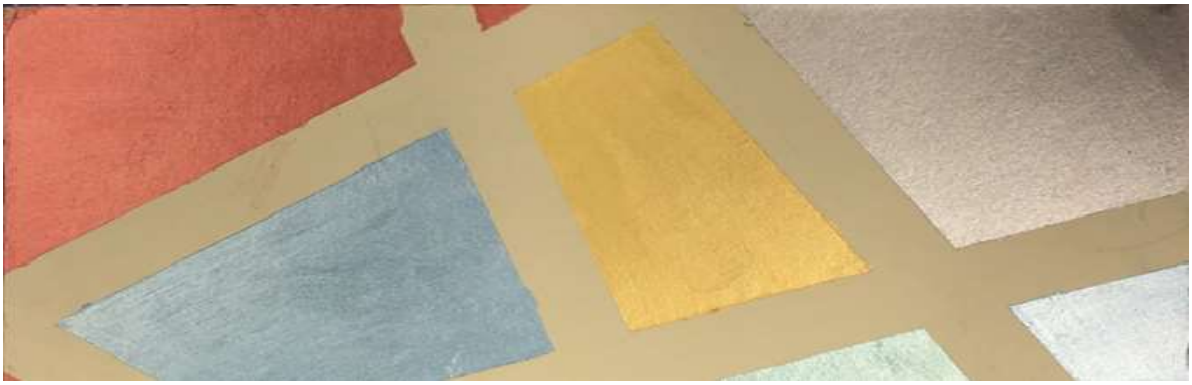
MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

September 2020 | Issue 107



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

(1) In the Health, Welfare and Deprivation of Liberty Report: updated MCA/DoLS guidance, the anorexia Catch-22, and two important cases on deprivation of liberty;

(2) In the Property and Affairs Report: remote witnessing of wills, professional deputy remuneration and the OPG annual report;

(3) In the Practice and Procedure Report: CoP statistics, short notes on relevant procedural points and the UN principles on access to justice for persons with disabilities;

(4) In the Wider Context Report: the NICE quality standard on decision-making and capacity, litigation friends in different contexts, and a guest piece giving a perspective on living with a tracheostomy and a ventilator;

(5) In the Scotland Report: the human rights blind spot in thinking about discharge from hospital in the context of COVID-19.

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, not least because the picture continues to change relatively rapidly. 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 has resources on his website 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.

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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.

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Video witnessing of wills

Legislation has been laid before Parliament to come into effect on 28 September 2020 to allow on a temporary basis for witnessing of wills to take place by video. The Wills Act 1837 (Electronic Communications)(Amendment) (Coronavirus) Order 2020 provides for the Wills Act 1837 to be amended with effect between 31 January and 31 January 2020 so as to allow for video witnessing. The legislation does not apply to grants of probate issued before this instrument was made, nor does it affect anything done pursuant to a grant of probate being issued prior to the legislation coming into force. This is the case even where the will was made on or after 31 January 2020. As distinct from grants of probate, the legislation does apply to grants of letters of administration (issued when a person dies without having made a will), provided that the video-witnessed will in question was made on or after 31 January 2020. The Explanatory Memorandum also makes clear that:

> *The Government considered many other options for reform of will making in the pandemic, but has chosen not to pursue certain reforms in view of the perceived risks of undue influence or fraud against a testator. As such, the legislation does not amend Section 9(a) of the Wills Act 1837, meaning that neither the remote signing on behalf of a testator, nor the use of electronic signatures or counterpart documents are permitted under these reforms.*

It should perhaps be noted that no such equivalent legislation has been passed in relation to Lasting Powers of Attorney: as the OPG guidance makes clear, the relevant steps have to be taken in person.

Rather oddly, the guidance relating to the legislation was introduced in advance. It is available here. An interesting feature of the guidance is that it notes that:

> *If possible, the whole video-signing and witnessing process should be recorded and the recording retained. This may assist a court in the event of a will being challenged – both in terms of whether the will was made in a legally valid way, but also to try and detect any indications of undue influence, fraud or lack of capacity.*

Putting aside the (substantial) potential complexities of retaining recordings, the recognition that capturing the signing and

witnessing process might enable detection of the wider and more subtle factors at play (including, in particular the interaction between witness and testator) is an interesting one. Translated to other settings – for instance the grant of a power of attorney or (even) the assessment of capacity – the recognition that the written word alone may not capture the true position is an important one.

Professional deputies and solicitors' rates

The Public Guardian v Andrew Riddle (Nos 1 and 2) [2020] EWCOP 41 (Senior Judge Hilder)

Deputies – financial and property affairs

Summary

Senior Judge Hilder has considered at considerable (necessary) length the ability of a professional deputy who is not a solicitor to charge fees at the solicitors' rate, as well as making more general observations as to their duties.

In *The Public Guardian v Andrew Riddle (No 1)* [2020] EWCOP 41,[1] she held (at paragraph 104) that it would be appropriate to exercise the court's discretion to extend the solicitors' costs provisions to a non-solicitor deputy where that deputy demonstrates that he/she/it is also subject to professional obligations comparable to those integral to being a solicitor, and where that non-solicitor deputy accepts being held to the same standards as a solicitor. On the facts of the (several) cases before her, she was not satisfied that Mr Riddle met these two tests. She acknowledged that Mr Riddle was not alone in calling for a review of the fixed rates under Practice Direction 19B, as the rates have not increased since 2010 and The Professional Deputies Forum argues that rates are now therefore 31% lower in real terms than they were in 2010. She noted that, as of March 2020, a subcommittee of the Civil Procedure Rules Committee, with the agreement of the Master of the Rolls, was engaged in a review of solicitors' guidelines rates in civil cases, which have al so not been increased since 2010. She observed at paragraph 107 that:

> *there is undoubtedly force in the argument that the rates of Practice Direction 19B should be similarly reviewed However, in my judgment, that does not provide any basis for unilaterally behaving as if the rates are other than as they are. Until there is a review - which, as already set out in The Friendly Trust's Bulk Application. is beyond the remit of proceedings such as these - I cannot give any weight to this part of Mr. Riddle's argument. To do so would simply be to subvert the Practice Direction.*

Of wider relevance, Senior Judge Hilder observed at paragraph 120 that, so as to ensure 'absolute clarity' for the future,

> *Going forwards, so that there is absolute clarity from the outset, any non-solicitor applicant for deputyship who operates on a basis which involves VAT liability should specifically seek in their deputyship application authority to pass onto the protected person any VAT in respect of deputyship fees at the public authority rate. Specific provision*

[1] Oddly, available via hyperlink from the body of the judgment available on Bailii, and only in PDF.

> *can then be made in the appointment order.*

She also confirmed (at paragraph 131) that:

> *If a deputy acting under the fixed fee regime at the public authority rate wishes to reclaim from the protected person the costs of an Independent Visitor* ***in addition to*** *the fees set out in paragraph 16 of PD 19B, specific authority is required. An Independent Visitor does not provide "specialist services that P would normally have been expected to pay if P had retained capacity," and so any charges incurred do not fall within the 'disbursements' permitted by paragraph 20 of the Practice Direction.*

At paragraph 134, Senior Judge Hilder reminded deputies that:

> *It is obviously important that returns are made to the OPG in a timely fashion. The very purpose of supervision of deputies is to protect the interests of vulnerable persons, so a deputy's failure to meet its obligations to the supervising body inevitably triggers concern. A deputy cannot fail to meet their obligations and then complain that questions are asked about their management of a protected person's estate. The onus is on the deputy to demonstrate that he is acting properly, and not on the Public Guardian to enforce compliance. Inadequate staffing resources is not an acceptable reason for failing to comply with reporting obligations but rather itself a cause for legitimate concern. It is part of the obligations of a paid deputy not to take on more appointments than he has resources to manage properly.*

On the facts of the cases before her, Senior Judge Hilder made orders refusing Mr. Riddle's applications for authorisation to charge fees at the solicitors' rate, refusing his applications for relief from liability for past charges, and giving Mr Riddle a very short further period of time to make good his words and restore each estate to its rightful level.

The subsequent judgment ([2020] EWCOP 41) contained confirmation that Mr Riddle had been good to his word, and that the Public Guardian did not now seek revocation of his appointment in those cases; it also contained specific supervision arrangements for him. The judgment also confirmed that Senior Judge Hilder had refused Mr Riddle's application to charge fees at anything other than the public authority rate, emphasising at paragraph 14(a) that "[t]*he Court's determination of fees authorisation must be determined in the best interests of the protected person, not the business interests of the potential deputy," and that Mr Riddle had not demonstrated that he offered services over and above those which a public authority might be expected to provide*."

As to costs, in the second judgment, Senior Judge Hilder agreed with the Public Guardian that each party should bear their own costs, and rejected Mr Riddle's claim for the Public Guardian to pay any of his own costs. Of wider relevance is her observation at paragraph 23 that:

> *The Public Guardian should not be constrained from bringing complex and multi-faceted cases to the attention of the court by a fear of costs risks. These proceedings were procedurally complicated to manage and administer*

> *as the number of cases under consideration grew in a piecemeal fashion, as set out in paragraphs 17 to 27 of the first judgment. That context is an important consideration when determining any allegation by Mr. Riddle that the conduct of the Office of the Public Guardian during these proceedings was not appropriate. Any order for costs against the Public Guardian must be clearly based on demonstrable significant failings. I am not satisfied that there were such failings in this matter.*

Comment

The length and fact-specificity of the two judgments are understandable given the complexity of the cases before the court, but the principles derived and extracted above are admirably simple and clear, as well as uncompromising both in relation to the powers of non-solicitor deputies to charge, and as to their obligations as regards the number of cases that they should take on.

Assessing capacity with one (judicial) hand tied behind the back

King v The Wright Roofing Company Ltd [2020] EWHC 2129 (QB) High Court (Queen's Bench Division (Kerr J))

Other proceedings – civil – mental capacity – assessing capacity – finance – litigation

Summary

In this personal injury case, Kerr J had to decide whether the claimant had capacity to conduct the proceedings, and whether he had capacity to manage his property and affairs.

The factual background is somewhat complex, but its very complexity is at the heart of the issue, and set up a position where the judge had a seemingly overwhelming number of obstacles to overcome to answer the questions before him.

The defendant had admitted liability (subject to contributory negligence) after the claimant, a roofer by trade, fell from a roof and suffered a severe head injury, and other serious injuries, falling from a roof in March 2016. The claimant had only partially recovered from the accident. He could not longer work, has lost his income and had been living off the interim payments and beyond them, running up debts including to his parents with whom he had been living since before the accident. He had taken five or six holidays in the Dominican Republic, funded by interim payments.

The claimant issued the claim in March 2019 as a protected party, with a litigation friend. In its defence, the defendant denied that he lacked capacity to litigate and manage his financial affairs. These issues therefore came before Kerr J as preliminary issues.

The claimant did not give evidence but, the court was told, regarded himself as having capacity to litigate and manage his finances. He mistrusted his solicitors and others involved in the claim on his side. He was weary of and exasperated with the litigation. He had approached the defendant's insurers, bypassing his solicitors, with a view to reaching a settlement directly with the insurers. He had also made cynical remarks indicating that he regarding the litigation process as a money spinner for the professionals involved. They were, he maintained, exploiting his claim and being paid out of his compensation money. He had also

expressed a desire to buy a property and settle in the Dominican Republic, where he said he had friends.

The claimant's solicitors were receiving instructions from the litigation friend. With the approval of the court, they were withholding certain interim payments from the claimant, wishing to protect him from squandering them. The Court of Protection appointed two deputies in February 2020 to manage his finances. The claimant's litigation friend and solicitors asserted that he did not have capacity to litigate this claim or manage the compensation he receives from it, applying the tests in the MCA 2005. They were concerned that he would "under-settle" the claim, squander the fruits of it and become unable to pay for the care he needs and will need for the rest of his life.

A trial on contributory negligence and quantum was scheduled to take place in a window from January to April 2021, i.e. at least 6 and potentially 9 months away. An offer or offers of settlement under CPR Part 36 had been made and rejected, but the judge did not know when and in what amounts. As he observed (at paragraph 9): "[e]*ven if I did, I would be in no position to assess whether they are, objectively good, bad or indifferent from the claimant's perspective*."

The evidence was voluminous, including both lay and expert. The judge was concerned about the fact that he did not hear directly from the claimant, noting at paragraph 119 that:

> *The claimant, however, was not called by either party so I did not, unfortunately, hear from him directly. I understand he was aware that the hearing was taking place and was not willing to provide a statement. I am not privy to any privileged discussions with him about whether it would be a good idea for him to give evidence. I can see why neither side might want to risk calling him but it concerns me that, while all the experts have met him, I have not.*

Kerr J found the case a "worrying" one (paragraph 123), for several reasons.

First, relations between the claimant and his representatives were poor and, at or near the point of breaking down. With his former case manager, they have already broken down. With his litigation friend, his former partner, his relations were now very difficult. Kerr J did not criticise her, but noted that she clearly did not command the claimant's confidence nor, in turn, did the solicitors who received her instructions. This in turn, meant that his Counsel was put in difficulty properly representing his interests in court before me. As Kerr J noted (at paragraph 125), "[s]*he is right, indeed obliged, to argue for the position of the litigation friend, supported by the solicitors but not by her ultimate client*." But, he asked, this meant:

> *126. Who, then, truly represents the claimant's viewpoint before me? The only party supporting his position is, paradoxically, his opponent in the underlying litigation. The interest of the defendant in the underlying claim is directly opposed to that of the claimant. It is no criticism of the defendant to say that it has a financial interest in the claimant settling the claim "fast and low".*

Second, Kerr J was very concerned at the costs of the satellite litigation concerning the claimant's capacity:

> *127. Could not a joint expert on capacity have been appointed? Were four experts and six reports really needed? The directions hearings were attended by two counsel, again at considerable expense. Who is going to pay the costs of all these reports, the deputies, the Court of Protection application and the fees of solicitors and counsel?*
>
> *128. Would it be fair for these costs to come out of the claimant's compensation if the defendant is right that he has capacity to litigate and manage his own finances? This is, of course, a question for me if and when that outcome is reached, but it is concerning that the claimant is, apparently, supportive of an outcome that could lead to a costs order that eats into his damages.*
>
> *129. Viewed in that light, the claimant's suspicions that the professionals may gain financially at his expense are not as fanciful as they might seem. Dr Toone's description of his suspicions as close to "pathological" ought to imply that they are groundless, but it is not certain that they are.*
>
> *130. The litigation friend and advisers had no choice but to act in what they consider the claimant's best interests, but that includes doing so at proportionate cost. It is obviously concerning to the claimant that his representatives are spending money on opposing his views and it is right that the money spent could, in principle (though it may be unlikely), deplete the net amount of compensation he eventually receives.*

Third, the claimant's approach to the defendant's insurers, "*while unorthodox and obviously inappropriate,* [did] *not lack a certain logic*" (paragraph 131):

> *If the claimant and the defendant are right, the litigation friend and solicitors may have allowed the action to become mired in unnecessary cost and delay. And it is not necessarily wrong to reason that a bird in hand may be worth two in the bush.*

A fourth difficulty was that:

> *132.* […] *The content of the claimant's discussions with Mr Anderson, of the defendant's insurers, is probably relevant to the capacity issues I have to decide; but the conversations surely took place behind the "without prejudice" curtain. The claimant's privilege cannot reasonably be waived by his representatives even if the defendant were willing to waive privilege on its side.*

Against the backdrop of those difficulties, and after a discussion which is striking for its thoroughness, and merits reading in its full for its clear agonising over the position, Kerr J concluded that:

> *162.* […] *the present circumstances including the claimant's absence from court make it difficult to judge his capacity. The breakdown of relations between him and his advisers and the strained relations with his litigation friend are inhibiting the court from deciding the issues on the basis of the best available evidence. Doing the best I can, I am just persuaded that absence of capacity on both counts is at present proved on the balance of probabilities.*

Kerr J then turned to case management. He laid down a marker, inter alia, that it was a "*serious question of case management*" as to whether he could or should require the claimant to attend and give evidence, or at least require his solicitors to convey to, the court's request to do so. He noted that it was an "*open question*" whether the court had the power to call a witness called by neither party.

He also noted that there was still time to change the litigation friend, either by consent or by order of the court. As he noted:

> *172. Difficulties in managing cases such as this fairly and effectively may arise where it is the defendant's admitted tort that has, or may have, changed the victim's personality in such a way that he acquires a propensity to under-settle the claim. The law appears to permit the wrongdoer to take advantage of this by agreeing to settle the claim at less than its true value, in its own interest.*
>
> *173. This is subject to the doctrine of undue influence and fiduciary duties that may be owed to vulnerable persons (cf. Masterman-Lister v. Brutton & Co (Nos 1 and 2) [2003] 1 WLR 1511, CA, per Chadwick LJ at [78]). But rather than have to resort to such doctrines, it is better for the claimant's interests to be protected by effective representation by persons in whom, even if lacking capacity, he has confidence.*

Comment

This is a fact-specific decision but Kerr J's judgment alighted upon a number of important points of difficulty that are unlikely to be limited to this case alone, including as to the delicate position occupied by a litigation friend in circumstances where (as so often) the absence of capacity does not mean the absence of strong feelings on the part of the protected party. And he chose his words with care, no doubt, when identifying that the claimant might be said to have a point that the litigation appeared to have gained a life of its own which on its face did not appear to be of direct benefit to him.

Finally, and although it did not feature heavily in the discussion, the case is of some interest for highlighting the evidence of a neuropsychologist, Dr Carter-Allison, who carried out a clinic based cognitive assessment as part of the claimant's rehabilitation programme. She reported on 12 August. This included a "multiple errands task" carried out in Bexleyheath town centre by Dr Carter-Allison and a specialist occupational therapist. This test, as Dr Carter-Allison explained in her report, "evaluates the effect of executive function deficits on everyday functioning through a number of real-world tasks" such as shopping and writing down information. Such observational evidence is vital in the assessment of the situation where a person is said to lack capacity because of executive dysfunction, and this reminds us that in such a situation, a final determination can only be reached by combining assessment by interview and assessment by observation (see also here our guidance note on capacity assessment).

OPG Annual report and accounts 2019/2020

This has just been published. It contains a useful survey of performance over the year and sets out aims for the next 5.

Highlights include:

For the future:

In the OPG business plan for 2019/2020 we had two key areas of work – OPG 2025 and the OPG business as usual (BAU). We have done a considerable amount of work in both areas – with some of the highlights given below.
Within the OPG 2025 programme we have taken forward work on:

• research to understand what our users and potential users need from an LPA

• 'Use an LPA', which allows our users to use an electronic version of an LPA – currently at private beta stage

• our case management system, to the point where supervision cases can now be undertaken on the new system, as well as the registration of LPAs

Within the BAU sphere we have:

• continued to work to achieve our targets and put resources into those areas where performance has not been to target

• published our revised Welsh Language Scheme following approval by the Welsh Language Commissioner

• continued to look at how we can get people into the OPG from a wide range of backgrounds – more detail of our work on social mobility can be found on page 26

• produced a learning and development strategy and programme for the OPG and launched this within the agency

• launched the processes for the supervision of Court Appointed Guardians for missing persons.

Some interesting statistics:

As at 31 March 2020 we were supervising 60,793 deputyship orders, an increase of 1,385 from the end of 2018/19 (59,408)
The number of applications to register LPAs and EPAs received in 2019/20 was 917,550 an increase of 81,600 on 2018/19 (835,950).

We ended the year with over 4.7 million current PoAs on the register

Average actual clearance time for power of attorney applications 40 days. Target: 40 days

Customer satisfaction survey % with PoA services (very or fairly satisfied) 89%. Target: 80%

Customer satisfaction survey % with deputyship services (very or fairly satisfied) 77%. Target: 80%

Customer satisfaction survey % with digital services (very or fairly satisfied) 95%. Target: 80%

% of safeguarding risk assessments carried out within 2 days 98%. Target: 95%

"Average time to conclude investigations 74 days. Target: 70 days

Significant achievements:

Launched OPG's first ever marketing campaign in Islington and Leeds, receiving over 5,000 visits to our 'your

voice, your decision' campaign site in the first six months.

Carried out research to explore the potential for a fully digital LPA service.

Built and tested the 'use an LPA' digital service to help attorneys use their LPA more easily.

Started research to look at the impact LPAs have had on our society and how we could further develop services to meet the needs of our customers.

Successfully migrated our data onto our LPA case management system, shutting down old systems and reducing costs.

The "Use an LPA" project referred to in the report is now live, as we reported in the July issue, and FAQs about it can now be found in the OPG website.

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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. To view full CV click here.

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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.

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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.

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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.

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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.

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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.

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. 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.

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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.

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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 October. 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.

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