been protracted by the amendment of

[1] Tor and Arianna having appeared in this matter, they have not contributed to this note.

the application (arising from the fact that Baby A no longer met the tests for stem death) and then the appeal.

(iii) Thirdly, that investigations into A's injuries had raised concerns that they may have been inflicted non-accidentally.

After a careful and detailed consideration of both the factual evidence, the expert evidence and the legal framework, the Judge concluded that baby A had suffered a catastrophic brain injury which had resulted in an irreversible loss of a significant amount of brain tissue; that there was no detectable electrical activity in his brain; that MRI scans showed the devastating extent of his brain damage; and that it was virtually certain that he would not recover consciousness. The court therefore concluded that treatment was futile in the sense that it would not bring about any improvement in baby A's condition and would not bring about a return to consciousness. The Judge however went on to carry out a best interest assessment, concluding (with little hesitation), that the burdens outweighed the benefits of his current life. The Judge therefore concluded that it was not in baby A's best interests to continue receiving mechanical ventilation.

Comment

One of the interesting parts of this judgment is the path taken by the Judge in relation to findings of fact about whether baby A experienced pain, or whether '*to avoid a binary determination and to carry forward both the probability that A does not feel pain and the possibility that he does feel pain into the best interests assessment*.' [para 62] What the Judge did, was to (a) make a finding of fact on the balance of probabilities that Baby A '*has no awareness of pain or discomfort*' [para 64] and (b) resist the calls to determine on the balance of probabilities (on the basis that such a finding was 'not necessary') whether or not baby A had a reflex response to pain. Instead the Judge found was that some vestigial reflex responses to pain or discomfort, for example, when suctioning takes place could not be excluded. He proceeded on the basis that it was legitimate for the court *'to feed possibilities as well as probabilities into a best interests assessment'* feeding into the best interest assessment of baby A's situation, a finding of fact that baby A had *'no conscious awareness of pain (on the balance of probabilities) but may have a vestigial reflex response to pain.'* [para 65] This led the Judge to take the burdens of treatment into account *'even though they probably did not cause pain or discomfort to baby A of which he is aware.'* [para 66]

The Court's approach, that it was not necessary to make a finding of fact on the balance of probabilities regarding baby A's reflex response to pain, appears to have been predicated on the basis that there was no disputed evidence on this point – the Judge describing the weight of evidence as being at one on this issue – and that a finding was not required in order to resolve a crucial issue.

Prolonged disorders of consciousness: POSTNote

The Parliamentary Office of Science and Technology (POST) has published a short note on Prolonged Disorders of Consciousness. The brief (five page) note helpfully pulls together significant research on prolonged disorders of consciousness, treatment and rehabilitation for them, commissioning care, and summarises key legal cases concerning them.

Settling a claim in Ireland where a person has an English COP deputy

M.K. v Sacred Heart Missionary Education Trust (Approval of proposed settlement) (Approved) [2022] IEHC 500 (16 September 2022)

Summary

This Irish case concerns the approval of a settlement of a case for personal injury where the claimant lacked capacity. The claimant was 60 years old, habitually resident in England and had since 2015 been detained pursuant to the Mental Health Act 1983. In 2007, the relevant local authority had been appointed by the COP to act as deputy for his property and financial affairs.

The claimant had brought a claim for damages for personal injury arising from sexual abuse while a pupil at secondary school in 1974 and 1975. The court considered the reasonableness of the proposed settlement, noting this was to be assessed by considering what the likely outcome would have been.

In this case, the Defendants had raised limitation as a defence. The court noted that the claimant had reached his majority in 1981, and had expressed a wish to commence proceedings in relation to the alleged abuse in his early 20s: the limitation defence therefore appeared to have good prospects. On the chronology before the court, it appeared that the cause of action had accrued and limitation expired before the claimant had subsequently lost capacity. The court also noted the evidential difficulties the claimant faced. In those circumstances, where the claim was likely to fail at trial, the proposed settlement was a good outcome for the claimant.

The judgment also contains discussion of the current routes for legal proceedings to be pursued on behalf of a person who lacks capacity in Ireland, noting that the legal landscape will change once the Assisted Decision Making (Capacity) Act 2015 comes into force. One option is an application for wardship; the other, that a person acts as 'next friend'. Similarly to a litigation friend in England and Wales, the 'next friend' is personally liable for the costs of proceedings.

The court discussed the proper procedure to follow where it becomes apparent that a claimant lacks capacity to conduct the litigation once it was already live, noting that the appropriate course was to make an application to appoint a next friend backed by medical evidence. That had not happened in this case, but would have been preferable, and would have enabled consideration to be given to the interaction with the deputyship under the MCA 2005.

The judge was satisfied in this case that the approval of the settlement did not cut across any orders made by the Court of Protection: the case had been pursued without any financial risk to the claimant, and the settlement itself represented a significant benefit to the claimant. Had the claimant been admitted into wardship, that might have risked a conflict between the orders of the courts in the two jurisdictions: however, there was no necessity for such a course in this case, and indeed no obvious jurisdictional basis for doing so.

Is capacity a relevant status for Article 14?

Dudley Metropolitan Borough Council v Mailley [2022] EWHC 2328 (QB) (14 September 2022) (Cotter J)

Summary

In *Dudley Metropolitan Borough Council v Mailley* (2022) EWHC 2328 (QB) the court considered the application of Articles 8 and 14 ECHR to a possession claim and the question of whether time spent in residential care by a person lacking mental capacity should deprive a family member of their right to succeed to that property.

The Defendant, Marilyn Mailley, had lived in the property with her mother since she was 11. As the court records in the opening of its judgment, had Ms Mailley's mother died at any point between the coming into force of s.30 Housing Act 1980 (now s.87 Housing Act 1985) and moving into respite care in October 2016, Ms

Mailley would have succeeded her as tenant pursuant to s.87 of the Housing Act 1985. Alternatively, while she retained mental capacity so to do, Ms Mailley's mother could have assigned the tenancy to her.

However, her mother having lost the mental capacity to assign the tenancy and having died while in residential care, and Ms Mailley being unable to use the lasting power of attorney her mother had granted to secure the tenancy for her own sole benefit, there was no succession in tenancy. The local authority accordingly brought possession proceedings against Ms Mailley.

Considering the case in the round, including the "(overly) extensive expert evidence", the court held that the Defendant's mental health difficulties and likely anxiety and depression at the loss of her house were not of sufficient significance to weigh against granting the possession order on article 8 grounds. Noting the huge dearth of family size properties in the area and the substantial underuse of Ms Mailley's property which was significantly cluttered, the court held that eviction was a proportionate means by which the local authority might manage its very limited housing stock.

The Defendant also sought to make out a defence based on a breach of Article 14 taken with Article 8. She argued that if s.87 Housing Act 1985 (the right to succeed a secure tenant) could not be read so as to include within those entitled to succeed to a tenancy *"the members of the family of those removed by reason of their ill health who due to mental incapacity cannot assign their secure tenancies under Section 91(3) Housing Act 1985"* [165], it would be incompatible with Article 14 (taken with article 8).

The court considered whether a lack of decision-making capacity might be construed as an "other status" for the purposes of Article 14. While noting the broad remit of other status and generous interpretation in cases such as *Mathieson-v-Secretary of State for Work and Pensions* [2015] 1 WLR 3250, the court noted previous circumstances in which capacity had been dismissed as a potential status for the purposes of Article 14.

In MOC (by his litigation friend, MG)-v-Secretary of State [2022] Singh and Peter Jackson LJJ had both dismissed such an argument on the basis that capacity can change and cannot be a sound foundation for status [65]; as per Jackson LJ, that "status is likely to be found in the disability itself, and not in the separate matter of capacity" [76].

Cotter J, having analysed the case law, reached the conclusion that capacity could not form the basis of a status on grounds of which a party could make out a claim of discrimination contrary to article 2:

> *179. Mr Stark submitted that the Defendant is the potential successor of a tenant who was permanently removed from her home as a result of her ill-health and who did not have capacity to assign her tenancy to her potential successor. He argued it is not capacity alone that defines status but being the daughter of a tenant with both of those particular characteristics. As a result of that status she was treated differently than two comparators in analogous situations (a) the potential successor of a tenant who dies at home and (b) the potential successor of a tenant who is permanently removed from her home as a result of her ill-health but is capable of assigning her tenancy i.e. retains capacity to assign her tenancy to a qualifying successor*
>
> *180. Ms Caney submitted that the contention must be that the Defendant is discriminated against on the ground of her 'status' as a member of the family of a tenant who had ceased to have mental capacity to be able to assign their tenancy. Otherwise there would be no difficulty in succession. So the Defendant's argument*

relies upon the capacity of a third party as the essential defining characteristic.

181. *Section 1(2) of the Mental Capacity Act 2005 provides that a person must be assumed to have capacity unless it is established that he/she lacks it. Section 2(1) provides that:*

> *"For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain." (Underlining added)*

Section 2(2) provides that it does not matter whether the impairment or disturbance is permanent or temporary. People do lose and regain issue specific capacity.

183. *Assuming status can be identifiable solely through the circumstances of others a characteristic is still required, which must be something more than being identified through the discrimination. As held in MOC an individual's own capacity is not a sufficient status for the purposes of Article 14. Status requires a characteristic which has the quality of reasonable certainty a fortiori when considering discrimination which concerns an ability to make a permanent change i.e. assign a tenancy. The main determinant of impaired capacity is cognition and any condition affecting cognition can affect capacity. For example, capacity can be impaired in head injury, psychiatric diseases, delirium, depression, and dementia. All can have varying impact on the functioning of, the mind or brain and mental capacity can change over the short and long term. I cannot accept Mr Stark's submission as it would mean that status for can rest on shifting sands. Whereas death is a certainty both in terms of inevitability and timing (i.e. when it occurred), capacity may be lost and gained and the material time may be down to a chance occurrence e.g. a temporary deterioration in symptoms, or manipulated, for instance by a relative who wished to delay the assessment until they had lived in the property with the tenant for the qualifying period of 12 months.*

184. *Mr Stark argued that there need not be uncertainty as the assessment of capacity could be at an identifiable point in time; the point at which a person permanently ceased to reside at the property. However this ignores the ability to regain capacity and in any event itself begs a question and introduces yet further uncertainty. It is in no way an answer to say that the issue could be determined ex post facto.*

185. *The lack of certainty also has practical significance. Mr Stark could not adequately address the obvious problem of what happens if a person does regain capacity and does not wish to assign and/or decides to return to the property. Unless a notice to quit had been served, and the relevant time period expired, the tenant could resume occupation even if the relevant property had for a period of time ceased to be their principal place of residence. There could be direct conflict with a relative who wishes to succeed to the tenancy (who may not want/agree with the tenant's return to the property). Given the advances in old age care and increased number of people who have temporary or respite care the potential for problems would be very real.*

186. *In my judgment identification through the incapacity of a third party cannot be sufficiently certain to provide status for an Article 14 claim.*

Comment

While this conclusion is arguably inevitable given the conclusion of Singh and Peter Jackson LJJ in *MOC*, it still seems somewhat surprising given the previously broad and generous ambit of "other status" in both Strasbourg and domestic case law. We cannot help but wonder whether, if argued on different bases and with more helpful facts, a claim based on lack of capacity as a status – particularly in circumstances where the status is manifestly unlikely to change – might succeed. It seems otherwise odd that a condition as immutable as "homelessness" or past employment with the KGB (see *RJM* [2009] 1 AC 311 [5]) might be considered sufficiently immutable to be construed as a status whilst an absence of decision-making capacity is not.

Jurisdiction of the Ombudsman

R(Milburn) v The Local Government and Social Care Ombudsman [2022] EWHC 1777 (Admin) (06 July 2022)(HHJ Sephton QC sitting as a High Court Judge)

Summary

The claimant, Mr Milburn, brought a judicial review against a decision by the Ombudsman that he did not have jurisdiction to investigate complaints Mr Milburn had made regarding Oldham Metropolitan Borough Council.

Mr Milburn was a young person in education who had an Education, Health and Care Plan (EHCP). He did not wish to attend a college and wished to have *'a bespoke package of education which included funding for relationship development intervention programmes designed to address his tendency to ruminate.'* [para 3] The Council declined this request, and Mr Milburn appealed to the SEND Tribunal, which allowed his appeal.

Mr Milburn went on to make a complaint regarding his treatment by the Council, alleging that *'they withheld most of his education in the run up to the Tribunal; they were rude and hostile towards his Mum; they made needless requests for irrelevant information and were obstructive and unhelpful. It is clear from Mr Milburn's witness statement that he was extremely distressed by the conduct of the Council.'* [para 4]

Mr Milburn's mother assisted him to make a complaint first to the Council and later to the Ombudsman, alleging 11 specific complaints regarding their treatment in the period leading up to the SEND Tribunal decision.

The Ombudsman found fault on the part of the Council for failing to make provision for Mr Milburn's education while he was appealing to the Tribunal. The Ombudsman declined to consider key complaints for the following reasons:

> [7]…*"I do not dismiss Ms X's concerns, but I cannot consider her complaint. The Ombudsman cannot consider complaints about matters that have been the subject of an appeal to the Tribunal. In this case, Ms X and Mr Y's dealings with the Council, including their attempts to secure interim provision and to agree amendments to Mr Y's EHC Plan working document, are inextricably linked to their appeal and are not matters the Ombudsman can investigate."*

Mr Milburn's mother invited the Ombudsman to reconsider, as she did not have *'a right of appeal to a tribunal in relation to the behaviour of Council officers.'* [para 8] The Ombudsman reconsidered his decision, but again declined to investigate:

> 9…*"In her complaint, Ms X identified what she believes to be contradictions in statements the Council has made about its attempts to obtain Mr Y's views. Ms X has also identified opinions expressed by Council officers about her role as Mr Y's representative which she finds offensive. I do not propose to investigate the details of these issues further. While I appreciate Ms X and Mr Y remain aggrieved, I*

> *do not consider it a good use of the Ombudsman's limited resources to pursue the matter further."*

The key issue was whether the Ombudsman was barred from investigation because *'the complainant "has or had a right of appeal, reference or review.'* [para 26] The court found that it was necessary to characterise the precise issue being complained of to the Ombudsman. The court considered that there were two discrete points:

> [29]…*(a) One matter is that the Council failed to obtain Mr Milburn's views and wishes, and when it received evidence regarding them, it ignored them.*
>
> *(b) The other matter is a complaint about the "numerous claims" that the Council had sought Mr Milburn's views from him when in fact it had not.*

The court agreed that the Omdbudsman lacked jurisdiction to consider the first matter as *'…there can be no doubt that the failure to obtain and act on Mr Milburn's view was something in respect of which he had a right of appeal to a tribunal… the consequence is that, since the Ombudsman is precluded from investigating this issue, Mr Milburn has no remedy in respect of the Council's deplorable conduct in not seeking or acting on his views.'* [para 30]

However, the court found that the 'numerous claims' in (b) were arguably maladministration of a type the Ombudsman could investigate, as the local authority had not made a showing that these claims could be considered by a tribunal or court of law. The court further considered that the Ombudsman had not given sufficient reasons explaining his view of why he lacked jurisdiction.

Mediation in the Court of Protection

An Evaluation of Mediation in the Court of Protection has published its findings (which can be found here). Dr Jaime Lindsey and Gillian Loomes-Quinn evaluated 6 cases that were mediated under a practitioner designed mediation scheme over a period of 21 months. The cases covered property and financial affairs, deputyship, and welfare matters. No medical treatment cases were mediated under the Scheme. In all six cases, full or partial agreement was reached at the mediation. Some of the key findings from the participant survey are as follows:

- 68.75% (n=11) of respondents to the participation survey (response rate 63% (n=19)) indicated some degree of improvement in working relationships.
- 93.33% (n=14) of respondents answered that it was cost effective to take their case to mediation and 64.29% (n=9) of respondents indicated that they would be prepared to pay for mediation.
- 62.50% (n=10) of respondents indicated that cases were resolved sooner via mediation than if the case had gone to a judicial hearing.

Overall, the authors concluded that CoP mediation has the potential to save costs, time and enhance working relationships between participants. Furthermore, satisfaction with the Scheme itself was very high. The authors go on to make a series of recommendations, most importantly (1) that the CoP ought to develop a mediation information scheme, based on the MIAM approach in the family courts or the MIAS approach in SEND, with a specific timeframe in which information about mediation should be provided, and a requirement for parties to consider the use of mediation in specific types of cases; and (2) a court-authorised mediation scheme should be piloted with authorisation from the CoP.

Advance choice documents: their potential and prerequisites – in conversation with Dr Lade Smith CBE

In the latest 'in conversation with,' Alex talks with Dr Lade Smith CBE about advance choice documents in the mental health context, their potential, and the prerequisites for making them work.

Online safeguarding, capacity and rights to participation – in conversation with Professor Andy Phippen

In this 'in conversation', Alex speaks with Professor Andy Phippen about online safeguarding, capacity, and why Andy really dislikes the term 'online safety'.

Piloting co-produced advance choice documents – in conversation with Dr Lucy Stephenson

In this 'in conversation', Alex talks with Dr Lucy Stephenson about a pilot project she has led on as part of the Wellcome-funded Mental Health and Justice Project which aimed to co-produce and evaluate implementation strategies for advance choice documents with those who experience fluctuating mental capacity in the context of bipolar.

Compendium of shedinars

Alex has compiled a compendium of his 'Shedinar' and 'In Conversation' series, which may be of particular interest to those starting new terms and new jobs for those coming to work in, study, or generally chew over the field of mental capacity. The 'shedinars' are 20 minute or so video introductions to key topics, and 'in conversations' are again roughly 20 minute conversations with people with interesting things to say about mental capacity (broadly defined).

The shedinar page is always the place to go for the full list.

Editors and contributors

Victoria Butler-Cole KC: vb@39ess
Victoria regularly appears in the C on, instructed by the Official Solicitor, family members, and statutory bodies, i cial and medical cases. Together with Alex, she co-edits the Court of Prote orts for Jordans. She is a contributor to 'Assessment of Mental Capacity 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 EC an rights, mental health and incapacity law and mainly practises in the Court nd Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinic egal Advice Centre, he teaches students in these fields, and trains health, so gal professionals. When time permits, Neil publishes in academic books an 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: adrian@adward.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 and Seminars

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

30 November 2022	BIA/DoLS Update Training
13 January 2023	Court of Protection training
26 January 2023	MCA/MHA Interface for AMHPs
16 March 2023	AMHP Legal Update
23 March 2023	Court of Protection training

To book for an organisation or individual, further details are available here or you can email Neil.

25 October 2022: Understanding the Law around Dementia

Are you a carer or partner of someone with dementia in the North West of England? Neil Allen with university students and lawyers from Simpson Millar solicitors will be offering free legal information and advice from 1-4pm at the Greater Manchester Law Centre. There will be four talks and drop-in advice clinics (and refreshments!). No need to book, but please do come along for what will be a super afternoon. Further details are available here.

National Mental Capacity Forum new series of webinars: starting 20 October with DNACPR and the MCA

NEVER STOP LEARNING ABOUT MENTAL CAPACITY:

The National Mental Capacity Forum is pleased to announce the launch of a second series of National Mental Capacity Webinars, produced in collaboration with the Autonomy Project at the University of Essex, and with support from the MoJ and DHSC.

ABOUT THE SERIES:

Born of necessity during the COVID-19 pandemic, National Mental Capacity Webinars provide a forum for free training and discussion for anyone involved in applying the Mental Capacity Act in practice. These 1-hour webinars bring together experts to address specific challenges relating to the MCA, and provide an opportunity for participants to ask questions and raise concerns, shaping the agenda for future webinars. The webinars are designed for new, novice and experienced practitioners. There are many paths to learning and the webinar series will provide learning prompts for individual professionals, professional associations and networks.

The first webinar in the new series will take place on **Thursday, 20 October, 2022, 1-2pm**. It will focus on the application of the Mental Capacity Act to decisions around the initiation of Cardiopulmonary Resuscitation, along with practices concerning DNACPR (Do Not Attempt Cardiopulmonary Resuscitation). We will review existing law regarding DNACPR, launch a new set of educational videos, and address some hard questions about the use of best-interests decision-making in the context of cardiac arrest. Confirmed speakers include: Karen Chumbley (Clinical Lead for End-of-Life Care; Suffolk & North East Essex ICS); Margaret Flynn (Chair, National Mental Capacity Forum); Alex Ruck Keene (Barrister, 39 Essex Chambers); Prof Wayne Martin (Director, Essex Autonomy Project) and Ben Troke (Partner, Hill Dickinson solicitors).

HOW TO REGISTER: Participation is free but places are limited. **Advance registration is required.** To register, please follow this link .

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.

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