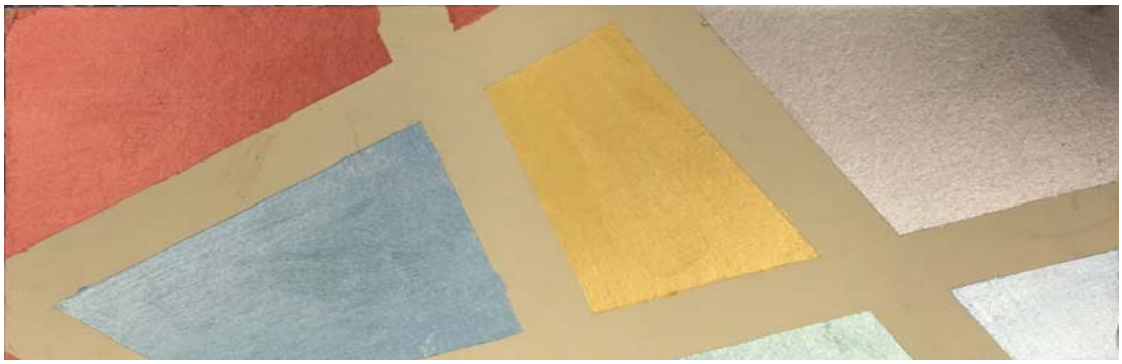
Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

October 2017 | Issue 80



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

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

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

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

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

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

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

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

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Court of Protection Rules 2017

As this issue goes to press, we await with – increasingly pressing – interest the laying of the Court of Protection Rules 2017 before Parliament (and the publication of the associated suite of Practice Directions). As the intention is that a full revised and consolidated package of Rules (reformatted into CPR/FPR format) will be ready to go by the time that the current pilot expire on 30 November 2017, we anticipate that these Rules will be laid in the very near future. Updates will be provided by the usual channels as soon as available.

Transparency update

The Court of Protection 'Transparency Pilot for increased access to public and media' was launched in 29 January 2016. The original intention was that it would run until 31 July 2016.

The note from the Vice President to the Court of Protection provided:

> *….the aim of the pilot is to effectively reverse the existing default position of private hearings. This means that there will have to be a good reason for not making an order that an attended hearing is to be in public including an anonymity order in terms of or based on the standard order (the Pilot Order).*

Serious medical cases to which Practice Directions 9E and 13A applied were not initially covered by the pilot, as they were not hearings that were held in private.

Amendments were made to the pilot order around April 2016 following a series of meetings between judges, lawyers, court staff and the media convened by the MOJ to feedback on the pilot, and again in June 2017 when the Vice President reported that the ad hoc Committee on the CoP Rules had recommended that a further amendment should be made to the Transparency Pilot to bring all proceedings in the CoP apart from applications for committal, within the pilot.

The pilot has now been extended until 31 November 2017.

For those of us who appear regularly in the CoP, it is rare for members of the public to attend, and save for the odd cases, Brian Farmer of the Press Association is almost the only journalist who

attends CoP hearings with any regularity. Is that because the public and the press are not interested in what is going on in the Courts, or are there problems with the way the pilot is set up and run which creates barriers to greater public interest in these cases?

Three particular problems have come to our attention:

1. First, cases are either being incorrectly listed as being in private when they should in fact be in public, or signs indicating that the hearing is in private are incorrectly placed or left on the Court doors. This appears (anecdotally) to be a problem particularly in the Royal Courts of Justice and may be an inevitable consequence of the fact that Judges have a long list of family and CoP cases, some of which are in private (family) and some in public (CoP). This gives rise to a serious concern about how effectively the transparency pilot is working. Brian Farmer of the Press Association (when asked for some comments to contribute to this article) puts it starkly:

   > *There have been a number of cases recently where judges have serious medical treatment issues before them but are wrongly listed in private. I think it would be fair to say that when that happens judges are making life and death decisions in secret.*

2. Secondly, it is said that there is insufficient information available to the public/press about a case, for the public/press be able to make a judgment about whether it would be of interest to them. The only information that is available comes from the listing, which should include the names of those parties who have not been anonymised (P will almost always be anonymised, leaving only the names of the public bodies involved) and the case descriptor. The case descriptors derive from one of the suite of documents generated as part of the pilot entitled 'CoP Listing General description of cases for daily cause list'. The descriptors are pithy (such as '*where P should live' or 'healthcare')*. The drafter of the Pilot order is directed to choose the case descriptor that best suits the case, and this is then used when listing the case. Thus a case could raise issues of real public importance (such as whether life sustaining treatment should be withdrawn from someone), but the only information the public and the press will have about the subject matter of the case is that it involves healthcare. (This is of course a significantly different position to that which existed prior to serious medical treatment cases being dealt with under the pilot, when the Press would be not only be notified by the applicant when one of these cases was being listed, but would also be provided with an explanatory note setting out the issues in the case). More worrying, in some cases, the case descriptor is missing entirely.

3. Thirdly, even if the press or a member of the public finds themselves in a hearing, there is often a real reluctance to provide them with key documents such as skeleton arguments so as to enable them to be able to make sense of the hearing. Rule 18 makes it clear that if a hearing is in public and a document 'has been read to or by the court or referred to' then the parties are not restricted to

using that document only for the purposes of the proceedings in which it was disclosed. This means that it is open to a party to provide a copy of a skeleton argument that is referred to during a hearing, to a member of the public or a member of the press. (Rule 17 also allows a non-party to make an application to the Court to obtain copies of documents on the court record. However as such applications need to be made in accordance with Part 10 (i.e. by filing an application notice supported by evidence), this is likely to deter most members of the public).

Clearly efforts need to be made to ensure that the system works as it is designed to work. As to whether further changes should be made, Brian Farmer of the Press Association makes the following suggestions:

- List all CoP cases being heard by judges at the RCJ in open court and include a brief description of the issue on the list – such as "serious medical treatment"
- Start all hearings in public.
- At the start of each hearing counsel for the applicant should give the court a 60-second "explanatory note" opening which would describe the issue and explain what, if any, reporting restrictions are being sought, without revealing P's name.
- The judge would have the option of going into private, either to hear the whole case or part of the case, or simply to allow a debate at which P could be named.
- Allow journalists but not the public to sit in on private hearings thus bringing the CoP in line with the Family Courts.
- Where the Court is sitting in public and is considering making a reporting restriction order, any journalist present should be given, in writing, the name of P and a draft of the RRO being sought, thus allowing a reporter to raise any concern about reporting restrictions or ask for a bit of time to consult a lawyer, while still allowing the judge to keep control of private information before making an RRO.

In September, the MOJ facilitated a number of workshops with lawyers, HMCTS staff and the press to obtain further feedback on the pilot. All of these issues were raised. We will have to wait and see whether the result is a change to the order/accompanying guidance if/when the pilot approach becomes cemented into the practice and procedure of the CoP come the introduction of the Court of Protection Rules 2017 and their accompanying PDs.

Access to justice in the Court of Protection

[*We are delighted to be able to publish a guest article by the authors of the recently published report on welfare cases in the Court of Protection, which is by some margin the most detailed and comprehensive attempt ever to examine how the court actually works in practice*]

The Court of Protection (CoP) has an important and growing jurisdiction under the Mental Capacity Act 2005 (MCA) over decisions concerning the health, welfare and liberty of people with mental disabilities. We have been researching the accessibility, efficiency and

transparency of the CoP's welfare jurisdiction in a four-year project funded by the Nuffield Foundation.[1] This has just concluded. Earlier this year we published a major report on the legal and policy issues surrounding the participation of P in CoP welfare proceedings.[2] In September 2017 we reported on findings from two empirical studies of the CoP's welfare jurisdiction during 2014-15.[3]

The first study from our recent report was conducted on 200 case files held in the CoP's main registry in London and 51 case files from CoP cases heard by High Court judges in the Royal Courts of Justice. This study was itself an exercise in 'transparency' – relying as it did upon the 2015 amendments to the Court of Protection Rules 2007 and a Practice Direction[4] which facilitated the sharing of information for research purposes. We are very grateful to the senior judiciary and the staff of the CoP for making this study possible, for hosting us and for supporting our research so strongly. The second study used the Freedom of Information Act 2000 (FOIA) to ask local authorities and NHS bodies in England and Wales about their involvement in CoP welfare litigation.

Our recent report covers a wide range of issues. Readers with a keen interest in the CoP's welfare jurisdiction might enjoy dipping into particular sections to see what we found. This article focuses on one of the most pressing questions facing the CoP's welfare jurisdiction at present: access to justice for P and those close to P where they object to a decision being made under the MCA.

The importance of access to justice under the Mental Capacity Act 2005

Most decisions about care or treatment on behalf of a person considered to lack mental capacity in relation to the matter are taken informally, with professionals and other carers relying upon the general defence contained in s5 for acts of care or treatment without consent. Alex has described the general defence as a 'de facto power'[5] when it operates in conjunction with the provision of health and social care services. Yet it is a power with little oversight and few safeguards against potential abuse. Its scope is increasingly uncertain and contested[6], and such duties as have sometimes been held to exist to involve the CoP for certain serious medical treatment decisions are unravelling, if indeed they ever did exist at law.[7] There is a growing suggestion in case law that the duty to refer serious medical treatments to court rests on the existence of conflict, rather than the nature of the treatment, but the precise scope and nature of this is unclear.[8]

In this context, it is important that the CoP is readily accessible for P and P's family where they

[1] www.nuffieldfoundation.org
[2] Series L, Fennell P and Doughty J, The Participation of P in Welfare Cases in the Court of Protection (Cardiff University, Report for the Nuffield Foundation 2017).
[3] Series L, Fennell P and Doughty J, Welfare cases in the Court of Protection: A statistical overview (Cardiff University, Report for the Nuffield Foundation, 2017).
[4] Court of Protection, *Practice Direction 13A - Hearings (including reporting restrictions)* (2015)
[5] Ruck Keene A, (2016) 'Powers, defences and the 'need' for judicial sanction', *Elder Law Journal* 244 (Autumn issue)
[6] For discussion see *The Participation of P in Welfare Cases in the Court of Protection* pages 64 – 75.
[7] *Re M* [2017] EWCOP 19
[8] For discussion see *The Participation of P in Welfare Cases in the Court of Protection* pages 64 – 75.

object to acts of care or treatment proposed under the MCA with a major impact on their lives. It is likely that such a right of access to a court is required by Article 8 of the European Convention on Human Rights, in conjunction with Articles 6 and 13.[9] Yet our research paints a rather dismal picture in this regard.

Three routes into the CoP's welfare jurisdiction

There are three main routes into the CoP's welfare jurisdiction:

1. a personal welfare application to the CoP, using the COP1 and COP1B application forms for declarations or orders under ss 15-17 MCA (the 'personal welfare' route);
2. where P is subject to an authorisation issued by a supervisory body under the deprivation of liberty safeguards (DoLS), an application may be made under s21A MCA for a review of the authorisation, using the COPDLA forms (the 'DoLS review' route);
3. an application for authorisation of a deprivation of liberty where this is non-contentious using the *Re X* 'streamlined' procedure and the COPDOL10 form (the '*Re X*' route).

The CoP files study only looked at the personal welfare and DoLS review routes, although we did ask local authorities about their involvement in *Re X* applications in our study using the FOIA.

Our study found that the personal welfare route into the CoP's jurisdiction was mainly used by public authorities seeking declarations that P lacked mental capacity in relation to some matter, and orders that their proposed course of care or treatment was in P's best interests. We found very few applications by P, and only a small number by P's family, using the personal welfare route. This finding was supported by our FOIA data from local authorities, who reported very few personal welfare applications being initiated by P or P's family. It was very rare for a personal welfare application to seek a declaration that P had mental capacity. When we looked at final orders for personal welfare applications, it was also rare for the CoP to conclude that P *had* mental capacity in these cases. Thus although the personal welfare route is in theory available to P or P's family to contest decisions made under the MCA, our evidence suggests that it is only very rarely used for this purpose.

By contrast, our findings were very different for the DoLS review route into the CoP's welfare jurisdiction. A large proportion of applications for DoLS reviews came from P. It was often clear from the file that P had instructed a solicitor with support from an IMCA or paid RPR. Although the majority of disputes were about where P lived and their care arrangements, many of the disputes that found their way into the CoP's welfare jurisdiction under the DoLS review route were actually about other matters such as specific medical treatments, contact with specific individuals, or even the capacity to consent to sex or marriage. The DoLS seem to offer an enabling framework for accessing

[9] For further discussion see *The Participation of P in Welfare Cases in the Court of Protection* Sections 2.3 and 3.1.

justice to bring MCA disputes to court, when the personal welfare route does not.

A (less disabling) framework for accessing justice

We should emphasise that we are not stating that the access to justice arrangements under the DoLS are satisfactory for the purposes of detention reviews in accordance with Article 5(4) ECHR: only a tiny proportion of those detained under DoLS do exercise their s21A rights of appeal. We also raise concerns about the lengthy timescales for a CoP DoLS review in our report. One of the saddest findings in our study was the significant number of P's who died before the CoP had made a final order in their case.

Yet for all the faults of the DoLS, they do seem to be more enabling (or less disabling) for those subject to health and welfare decisions made under the MCA to access justice to bring disputes to court. There are some good practical reasons for this. When a decision is made 'informally' under the MCA, there is no obligation to inform P or those close to P of the existence of a mechanism to challenge the decision in court. In many cases, they will not even know that the decision has been made under the MCA. By contrast, because of the engagement of Article 5 in detention cases, the DoLS require the individual and their representative to be informed of their rights to appeal to the CoP.[10] When P or an unpaid representative has difficulty understanding or exercising rights of appeal, they should (in theory) have access to a s39D IMCA, who should (in theory) help them to exercise rights of appeal.[11] It was telling that we found only one case under the personal welfare route where an IMCA had been involved in the application, but IMCAs' involvement was clear from the file in 40% of cases where P was the applicant.

Although unlikely to be a barrier for P or P's family where they have access to skilled and experienced legal representatives, we also highlight that the personal welfare application forms are poorly designed for challenging decisions made under the MCA. Although the first principle of the MCA is that P should be assumed to have mental capacity, the personal welfare application process is predicated on the assumption that P lacks capacity: the COP1 form and guidance notes instruct applicants to submit a COP3 assessment of capacity form alongside, and the COP3 form is designed on the basis that those completing it will find that P lacks mental capacity. Nowhere in the personal welfare application forms or guidance are instructions given for those seeking a declaration that P *has* mental capacity.

Another very important reason why the DoLS may enable P or P's representative to access the CoP's welfare jurisdiction is the availability of non-means tested legal aid for DoLS reviews. By contrast, legal aid for personal welfare applications is means tested, and very often this means that access to justice is simply unaffordable for P or P's family. Our FOIA study found that the median value of a legal aid certificate for P was £7,672 for a medical case, £20,874 for a non-medical case and £7,288 for a deprivation of liberty case. The costs for self-

[10] MCA Schedule A1 ss 57-58

[11] This duty was clarified by Mr Justice Baker in *AJ v A Local Authority* [2015] EWCOP 5, a case that fell towards the end of our reporting period.

funding litigants are likely to be higher, however, as legal fees are not restricted for privately paying clients as they are for legal aid work. Our research also indicated that cases about relationships – contact with others, or capacity to consent to sex or marriage – are especially complex: they last longer, and involve more parties and more hearings. These cases are likely to be especially costly.

One of the effects of *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*[12] is to bring within the ambit of the DoLS a wide range of related welfare issues. Whatever one thinks of the wider effects of this judgment, it has enabled access to justice for many who would otherwise be unable to access the CoP's welfare jurisdiction. Our sample of case files from 2014-15 suggests that many applicants were taking advantage of newly widened scope of the DoLS to bring before the CoP welfare matters such as medical treatment disputes and safeguarding issues around relationships.

Recent Court of Appeal rulings will, however, restrict the ability of Ps or families today to use the DoLS in this way, at least in relation to medical treatment disputes. Following *R (Ferreira) v HM Senior Coroner for Inner South London*[13] many medical treatment decisions will no longer be considered to engage the 'acid test' of *Cheshire West* and so P will not be eligible for DoLS. And following the Court of Appeal's recent ruling in *Director of Legal Aid Casework & Ors v Briggs* [14] serious medical treatment decisions have been excluded from the scope of s21A reviews. Mr Justice Peter Jackson described these rulings as sweeping away two 'fictions' in *Re M*[15], but leaving 'a serious practical concern for those families who do need specialist legal representation to enable serious medical treatment issues to be resolved'.[16] Without the DoLS review route into the CoP's jurisdiction, it is unclear how – if at all – P's and families in these circumstances can challenge decisions made under the MCA.

Outcome of DoLS reviews

Our research suggests that without the DoLS review route, the CoP's personal welfare jurisdiction is almost entirely inaccessible for Ps or families in dispute with health and social care professionals about serious medical treatment decisions or wider welfare matters. However, based on our relatively small sample of 52 DoLS reviews with final orders on the file, our findings indicate that a DoLS court review often results in a change of outcome for P. In 17% of cases the supervisory body terminated the application before a final order was made, and in 23% of DoLS review applications the CoP made orders that the qualifying requirements for the DoLS were not met. The CoP's DOLS jurisdiction may be difficult to access, but once engaged it does not appear to be operating as a rubber stamp.

We note with regret, however, that we were unable to offer any insights into how often the outcome of a CoP welfare application or DoLS review reflected what P wants or would have wanted. We found it impossible in many cases to locate information about P's wishes, feelings, values and beliefs from the information available

[12] [2014] UKSC 19
[13] [2017] EWCA Civ 31
[14] [2017] EWCA Civ 1169
[15] [2017] EWCOP 19
[16] Ibid, paras 39 and 40.

in the files. The jurisdiction is increasingly placing P's wishes, feelings, values and beliefs at the heart of decision making. However, the absence of reference to P's wishes, feelings, values and beliefs in the COP1 form,[17] and lack of routine recital of what could be ascertained about P's subjective preferences in orders, means that the CoP's forms and processes do not yet reflect this direction of travel.

The future of the Court of Protection

The CoP faces a seemingly impossible challenge of balancing accessibility, efficiency and justice. The more accessible the court's jurisdiction, the higher the volume of litigation. The higher the volume of litigation, the harder it will be for the court to facilitate P's participation – another area of serious concern in our research – and the danger that it may become a 'rubber stamp' will increase. In one sense, the inaccessibility of the CoP's jurisdiction is precisely what enables it to function: it is doubtful that it could cope in its current form with the influx of cases if its jurisdiction were as accessible as it should for the purposes of reviewing detention and restoring legal capacity in the context of serious health and welfare disputes.

The root of the problem is the absence of any alternative mechanism for independent oversight of, and challenge to, decisions made under the MCA. When the Law Commission proposed what became the Mental Capacity Act 2005 in the 1990's, they proposed statutory restrictions on the general defence – with certain very serious decisions having to be made by a court, and with others subject to a second opinion scheme similar to that under the Mental Health Act 1983.[18] For reasons that have been lost to posterity,[19] the government chose not to take these proposals forward.[20] In the Law Commission's recent report on mental capacity and deprivation of liberty they proposed statutory restrictions on the general defence and the requirement for formally recording mental capacity assessments and best interests decisions in certain situations.[21] We suggest that this is an inadequate safeguard in the context of a dispute between a public body and P or P's family regarding serious human rights issues, and we should be thinking more creatively about radical modifications or alternatives to the CoP's current welfare jurisdiction where disputes arise.

At present, however, the CoP's welfare jurisdiction is all that is realistically available where P or those close to P object to decisions

[17] Although the COP3 form does ask 'Has the person to whom this application relates made you aware of any views they have in relation to the relevant matter?' the capacity assessor will not necessarily have access to the range of information about P's wishes, feelings, values and beliefs that should be available to the applicant. Moreover, in our sample this section was often not completed by COP3 assessors.

[18] Law Commission, *Mentally Incapacitated Adults* (Law Com No 231, HMSO 1995)

[19] The Ministry of Justice has not retained any records of the consultation response on this question. If any readers have any consultation responses, or information about why these proposals were not taken forwards, Lucy would be very interested in hearing from them regarding her current research on the history of the Mental Capacity Act 2005.

[20] Lord Chancellor's Office, *"Making Decisions" The Government's proposals for making decisions on behalf of mentally incapacitated adults. A Report issued in the light of responses to the consultation paper Who Decides?* (Cm 4465, London, HMSO, 1999) para 12.

[21] Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017)

made by health and social care professionals with a significant impact on their lives and human rights. In the absence of an alternative mechanism to provide scrutiny and a means of challenge to health and welfare decisions, urgent action is needed to address these access to justice concerns. Improving legal aid for personal welfare disputes would be a good start, but it will also require public bodies to ensure that people are given the knowledge and assistance they need to exercise their rights to seek review of a deprivation of liberty authorisation and restoration of legal capacity.

Lucy Series (SeriesL@cardiff.ac.uk), Phil Fennell and Julie Doughty,
Centre for Health and Social Care Law, Cardiff University

Inherently problematic? Capacity thresholds, autonomy and the inherent jurisdiction

LB Wandsworth v M & Ors [2017] EWHC 2435 (Fam) (Hayden J)

CoP jurisdiction and powers – interface with inherent jurisdiction

Summary

In *LB Wandsworth v M & Ors*, Hayden J was faced with a significant problem in relation to a child about to turn 18. The solution that he adopted, unfortunately, both casts unhelpful doubt upon a central plank of the Court of Protection's jurisdiction and highlights, again, just how unsatisfactory the current state of the inherent jurisdiction is in this context.

In order to understand the problem confronting Hayden J (and the problems his judgment arguably causes), it is necessary to set out the relevant facts in a little detail.

The case has received a degree of media attention, as it concerned three boys who were said to have been brought up by their mother in a "narcissistic cult," in extremely isolated conditions. For present purposes, the relevant boy was "J," who was about to turn 18. He was, at the point of the judgment, in a residential unit, and had been living there for nearly two years apart from his mother, and with no contact with her. Having previously expressed a strong wish not to live at home, he was now expressing a wish to live with his mother and his older brother N (who was 21 and had only left the flat on one occasion in over 3 years), although he was refusing to see her or availing himself of the opportunity of the telephone contact which has been offered. It was clear that J's assessment was of his own situation was "*fraught with danger both immediately and in the longer term*," and that the apparent contradiction in J not wishing to see his mother but wishing to return to live with her was driven was explained (by the Senior Family Therapist) as she describes as "*a form of suicidality*" by which she explained she considers J "*is giving up on the whole idea of having or developing any thing other than a very, very narrow and isolated life."* It appeared, further, that it was his elder brother, N, who was the real attraction for J's return, as he "*appear*[ed] *to have achieved precisely the refuge that J seeks*." J had also "volubly articulated a deep seated resistance to '*the intervention of the state*'."

The professional consensus was that J was making modest but important advances in the

residential unit. The Senior Family Therapist's evidence as to the objectives to be achived were that "*J needs to have a home environment separate from his brothers, as they have encouraged and supported his cut-off and unrealistic approach to life,"* and that "[t]*here should be a slow and gradual exposure to external reality, including social relationships and education, so that [J] very slowly becomes accustomed to this and able to manage. To what extent he will be able to make progress in this is currently unknown. There are one or two hopeful indicators… …but it is possible that his personality structure has become so rigid as to make him feel unable to adapt and learn to become an independent, autonomous adult with a meaningful relationship to the world.*" It was considered that J's continuing reluctance to involve himself in "*external reality*" and his persistent self-aggrandisement, gave rise to a serious risk of his developing severe personality difficulties such as Narcissistic Personality Disorder.

Given that J was about to turn 18, how could the goal of ensuring that he stayed at the residential unit be achieved? It appears from the judgment that it was only very late in the day that the local authority took the view that it might be possible to argue for this on the basis that J lacked the relevant decision-making, and put a mental capacity assessment before the court so as to get Court of Protection proceedings off the ground. The assessment concluded that due to J's 'lack of insight' and 'inflexibility of thought', he 'on the balance of probabilities lacked mental capacity to make the decision as to where he should live'. The social worker added to this in oral evidence that J was unable to 'sift and weigh the issues' underlying the decision. However, she did not illustrate her assertion by reference to identified difficulties.

Hayden J, however, was very concerned about this assessment.

> *46. I do not mean to be discourteous to those involved in this assessment. I suspect that the process was almost entirely driven by a determination to secure that which is undoubtedly in J's best interests i.e. continued placement at this residential unit. However, I am convinced that the assessment displays insufficient forensic rigour to justify its conclusion. Neither do I regard its determination that J lacks capacity as adequately reasoned.*
>
> *47. Furthermore, having listened to the evidence from those who undertook the assessment I am far from satisfied that they explained the purpose of the assessment to J. Indeed I would go further, I do not think they did. One of the key principles of the Mental Capacity Act is that a person should not be treated as unable to make a decision until everything practicable has been done to help the person make their own decision (see s1 (3)). The code of Practice dedicates an entire chapter to providing guidance and prompt consideration of a range of practical steps which might assist in this objective. It seems to me to be fundamental to the assessment process that P is informed of the purpose of the assessment. Mr Cheung insinuated that he had done this but, if he will forgive me for saying so, I did not find him convincing. In the written assessment there appears, at (5), the following question*: *have you explained the purpose of the assessment to P*? *The answer, which I repeat in full, reads* 'Yes'.

> J is aware of the current situation and this topic has been brought up and discussed on many different occasions.'
>
> […]
>
> *49. It seems to me that a prerequisite to evaluation of a person's capacity on any specific issue is at very least that they have explained to them the purpose and extent of the assessment itself. Here, that did not happen. In my view, it is probably fatal to any conclusion. In any event, it, at least, gravely undermines it. I have very much in mind PC and Anor v City of York Council [2013] COPLR 409, [2013] EWCA Civ 478 where Peter Jackson J (as he then was) made the following observation:*
>
> > *'… there is a space between an unwise decision and one which an individual does not have the mental capacity to take and … it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates.'*

Although he was very concerned about the assessment, Hayden J noted that, at an earlier stage J's solicitor had considered (during the course of assessing whether J was competent to instruct him) had also spent some time considering the question of where J should live. Although the observations were made in this specific context, J's observations were interesting. "*J said he wanted to return home, not to be with M or N but to the 'home itself'. J amplified this, saying he sees being at home as 'freedom – not in the sense of being allowed out as he does not wish to go out'. He said, 'at home there is freedom not being homogenised by society'. He also observed that education was 'indoctrination by the State to make people slaves'. He considered that being in the unit was 'like being in a prison'. He expanded on this saying 'not in the physical sense but the emotional'. He continued, that he was 'forced to communicate in a way with people that was not beneficial to him'.*" Hayden J was "*left with a real anxiety as to whether these remarks illustrate a lack of capacity to take the decision in focus or merely an illogicality or general unreasonableness on J's part*."

Hayden J then went on to consider whether the material before him passed the s.48 threshold. This threshold had – it was generally considered – been definitively considered by HHJ Marshall QC in *Re F* [2009] EWHC B30 (Fam) thus "*What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard. There are various phrases which might be used to describe this, such as "good reason to believe" or "serious cause for concern" or "a real possibility" that P lacks capacity, but the concept behind each of them is the same, and is really quite easily recognised*." HHJ Marshall QC had, further, stated the "*proper test for the engagement of s 48 in the first instance is whether there is evidence giving good cause for concern that P may lack capacity in some relevant regard. Once that is raised as a serious possibility, the court then moves on to the second stage to decide what action, if any, it is in P's best interests to take before a final determination of his capacity can be made. Such action can include not only taking immediate safeguarding steps (which may be positive or negative) with regard to P's affairs or life decisions, but it can also include giving directions to enable evidence to resolve the issue of capacity to be obtained quickly. Exactly what direction may be*

appropriate will depend on the individual facts of the case, the circumstances of P, and the momentousness of the urgent decisions in question, balanced against the principle that P's right to autonomy of decision-making for himself is to be restricted as little as is consistent with his best interests. Thus, where capacity itself is in issue, it may well be the case that the only proper direction in the first place should be as to obtaining appropriate specialist evidence to enable that issue to be reliably determined."

Hayden J, however, took the view that this set the bar too low:

> *65. There can be no doubt that the cogency and quality of evidence required to justify a declaration of incapacity, pursuant to Section 15, will be greater than that required to establish the interim test. However, it is important to emphasise that the presumption of capacity is omnipresent in the framework of this legislation and there must be reason to believe that it has been rebutted, even at the interim stage. I do not consider, as the authors of the 'Mental Capacity Assessment' did that a 'possibility', even a 'serious one' that P might lack capacity does justification to the rigour of the interim test. Neither do I consider 'an unclear situation' which might be thought to 'suggest a serious possibility that P lacks capacity' meets that which is contemplated either by Section 48 itself or the underpinning philosophy of the Act. In exchanges with Counsel the test has been referred to as 'a low one' or 'a much lower threshold test at the interim stage'. Additionally, when I look, for example, at the words of the Judge in Re FM [a decision of King LJ on permission to appeal] I am left with a real sense of unease, particularly as the facts in that case appear to have some similarity to those here.*
>
> […]
>
> *66. Ultimately whilst I recognise that, for a variety of reasons, it will rarely be possible at the outset of proceedings to elicit evidence of the cogency and weight required by Section 15, I think it is important to emphasise that Section 48 is a different test with a different and interim objective rather than a lesser one. 'Reason to believe' that P lacks capacity must be predicated on solid and well reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves.*

Having "honed the test," Hayden J declared himself:

> *entirely satisfied that it is not met in J's case. In summary: the purpose of the assessment was not explained to J; the analysis of the extent of J's understanding of the relevant information is superficial and incomplete; the ultimate reasoning underpinning the conclusions of the assessment is vague and unsatisfactory. It would be entirely disrespectful to J to curtail any aspect of his autonomy on the basis of such unsatisfactory evidence. I am entirely unclear as to whether J has capacity to decide where he lives or not. Accordingly, even on an interim basis, the presumption of capacity has not been rebutted. These are important principles which must never be eclipsed by a paternalistic emphasis on welfare. To do so, lets in the dangers Lord Reid alluded*

> *to in S v McC: W v W (supra).*[22] *Further, I would add, to conclude otherwise, on this evidence would serve only to reinforce J's own heightened anxieties about the unmarshalled power of the State and thus potentially undermine the welfare objectives.*

However, the story did not end there, because Hayden went on to consider whether he could exercise the declaratory and injunctive powers of the High Court under its inherent jurisdiction, on the basis he could do so "*if I am satisfied that J is a vulnerable adult, at risk of harm, whose autonomy has been compromised in relation to his decision making processes and who may be sufficiently protected by this relief*." In so doing, although dealing with the position where J was, in fact, still under 18, Hayden did not appear to limit his consideration of the scope of the inherent jurisdiction to its exercise in relation to a minor. Rather, his approach appears to have been predicated upon J being (for these purposes) an adult, quite possibly because he anticipated that relevant steps under the jurisdiction would need to be taken even after J's 18th birthday.

Having traced the concept of "vulnerable adult" through *No Secrets*, *Re SA* and *Re DL*, Hayden J held:

> *"82. It would be unconscionable and socially undesirable if, due to the weaknesses of an assessment which failed satisfactorily to resolve whether there are reasons to believe that J lacks capacity, he were to find himself beyond the reach of judicial protection. I am clear that he is not. The question that arises is how he can most effectively be protected with the least intrusive and most proportionate curtailment of his autonomy.*
>
> *83. The starting point is that a thorough, MCA compliant assessment of capacity be undertaken immediately.* […]
>
> *84. When the report is available, it will be necessary to revisit the question of capacity and therefore jurisdiction. I am entirely satisfied that the inherent jurisdiction of this Court permits J to be protected whilst these investigations resume. I have already set out the benefits of J remaining in the unit and have no doubt at all that to do so is in his best interest. Without revisiting these issues I would emphasise that the primary advantage that the unit offers to J is the opportunity of interacting with other people, precisely that for which he has no appetite and would wish to avoid.*
>
> *85. Having established jurisdiction, a question then arises as to how to frame the injunctive relief. The wide scope of this relief was considered in detail in the Court of Appeal in Wookey v Wookey [1990] 1 Fam 126 and revisited in P v P [1999] 2 FLR 857. Whilst the relief available will invariably be bespoke, there are some identifiable characteristics to it which cast light on its application. Injunctive relief is a discretionary remedy, it acts in personam and it is derived from equitable principles. Furthermore, it may only be granted to those amenable to its jurisdiction and it must be capable of being put into effect. It follows logically from these general propositions that the*

[22] "*English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions*."

> *injunction must serve a useful purpose and have a real possibility of being enforced in personam.*
>
> *86. Central in considering the extent of the relief to be granted is the requirement to identify a balance between the protection of the individual and respect for his liberty. Thus, the order must reflect the tension between these two competing rights and obligations. The interference must be the minimum possible and proportionate to the identified objectives. It should also be for the shortest duration. It follows that the need for the restriction should be kept in regular review."*

In the circumstances, Hayden found that the right balance was struck thus:

> *88. As J has emphasised, he is motivated to protect "freedom of mind", always an illusive concept. He is not concerned with freedom of the body. There is no evidence that he feels his physical movements to be restricted in the unit in any way at all. The identified danger to his welfare development is a return to M's home which, I repeat, has been identified by the experts as a 'kind of suicide' for him. Accordingly, I do not consider the injunction should be drafted in terms which compel him to live in any particular place but I do want to restrain him from living at M's home. This I believe to be the proportionate intervention having regard to the principles I have set out above. It is to endure only until I reconsider the question of capacity further and inevitably that of jurisdiction too when a detailed capacity assessment has been completed.*

Comment

On the basis of the material contained in the judgment, it appears absolutely clear that both the professionals involved and Hayden J were correct to wish to take steps to intervene to seek to secure J's longer-term welfare and wellbeing. This is arguably a classic case where taking a very narrow view of autonomy and simply deferring to his stated wish to live at his mother's home would be – ethically – entirely the wrong course of action. For more on the ethics of intervention in such situations, we would commend Camillia Kong's *Mental Capacity in Relationship* (Cambridge 2017) – and Alex suspects this case will feature in the forthcoming practical guide that he and Camillia are writing together to applying relational autonomy in practice.

If, ethically, the result being sought by Hayden J was entirely correct (and, again, it provides a useful way in which to test whether the outcome that might be dictated by the CRPD is one we wish to follow), legally the approach is much more problematic.

To start with, it is unfortunate (to put it mildly) that Hayden J did not have drawn to his attention that the *Re F* test is that which has been applied by the Court of Protection since 2009 (and is cited in the standard practitioner works such as Jordans' *Court of Protection Practice* and LAG's *Court of Protection Handbook*). It has also been applied in reported cases, including that of Charles J in *Re UF* [2013] EWHC 4289 (COP); [2014] COPLR 93 (at para 18). The test that Hayden J seeks to set out – which arguably includes in it a requirement for P to participate – would make it very difficult to obtain interim relief in cases in which social

workers or others are being prevented from seeing and assessing P but in which there is nonetheless proper reason to believe (from surrounding evidence) that they may lack capacity to make the decision in question. An example of the very practical difficulties that can be caused in this context, and the power of s.48 to assist can be seen in *Re SA; FA v Mr A* [2010] EWCA Civ 1128, a case which also demonstrates how the court can and should calibrate the steps that it will take under s.48 so as to reflect that capacity is still in issue. [23]

The second problem is that, from an outside perspective, one could legitimately ask why Hayden J went to such lengths to decline to engage the interim jurisdiction of the Court of Protection but then, through deploying the inherent jurisdiction, brought about an essentially identical outcome to that which would have been obtained had it been engaged, in other words: (1) requiring rapid steps to be taken to get better capacity evidence; and (2) directing relief against the subject matter of the proceedings to secure their well-being in the interim.

This was not a situation (at least from the judgment) where it could be said that J's decision-making was currently being compromised by the actions of M (or N) – i.e. this was not the sort of undue influence/coercion case envisaged in *Re SA* or *Re DL*, where relief would have been directed against the perpetrator of the abuse. Rather, in the (laudable) aim of securing a richer version of autonomy for J, Hayden J prevented him from taking precisely the course of action which – at least at face value – J was saying he wanted to take. We note in this regard that Munby J (as he then was) held in *JE v DE* [2006] EWHC 3459 (Fam) that preventing a person from living in the one place that they say they wish to live amounted to a deprivation of their liberty.[24] Although this definition may well not have survived the formulation of the 'acid test' in *Cheshire West*, it nonetheless shows that at least one judge has previously held that preventing an individual from living in one specific place is a very serious interference with their rights (and, if this applied to J's case, on what basis could the deprivation of his liberty be justified by reference to Article 5(1)(e)?).

In the circumstances, therefore, it seems to us that this case provides powerful evidence as to why it is so necessary that a long, hard look is taken at the way in which the inherent jurisdiction is evolving with a view – ultimately – to developing (1) a statutory basis upon which intervention in J's case can be justified (if we think it should); and (2) principles to govern what steps can be taken by way of such intervention. The High Court ducked the

[23] Whilst this started as a permission application before Munby LJ in the Court of Appeal, he also then, substantively, determined matters having granted permission.

[24] "*But the crucial question in this case, as it seems to me, is not so much whether (and, if so, to what extent) DE's freedom or liberty was or is curtailed within the institutional setting. The fundamental issue in this case, in my judgment, is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses, specifically removing himself to live at home with JE.*"

opportunity to undertake (2) in the decision in *Mazhar v The Lord Chancellor* [2017] EWFC 65, but in any event we think that the principles at stake are too important to be left to evolution through case-law. We should perhaps lay down a marker that if the process of setting down a statutory framework leads us to take a wider view of what autonomy may means, we would say "so much the better."

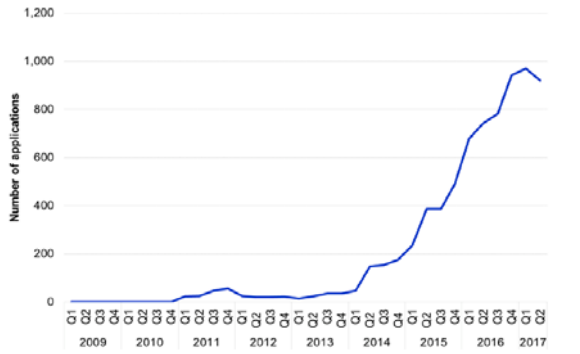
Short Note: judicial concern about inherent jurisdiction and deprivation of liberty

We note briefly the comments of Holman J in *A Local Authority v AT and FE* [2017] EWHC 2458 (Fam) in relation to the increasing use of the inherent jurisdiction to authorise children's deprivation of liberty as a result of the lack of places for secure accommodation orders. His Lordship observed that *"I personally have been almost drowned out by these applications this week"* and "*There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children. This is a situation which cannot go on, and I intend to draw it to the attention of the President of the Family Division.*" His Lordship was particularly concerned that this "*child has been deprived of his liberty now for three months without any guardian being appointed to act on his behalf*" and ordered Cafcass to allocate one. Moreover, and with clear parallels to COP proceedings, the court observed that "*it is very important that ordinarily in these situations, which in plain language involve a child being 'locked up', the child concerned should, if he wishes, have an opportunity to attend a court hearing.*"

Court of Protection statistics: April to June 2017

The latest figures an increasing trend in applications and orders made in relation to deprivation of liberty. There were 919 of such applications made in this quarter, up 24% on the number made in April to June 2016. Similarly, orders made for deprivation of liberty almost doubled over the same period, from 375 to 689 respectively.

Figure 10: Deprivation of Liberty applications, January to March 2008 to April to June 2017 (Source: Table 20)



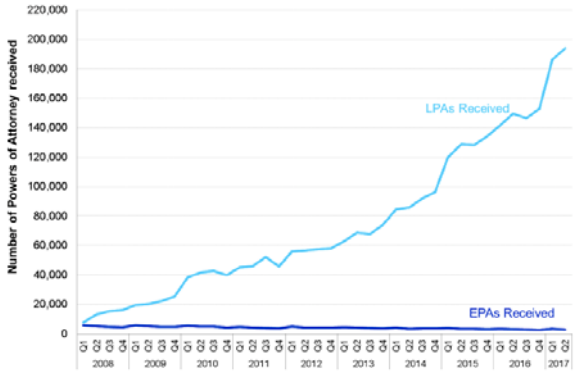
By burrowing into the supporting spreadsheet, we can see that the 919 deprivation of liberty applications were broken down into 106 applicatons for orders under s.16, 282 s.21A applications, and 531 applications under the *Re X* process.

Deprivation of liberty aside, there were 7,623 other applications were filed, unchanged from the equivalent quarter in 2016 (7,616 applications). Just under half (49%) related to applications for appointment of a property and affairs deputy. In comparison, there was a 52% increase in the number of court orders made in this period. The 10,205 orders were driven by a clearance of outstanding cases and an increase in the number of cases being dealt with by regional courts. Almost half (41%) of these

related to the appointment of a deputy for property and affairs.

A significant increase was also seen by the Office of the Public Guardian, with 194,012 Lasting Powers of Attorney received in this quarter, up 30% on the same quarter for 2016. This is largely due to increased publicity and new online forms making it simpler and faster to apply for LPAs. Conversely, and perhaps unsurprisingly since it is now 10 years since it stopped being possible to create an Enduring Power of Attorney, there was a 9% drop down to 2,953 in the receipt of Enduring Powers of Attorney.

Figure 11: Powers of attorney received, January to March 2008 to April to June 2017 (Source: Table 22)



Amendment to Explanatory Report of the 2000 Hague Convention

In a very unusual step, the Explanatory Report to the 2000 Hague Convention on the International Protection of Adults (which underpins Sch 3 to the MCA 2005 in complex ways explained here) has issued in a new and revised edition, available here. In addition to the correction of a few typos, the new and revised edition includes in particular a modification to paragraph 146 made by the Rapporteur, Professor Paul Lagarde relating to the confirmation of powers of representation (powers of the attorney and the like). The new paragraph reads thus:

> *The concept of the confirmation of powers must give every guarantee of reliability and be seen in the light of legal systems which make provision for this confirmation and place it in the hands of a particular authority, judicial in Quebec, administrative elsewhere. The first version of this report, which was based on a reading of the Convention text, set forth that this confirmation is not a measure of protection within the meaning of the Convention. If this indeed were the case, there would be no need to mention it alongside the measures of protection in Article 38. However, some delegations have since asserted that this analysis is not one which, according to them, flows from the discussion, difficult as it was.* […] *According to this view, a confirmation could constitute a measure of protection within the meaning of Article 3 and it could only be given by the competent authority under the Convention. A consequence of this might be that, if the adult has, in accordance with Article 15, paragraph 2, submitted the conferred power to an applicable law other than that under which the authorities have jurisdiction under the Convention, the representative risks being deprived of the possibility of having his or her powers confirmed, for instance, by the competent authority of the State whose law is applicable to the power of representation.*

In the domestic context, the CoP Rules now provide for a standalone application to be made in any case where there is doubt as to the basis upon which the attorney under a foreign power is operating (see Part 24, at present).

Editors and Contributors

Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

Editors and Contributors

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click here.

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Adrian Ward: adw@tcyoung.co.uk

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

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

Adults with Incapacity: the Future is Now

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

'Taking Stock'

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

International Congress on Vulnerabilities, Law and Rights

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

Deprivation of Liberty in the Community

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

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

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

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Report will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

International Arbitration Chambers of the Year 2014 Legal 500

Environment & Planning Chambers of the Year 2015

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085