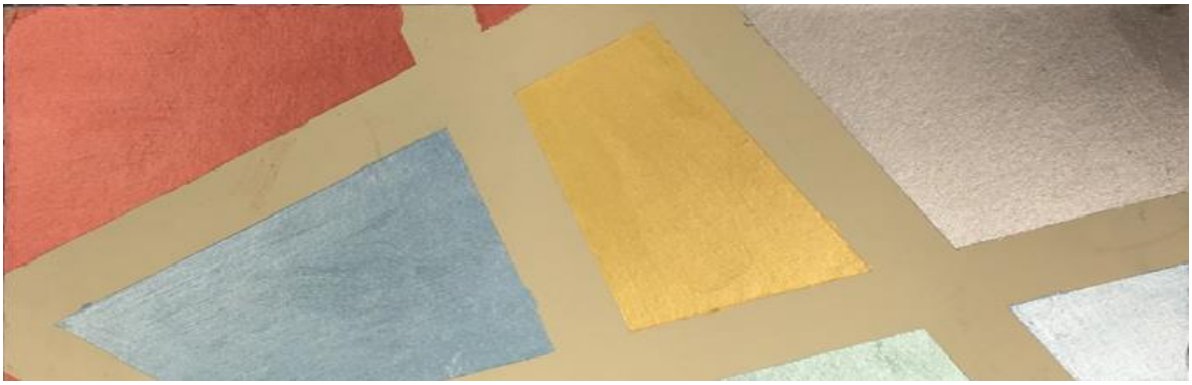
MENTAL CAPACITY REPORT:
SCOTLAND
September 2022 | Issue 125



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

(1) In the Health, Welfare and Deprivation of Liberty Report: Person-specific contact and sexual relations capacity; treatment plans for disordered eating; and updated DoLS statistics.

(2) In the Property and Affairs Report: Electronic billing pilot rolls out.

(3) In the Practice and Procedure Report: Transparency orders; and the BMA opines on s.49 MCA reports.

(4) In the Wider Context Report: Brain stem death testing; deprivations of liberty of young people in Scotland; the CRPD's application in the Battersbee case; foreign convictions; coercive control; litigation capacity; the Care Act considered in the Court of Appeal.

(5) In the Scotland Report: Further updates on Guardians' remuneration and the PKM litigation; nearest relatives; and the MHTS project concludes.

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.

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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

IN MEMORIAM: ELIZABETH REGINA

Personal memories from one contributor to the Report

I was here once before. Back over that long bridge of time, the headmistress walked into the classroom with a wireless. Solemn music. The only words were those of the ancient formula: "The King is dead, long live the Queen!". In those days none of us needed to be prompted to stand rigidly to attention whenever the National Anthem began.

A few months later my brother and I stood, late one evening, at the entry to Euston Station. The Queen arrived for her journey north to receive the Crown of Scotland. With the combination of dignity and warmth that became her hallmark, she spotted us, leant forward in the car, and waved – just as a neighbour might do on seeing a friend's children. Next day we followed her north on the Royal Scot, as our family made its migration to live in Scotland.

It was the same 40 years later. I and others entered Buckingham Palace tensely ready for a formal event, only to find that we were welcome guests of the Queen in her home, and treated that way. You can't fake the warmth, human interest, and valuing of every human being for what they are, that imbued more real engagements with others than any other person has ever accomplished, or probably ever will.

Not only those personal values were carried throughout the long journey across that bridge. It is timely to remember that they were formed at a time when our country, like our continent and elsewhere, devastated by war, did not wallow in self-pity, but tackled with energy and enthusiasm a transformation towards a truly just and caring society. My father's dearest possession from those times was not from the memorabilia of war, but the copy of the Beveridge Report that he gave to me shortly before his death. And all of us inherited the fundamental human rights instruments created in those times, followed by – in our continent – the creation of the Council of Europe with the role of safeguarding them.

The Queen of course remained non-political, but the life that we now mourn and celebrate was the embodiment of those fundamental values that led to the creation of all that we have inherited, now passed into the safe hands of her successor. Particularly at this time, they are values that we not only should, but must, defend from all threats, external or internal.

As for Scotland, let us never confuse the previous such moment in 1603 when two lineages of sovereignty were conjoined on the next bridge, with debate as to whether the quite different union of 1707 should be dissolved. So long as we aspire to live in the certainties of a free and democratic society, with equal respect for all human beings, embedded in the enduring timescales of a constitutional monarchy, we should never jump off that bridge.

Adrian D Ward

Functions of nearest relative – application under AWI s4

A decision remarkable for what it did not contain, rather than what it did, was issued in a Note by Sheriff Brian Mohan, sitting at Paisley, on 19th August 2022 in an application for "nearest relative" status in Application for Welfare Guardianship by Renfrewshire Council ("the Council") (in respect of the Adult HS), [2022] SC PAI 24. The principal application was for appointment of a welfare guardian to the adult HS, aged 95, suffering from dementia and resident in a care home. Two of the adult's three daughters entered the process. The need for guardianship, and the proposal to appoint the Council as guardian, were uncontested. An application by the adult's second daughter to have conferred upon her the functions of nearest relative was supported by the eldest daughter but contested by the youngest daughter.

The background to the dispute was a rift in relationships among the daughters. The second and youngest daughters had not spoken to each other for eight years. The sheriff heard evidence by affidavits, demonstrating an adverse impact by the hostility between the daughters upon the adult's care, and those caring for her. Having narrated the tenor of formal reports and other evidence as to the impact of the feud, the sheriff noted that it had spilled into everyday decisions within the care home in which the adult had resided since late 2021. One sister left a kettle in the adult's room, leading to a complaint by another. One wanted the adult's room painted in one colour, resulting in objections by another and a request to staff to change the paint. A rug was placed in the adult's room by one sister, apparently to provide a more homely atmosphere, but this was objected to by another, who reported it as a trip hazard. The sheriff concluded that: "*It is not appropriate that either the care home where the Adult resides, or the social work department which carries out the duties of welfare guardian, should be used as a platform for the Adult's daughters to continue to air their mutual grievances. Neither the passage of time, the deterioration in their mother's capacity, nor even the observations of numerous professionals about the impact which their dispute is having on the arrangements surrounding their mother's care, has enabled the sisters to put aside their differences.*"

An original intention by the daughters to apply for appointment of all of them as joint guardians was abandoned in the face of evidence and opinions that such guardianship would be unworkable. The Council applied by agreement of all concerned, was appointed under an interim order in October 2021 (to facilitate the adult's move to a care home), and thereafter under a final order for a period of three years. The application by the second daughter in relation to the functions of nearest relative narrated that the oldest daughter had a number of health problems which prevented her effective participation in decision-making. The application by the second daughter was supported by a letter from the eldest daughter, who (according to the Note) wanted the second daughter "*to take care of her [the mother's] affairs*" because the eldest daughter's own health difficulties meant that she was unable to fulfil the role of nearest relative. In the face of opposition by the youngest daughter, the second daughter suggested the alternatives of her own appointment as nearest relative in addition to the eldest daughter; or alternatively that the eldest daughter should remain sole nearest relative but that the sheriff direct that the second daughter be consulted in accordance with section 1(4)(c)(ii) of the Adults with Incapacity (Scotland) Act 2000 ("the Act"). The youngest daughter submitted that no-one should have the functions of the nearest relative, and that it was unnecessary to direct the local authority to consult any of the daughters formally.

The sheriff first addressed and rejected the proposition that two persons could hold the

position of nearest relative jointly. "*That does not appear to be contemplated anywhere in the legislation. I was offered no authority or commentary which supported that position. There is a careful order of priority within the list of persons identified as 'the nearest relative' in section 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003: that mechanism was adopted in section 87 of the 2000 Act (as amended). That background, together with the straightforward grammar of the term 'the nearest relative' (using the definite article, the superlative form of the adjective and the singular noun) indicate that it is a position to be held by one individual only. I therefore reject the submission that LM could be appointed as a joint or additional nearest relative*."

The sheriff did not agree that it would be appropriate to give the suggested direction under section 1(4)(c)(ii) of the Act. That, he considered, could lead to confusion about the roles and could duplicate the work of those involved in the day-to-day care of the adult. He accordingly concluded that his options were to make no order, leaving the eldest daughter as nearest relative; appoint the second daughter as nearest relative in place of the eldest; or make an order that no-one should exercise the functions of the nearest relative. These options were all available to him under section 4 of the Act. As regards the last option, he noted that he was not able to make that or any other order *ex proprio motu* but that, an application such as the second daughter's having been made, he could under section 4(1)(c) order that no person should exercise the functions of the nearest relative. It should be noted that these provisions relate only to the exercise of those functions under the 2000 Act. Having considered all of the evidence before him and the submissions made to him, the sheriff decided that no person should exercise the functions of the nearest relative during the period of the guardianship order.

What, then, was remarkable about the sheriff's decision? The sheriff narrated the role of the nearest relative under the 2000 Act, including in particular the requirement to take account of the views of *inter alia* the nearest relative in relation to any intervention in the affairs of an adult (section 1(4)(b) of the Act). He noted that "intervention" was not defined in the Act, but quoted with apparent approval my suggestion in "Adult Capacity" (2003), para 4-3, that it covered any decision, act or deliberate omission within the broad scope of the Act's provisions in any way affecting (or intended or having the potential to affect) the welfare, affairs, interests or status of an adult. He narrated some of the provisions of the Act which explicitly required involvement of the nearest relative, to which others such as consenting to research under section 51, could be added. In describing a situation in which many matters decided by the guardian would require consultation with the nearest relative, the sheriff did not address the extent to which the burden of doing so might be restricted by the qualification in section 1(4)(b) "in so far as it is reasonable and practicable to do so".

More significantly and surprisingly, however, the sheriff appears to have overlooked the obligation incumbent upon him to take account of the views of the (then) existing nearest relative under section 1(4)(b) in relation to the decision at which he arrived. He had before him a letter accepted as indicating the eldest daughter's agreement to appointment of the second daughter. He appears to have had no information before him as to the views of the eldest daughter on the proposition that her mother should be left with no-one exercising the functions of the nearest relative.

A subsidiary but also significant point arises if I was correct in my article "Two 'adults' in one incapacity case? – thoughts for Scotland from an English deprivation of liberty decision", 2013 SLT (News) 239–242, that the words of section 1(1) of the Act mean what they say and require compliance with the principles in relation to any adult (defined simply in section 1(6) as a person over the age of 16) subject to any intervention in terms of an order made under any proceedings under the Act. The intervention in relation to the

eldest daughter was to remove from her the status of nearest relative to her mother. She had apparently consented to that for the purpose of appointing the second daughter, but not for the purpose of leaving her mother with no-one exercising the functions of nearest relative. So far as I am aware, the proposition in that article has never been challenged in any decision or published material. On the basis of that proposition, the section 1 principles should have been satisfied in relation to the eldest daughter, in addition to the requirement to consult her in relation to her mother under section 1(4)(b). On the face of it, there would also seem to be a question as to whether the eldest daughter's rights under Article 8 of the European Convention, and in that context her rights under Article 6, have been violated. The points in this paragraph are of course matters for the eldest daughter herself, rather than the other parties, though one would suggest that they do have a legitimate interest in ensuring that what took place is properly intimated to the eldest daughter. The sheriff's failure to comply with section 1, and in particular section 1(4)(b), of course goes to the heart of his decision and would appear to be a matter of legitimate interest to the other parties.

We understand that an appeal has been lodged, but we do not know what are the grounds of that appeal.

Adrian D Ward

Financial guardians' remuneration – update by the Public Guardian

(Note: We have followed the topic of changes to the remuneration of professional financial guardians through several issues: see the May 2022, April 2022, March 2022, February 2022, and November 2021 reports. Initially, professional financial guardians expressed concerns about reduction in their remuneration with a change to effectively deducting VAT from their authorised charges, when this had previously been allowed as an addition. That was carried forward positively at the initiative of the Public Guardian into working with professional financial guardians on the process for sanctioning uplifts to fees above the standard scale figures. We are grateful to Fiona Brown, Public Guardian, for providing us with the following note, with permission to publish it. We would mention at the same time that the fees payable to the Public Guardian were increased with effect from 1st July 2022.)

"Throughout the course of 2022, OPG Scotland has been working with a group of professional financial guardians to agree a straightforward, transparent process, via which financial guardians can request an uplift in remuneration.

"Remuneration is currently set on a standard scale, based on the value of the Adult's moveable estate. There will be no change to the scale remuneration.

"The uplift process allows financial guardians to request an additional payment, where the routine financial guardianship work has been excessive, or where there has been an element of non-routine work within that accounting period. Any uplifted sum is then added to the scale remuneration due.

"To ensure the process is as straightforward and transparent as possible, the working group has developed a pro forma "Uplift Application Form", with embedded guidance, hourly rates and an uplift rate cap. The application will be completed by the financial guardian and submitted along with relevant evidence, with the Annual Account. It will thereafter be considered at the same time as the Annual Account, during the account review process. Any uplift sums will be added to scale remuneration, and totalled on the Audit Certificate.

"In addition, as we recognise that in year one of some cases, there may not be adequate funds to cover an uplift in remuneration (usually whilst heritable property is being sold, and where

moveable estate value is low), any uplift can be taken over a two year (accounting) period.

"This process will be offered by way of a pilot in the first instance, to members of the Professional Guardian Scheme, throughout the remainder of 2022.

"It is hoped that full roll out and implementation can take place in the new year."

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Adrian D Ward

PKM litigation ends, leaving loose ends

As with the preceding item, we have followed what is generally known as "the PKM litigation" through several issues of the Report: see the May 2022, March 2022, February 2022, and December 2021 reports

Originally there were two cases. One did not proceed beyond a decision of the Sheriff Appeal Court: *RM and SB as joint guardians of the adult PKM (Appellants) v Greater Glasgow Health Board (Respondent)*, 2021 SAC (Civ) 33. The other concluded on 1st August 2022, with what can only be described – as regards the important points of law raised by the litigation – as an inconclusive conclusion.

The factual issue at the heart of the first case was that the adult PKM did not want to receive kidney dialysis. His welfare guardians determined that he should receive dialysis. Doctors considered that his refusal was competent, and on ethical grounds were not prepared to force treatment upon him that he did not want. The case proceeded as a contest between the guardians and the medical practitioners, as to whose view should prevail. It concluded with an agreed disposal, agreed – that is to say – by the parties represented in the proceedings, including a safeguarder who had been appointed. The decision of the Sheriff Appeal Court is remarkable in a number of ways, mostly as to matters upon which it would appear that the court was not addressed.

In the second action, the guardians sought an order requiring the Health Board to revoke and remove from PKM's health records (including computer records) any Do Not Attempt Cardio Pulmonary Resuscitation (DNACPR) "directions". At first instance the sheriff initially refused to grant an interim order in those terms, then at a subsequent hearing granted the interim order. The Board appealed that decision to the Sheriff Appeal Court, which in turn acceded to a request to remit the matter to the Court of Session. The Inner House refused the appeal and confirmed the grant of the interim order. PKM wished the DNACPR notice to remain on his record, but did not participate in the appeal proceedings. One has to conjecture that the Inner House anticipated that final disposal would bring the matter back there, as the appeal against the interim order was issued in the form of a "Statement of Reasons", not publicised in the usual way, though I was able to access a copy. It was not published on the scotcourts website.

Following the hearing before the Inner House, the second case went back to the sheriff. In the meantime, PKM sustained a choking fit and collapsed. We understand that this was not directly related to his kidney condition. However, following that episode he told his doctors that he now does wish to be resuscitated in the event of a cardiac arrest.

That left outstanding conclusions on behalf of PKM's guardians for directions under section 3 of the 2000 Act, firstly declaring that the medical practitioners did not have authority to put the DNACPR in place, and secondly a direction to them that they should not do so again in the future. Those points, we understand, were resolved by the guardians' agent seeking an

undertaking from the NHS Board that they would not put in place any further DNACPR note without prior consultation with the guardians, which undertaking was given. Thereupon the case was dismissed, with no expenses due to or by any party.

The Mental Welfare Commission ("MWC"), an interested party in these proceedings, appeared at the procedural hearing where the joint motion of the health board and guardians was heard. Counsel for MWC advised the court that there were legal points arising which remained unresolved, and MWC would consider the best way in which to take these forward in light of the conclusion of the present proceedings.

Disappointingly, unless MWC indeed finds a way to have relevant issues judicially addressed, the outcome will leave without final resolution the important issues already identified in previous Reports, including in particular the extent to which section 67 of the 2000 Act allows guardians to override any apparently competent decisions of the adult; the extent to which section 67 applies beyond "transactions" in the normal sense of that word to other acts and decisions, including those in relation to healthcare and other personal welfare matters; whether medical practitioners have authority to act where appointees with relevant powers have refused consent and the matter has not been referred for determination under section 50 of the 2000 Act; and what in law are the consequences of doing so as regards potential civil and/or criminal liability of those medical practitioners (having regard to the omission of persons acting under Part 5 of the 2000 Act from the protections otherwise afforded to persons acting under the Act by section 82). Also unaddressed is the appropriateness of the long timescale over which these evidently serious and urgent matters were before the courts.

Adrian D Ward

MHTS project: a report of major national and international significance

After five years of work, on Monday 5th September 2022 the Centre for Mental Health and Incapacity Law at Edinburgh Napier University launched the final report of the MHTS project, the full title of which is: "The Mental Health Tribunal for Scotland: the views and experiences of Patients, Named Persons, Practitioners and Mental Health Tribunal for Scotland members". The joint principal investigators for the project were Professor Jill Stavert of Edinburgh Napier University and Professor Michael Brown of Queen's University, Belfast. It should be noted that Professor Brown, despite that academic location, is a General Member of MHTS. The report was launched at a well-attended invitation seminar on 5th September, at which the speakers included both Professors Stavert and Brown. The project was supported by Nuffield Foundation, also represented at the seminar.

If one attempts to step back from the wealth of carefully researched detail and rigorous evaluation in the report, the overall impression is of a piece of work of the highest importance and significance, shining a piercingly rigorous light into the workings of Scotland's Mental Health Tribunals, which although it has kept strictly to its remit nevertheless contains challenging insights relevant to questions of access to justice, and delivery of justice, across the whole field of Scotland's courts and tribunals; and at the same time making a groundbreaking contribution towards international study and concerns about the functioning of such tribunals worldwide. The report comes at a time when psychiatric compulsion rates, which vary across the world, are rising in Scotland; when there are increasing imperatives to give full effect to the United Nations Convention on the Rights of Persons with Disabilities, and resulting requirement for a much more proactive, holistic and non-discriminatory approach to realising the rights of persons with mental disorders. The report additionally comes at a time when MHTS is shortly to move from being a free-standing tribunal to being a chamber within the Scottish

tribunal system, with understandable accompanying concerns about the potential for dilution of its specialist competence and role. Significantly and importantly, the report also comes shortly before the Final Report of the independent Scottish Mental Health Law Review due by the end of this month. For those who might query how the SMHLR Report at the end of this month can take full account of the work of the MHTS project published less than four weeks earlier, one may reasonably expect that the realistic answer is to point to the major involvement of Professors Stavert and McKay of Edinburgh Napier University in the work of SMHLR.

The aims of the MHTS project were:

- To find out the views and experiences of a purposive sample of stakeholders of the MHTS, including patients, named persons, MHTS panel members, and health and social care professions.
- To evaluate the extent to which the MHTS currently gives effect to the Millan Principles and existing and evolving international human rights standards.
- To find out the profile and scope of applications and work undertaken by the MHTS.

The impact of the report has been achieved not only by comprehensively fulfilling its remit, but also by being careful not to stray beyond the bounds of that remit, so that the project did not assess MHTS decisions or whether compulsion was necessary. It was about evaluating experiences and making recommendations to improve experiences, if necessary. It also did not enter the debate on the appropriateness of psychiatric compulsion.

From the data collected from participants, a sample across all stakeholder groups, the project identified good practice as well as areas where improvements can be made, but the shortfalls were striking. While it was felt that the principles of benefit, least restrictive alternative, and reciprocity were fundamental, obstacles such as limited resourcing prevent their full implementation. At times patients disputed whether the care and treatment offered in fact provided benefit. A lack of supported accommodation and of resourcing in the community was felt to delay discharge and to act as a barrier to fulfilling the principle of least restrictive option. Participants highlighted the importance of informal care, but patients reported that they did not recall informal care being ruled out before compulsory treatment was authorised.

Participants across various groups contributing to the study identified various facilitators to patient participation, including conveners adjusting their approach to suit patient needs; reductions in formality and in the use of complex and legalistic language; and tribunals visiting on wards patients unable to attend hearings. There were however negative counterparts to these, with perceptions of obstacles in practice including tokenistic participation and the perception of a hearing as a foregone conclusion; formality, and use of complex and legalistic language; an unhelpful order of speaking; and the effect of clinicians' perceptions of patient risk. It was felt that the potential of independent advocacy was restricted by resource limitations and varying quality of performance, the latter concern also being directed at quality of legal representation.

At a time when the world is waking up to the significant potential of "unilateral voluntary measures", equating to the broad definition of "advance directives" by Council of Europe[1]. It is

[1] See Council of Europe Ministerial Recommendation (2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity; and also the recent report of the Law Society of Scotland

disappointing to read of perceptions that advance statements under current mental health law are rare, and frequently overridden.

Other major topics revealing significant concerns include perceptions of fairness, and of the power of the "medical domain"; and issues around effective provision of support for patients at hearings.

The report lists ten recommendations for action within the remit of MHTS; seven which it proposes should be included in the Final Report of SMHLR and reflected by Scottish Government in subsequent legislative and policy reforms; four further recommendations to Scottish Government; and of particular relevance to much of the readership of this report, a concluding recommendation that Scottish Government should require, and the Law Society of Scotland should ensure, training for solicitors representing patients and named persons on common mental health conditions; on care, support and treatment in hospital and communities; and on related human rights requirements of both the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities.

Adrian D Ward

Deprivations of liberty of children

Note: Shauneen Lambe of Child Law Network has provided a guest article for English practitioners (featured in the September 2022 'Wider Context' and 'Compendium' reports) on the topic that we have previously followed in the Scotland section on issues surrounding transfer to Scotland of children and young persons (up to age 18) subject to deprivation of liberty authorisations in England & Wales.

cross-committee working group on *inter alia* advance choices (advance directives).

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Conferences and Seminars

Forthcoming Training Courses

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

14 September 2022	AMHP Legal Course Update
16 September 2022	BIA/DoLS legal update (full-day)
30 September 2022	Court of Protection training
13 January 2023	Court of Protection training

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

The University of Essex is hosting two events in October:

3 October 4.30pm – 7pm: Evaluation of Court of Protection Mediation Scheme Report Launch

Garden Court Chambers,
57-60 Lincoln's Inn Fields, London, WC2A 3LJ, and online by zoom
Register at: *https://www.eventbrite.com/e/evaluation-of-court-of-protection-mediation-scheme-report-launch-tickets-411843032597*

5 October 1pm – 5pm Mental Capacity Law in Contract and Property Matters

Wivenhoe House Hotel, University of Essex, Colchester, and online by zoom
Register at: https://www.eventbrite.co.uk/e/mental-capacity-law-in-contract-and-property-matters-tickets-365658192497
Speakers include: Clíona de Bhailís, Researcher, NUI Galway, Shonaid and Andy, PA and Support Workers, Outside Interventions
Professor Rosie Harding, University of Birmingham, John Howard, Official Solicitor and Public Trustee Property and Affairs Team, Gareth Ledsham, Russell Cooke Solicitors, Her Honour Judge Hilder, Court of Protection

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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