



Welcome to the February 2023 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: is depriving a person of their phone depriving them of their liberty, a reminder that the court is the ultimate arbiter of best interests and an Ombudsman comes belatedly to the rescue;
- (2) In the Property and Affairs Report: a reminder of the new process for applying for deputyship and how the Powers of Attorney Bill would amend the MCA 2005;
- (3) In the Practice and Procedure Report: the Vice-President intervenes on s.49 reports and new contempt rules;
- (4) In the Wider Context Report: Parliamentary consideration of the draft Mental Health Bill, a toolkit for supporting decision-making, and confidentiality and common sense;
- (5) In the Scotland Report: the Supreme Court dismisses an appeal against assessment for services and an opposed application for guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

Editors

Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sullivan
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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

Contents

Reminder – all change for property and affairs deputyships	2
LPA applications continue to rise.....	2
Power of Attorney Bill – how would it change the MCA? (and walkthrough).....	2
The Law Commission Wills project restarts	3

Reminder – all change for property and affairs deputyships

With effect from 1 January 2013, Practice Direction 9H set out a new mechanism for applying for property and affairs deputyships. The major change is to move the notification procedure upfront. Applicants should notify 3 people who know the person affected by the application, for example, relatives, a social worker or doctor. They should then gather the responses before submitting their application. Applicants should send responses and all recordings of notifications to the court with their application. There are new forms to use for upfront notifications, the COP14PADep and COP15PADep. These forms are both notification and acknowledgement forms combined. The forms should be returned to the applicant or agent within 14 days of notification where possible. The applicant should then send/upload all acknowledgement forms whilst making the application to the court. After 14 days from notification, the court will assume agreement to the order being made if no acknowledgement form is returned to the applicant and no COP5 is filed by those notified.

From 1 February 2023, property and affairs deputyship applications that do not follow the new upfront notification process will be returned to the applicant.

HMCTS held a drop in session on Monday 19 December 2022 to explain the new process for making property and affairs deputyship applications: a recording of the session is available to watch on the HMCTS YouTube channel.

LPA applications continue to rise

The most recent statistics from the Ministry of Justice show that from July to September 2022, there were 201,121 LPAs registered, up 19% compared to the equivalent quarter in 2021.

Power of Attorney Bill – how would it change the MCA? (and walkthrough)

In May 2022, the Ministry of Justice indicated in its response to the Modernising Lasting Powers of Attorney consultation that it intended to bring forward primary legislation to amend the MCA 2005 to reform a number of key provisions relating to LPAs. Stephen Metcalfe MP introduced in December a Private Members' Bill, the Powers of Attorney Bill 2022, which has government support, and has progressed beyond second reading.

Despite the helpful Explanatory Notes, the Bill is not an easy piece of legislation to read on a standalone basis. Alex has therefore prepared an entirely unofficial version of Schedule 1 to the Mental Capacity Act 2005 (providing for

formalities relating to LPAs) as it would stand if it were amended by the Powers of Attorney Bill.

Alex has also done a short walkthrough of the Bill and some of the key changes it is proposing (as well as one key one which is not been proposed).

The Law Commission Wills project restarts

The Law Commission has announced that the Wills project, paused since 2019, has come back to life. Interestingly, in making the announcement, the Law Commission notes that:

In view of the passage of time since our original consultation, and the impact of the Covid-19 pandemic on making a will, we will be further engaging with stakeholders as we develop our final policy. We intend to publish a supplementary consultation paper on discrete issues on which we think there might be a shift in views among consultees, in the light of developments since our 2017 consultation. We aim to publish the supplementary consultation paper in September 2023.

Editors and Contributors

**Alex Ruck Keene KC (Hon):** alex.ruckkeene@39essex.com

Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).

**Victoria Butler-Cole QC:** 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. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).

**Neil Allen:** neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).

**Arianna Kelly:** Arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click [here](#).

**Nicola Kohn:** nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).

**Katie Scott:** katie.scott@39essex.com

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

**Rachel Sullivan:** rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click [here](#).

**Stephanie David:** stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, ICBs and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click [here](#).

**Nyasha Weinberg:** Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click [here](#)

**Simon Edwards:** simon.edwards@39essex.com

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

**Adrian Ward:** adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).



Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

Advertising conferences and training events

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

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

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

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

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

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

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

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[For all our mental capacity resources, click here](#)