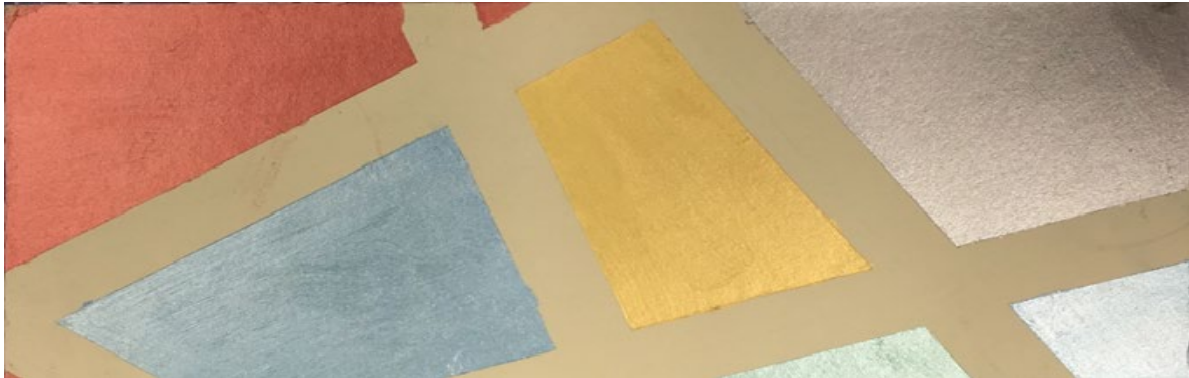




Welcome to the September 2026 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: an update on post-AGNI developments, two capacity conundrums in one case and 'over-litigation' in a PDOC case;
- (2) In the Property and Affairs Report: an update from the Property and Affairs Court User Group meeting and the OPG is recruiting lawyers;
- (3) In the Practice and Procedure Report: the Court of Appeal resets the approach to personal welfare deputies, and cross-border cases involving Scotland;
- (4) In the Mental Health Matters Report: recent cases concerning the relationship between the MHA and the MCA and an excoriating judgment on "detainability;"
- (5) In the Children's Capacity Report: AGNI and children and the Joint Committee on Human Rights reports on the human rights of children in care;
- (6) In the Wider Context Report: litigation capacity complexities, and recent medical guidance documents concerning consent, voluntarily stopping eating and drinking, and eating disorders and critical care.
- (7) In the Scotland Report: a Practice Note that has caused some consternation.

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

Editors

Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Annabel Lee
Alex Cisneros

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.

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Legal Director for Mental Welfare Commission

The Mental Welfare Commission for Scotland is to be commended for creating a new post of Executive Director (Legal & Policy). The Commission is of course an authoritative source of law and best practice across the many areas of skill and expertise relevant to its remit and available in-house, and it is notable that Colin McKay (now a professor at Edinburgh Napier University) was the first and – so far – only lawyer to be appointed as Chief Executive of the Commission. The creation of this new post is the right thing at the right time, as is clear from the following statement kindly provided for this Report by Colin's successor, Julie Paterson:

"The Mental Welfare Commission for Scotland is delighted to introduce the new role of Executive Director (Legal & Policy), a senior leadership position created to strengthen legal expertise and policy capability across our organisation.

"This is a key executive level role which will influence national thinking on mental health and incapacity law, and provide expert leadership on human rights issues. The role is being established as Scotland's mental health and incapacity legislation undergoes significant reform and provides an opportunity to help drive and shape that change, supporting the development and implementation of a modern legal framework that better protects the

rights of people with mental illness, learning disability, dementia and other conditions within the broad remit of the Commission."

Adrian D Ward

New Practice Note – a case for review and re-issue?

When guardianship and related procedures were transferred from the Outer House of the Court of Session to the sheriff courts in 2002, it was foreseen that there would be a risk of divergence in interpretations and practices among different sheriff courts.

"The convenience and lesser expense of the sheriff court was never available for appointment of tutors, which may have been a disadvantage for individual petitioners. Nevertheless, during the period of revival 1986 – 2002, which paved the way for the new régime, this area of law benefited from being developed with the coherence and authority which resulted from all petitions being heard by the Court of Session, rather than being scattered across Scotland's sheriffdoms." (Adult Incapacity, Ward, 2003, para 10-13).

Practice has certainly diverged across different sheriff courts. Where sheriffdoms have adults with incapacity ("AWI") practice notes, they vary. That Scotland's sheriffs principal have collaborated to produce a uniform practice note is thus to be welcomed – a welcome tinged with

regret that it has taken a quarter of a century for it to appear. It is nevertheless worrying that one already hears complaints from practitioners that they are still experiencing significant divergences in practice, even after the coming into force on 13 July 2026 of the new All-Scotland Sheriff Court Civil Practice Note No 1 of 2026: "Applications under the Adults with Incapacity (Scotland) Act 2000".

Of much greater concern are the complaints, also to be heard from practitioners, that the new practice note appears to have been prepared and issued without any consultation of which they are aware. It seems unlikely that if the consultation that has generally preceded developments in AWI law and practice had been carried out, the notable omissions and errors in the new practice note would have been spotted and corrected. As it is, one must hope that the present Practice Note will soon be superseded with a corrected and updated version.

The present Practice Note fails at the first hurdle. All AWI applications customarily commence with averments along the lines of: "*The adult is habitually resident at xx, which is within the territory of this court. This court accordingly has jurisdiction.*" See for example the styles offered in *Adult Incapacity*. The Practice Note omits any requirement to aver and demonstrate which of the grounds of jurisdiction in Schedule 3, paragraphs 1 and 2, apply. (All statutory references are to the Adults with Incapacity (Scotland) Act 2000; and hereafter all references to paragraphs are to the new Practice Note.)

Curiously, the Practice Note seems to require that only the current address of the adult be specified. That will not necessarily be the adult's habitual residence, and of course habitual residence is only one of the grounds of jurisdiction. In the cases of *Aberdeenshire Council v SF* [2024] EWCOP 10 and *Argyll and Bute Council v RF* [2025] EWCOP 12 (T3), so far

as one can deduce from the Court of Practice judgments, the original Scottish guardianship orders would appear to have been granted on the basis of habitual residence in the relevant sheriff court district, but the adult having no current address there, being resident in England. It is also good practice to specify the ordinary residence of the adult, and thus "the local authority" in terms of the relevant provisions of the 2000 Act. Again taking a cross-border example, in *Milton Keynes Council v Scottish Ministers* [2015] CSOH 156 the Scottish court proceeded on the basis that it had jurisdiction, but the adult's ordinary residence would appear to have remained in England when she was removed to Scotland, and thus Milton Keynes Council was held still to be responsible for her care costs.

A further apparent omission, in relation to guardianship applications, is the requirement to aver and demonstrate that all proposed guardians consent to being appointed (section 59(1)(a)). That may be presumed only in relation to an applicant who is proposed as guardian.

Some of the omissions may not have seemed to be such a quarter of a century ago, prior to the whole development since then of the human rights dimension that must underlie all AWI practice. However, while paragraph 3(t) refers to deprivation of liberty, it does need to require clear specification of whether proposed powers would, if granted, lead to interference with rights assured by Articles 5 or 8 of the European Convention on Human Rights. The measures proposed should specify how such powers will be operated lawfully, having regard to the exceptions in each of those Articles, and related provisions and jurisprudence, including in particular under Article 6 of the Convention. These should include the proposed mechanisms to give the adult a real right to seek review.

Provisions are required to ensure real participation of the adult in the proceedings. Is it anticipated that the adult will be unable to attend the proceedings, despite provision of reasonable accommodations? If not present, will the adult be independently represented? The appointment of a safeguarder may not achieve that, as the safeguarder's responsibilities are to the court, rather than primarily to the adult.

The only reference to the UN Convention on the Rights of Persons with Disabilities in paragraph 3(i) seems to imply that the Disability Convention is accepted by the sheriffs principal as fully applicable: but if so, then other requirements of that Convention should be incorporated, and read along with the provisions of the European Convention to ensure a coherent human rights-compliant regime. In paragraph 5(i), which refers to duration of orders, such a coherent approach would require limitation of any order relating to Article 5 rights to the general norm of six months.

It is apparent that the present text has not been check-read. Paragraph 4(b) seems to have conflated two quite separate intended requirements. As it appears, it suggests that a crave for appointment of a substitute guardian should: "specify whether the application is made due to the death, incapacity or resignation of the original guardian". That, as it appears in the Practice Note, obviously makes no sense. A substitute guardian is appointed "to act as guardian in the event of the [original] guardian ... becoming unable to act" (section 63(1)). One cannot predict at that point in time what might render the individual guardian unable to act.

Some editing points are minor, but nevertheless ought to have been corrected in a document of this status. Thus, "even" in the second line of item 22(iii) of the checklist in Appendix 2 to the Practice Note should be "ever", and the reference in paragraph 4(s) to section 60(4)(A) should be to section 60(4A).

Further editing points are more significant. The structure of the Practice Note is to deal with "all proceedings" in paragraph 3, and with "all proceedings under Part 6 of the 2000 Act" in paragraph 4. However, some of the provisions in paragraph 3 would appear properly to belong in paragraph 4, examples being paragraphs 3(i), (k) and (r).

Strangely, one has to look in four different places to ascertain whether, for example, a continuing attorney must receive intimation of an application seeking welfare powers only. There should at least be consistency among provisions (4) and (5) of paragraph 3(b), paragraph 4(g), and question 7 of the checklist.

Section 1(4)(a) requires ascertainment of the present and past wishes and feelings of the adult. Paragraph 3(c) adds the qualification "about any order sought". This seems to make the fundamental error of viewing matters from the position of the lawyers involved, rather than that of the adult, who should be central to the proceedings, not peripheral. Adults who might struggle to understand any full explanation of an order sought, and its implications, may well have significant wishes and feelings which must be taken into account.

Paragraph 4(c) and question 25 perpetuate the over-simplification that appointments can be characterised as either "joint" or "joint and several". Is the intention to disapply the scheme of section 62(6) – (9)? If not, stating "severally" or "jointly and severally" would seem to add nothing but confusion. If so, then the nature of the disapplication and the basis on which it is competent, and why it would better accord with the section 1 principles, should be specified.

In paragraph 4(i) and elsewhere, the situation of adults having assets or other interests furth of Scotland appears to be disregarded. Good practice where there is a fixed asset overseas is

to ask the court to use its power under section 58(3) to grant an intervention order in respect of that property only, so that only the intervention order, and not the whole guardianship order, need be transmitted to the other jurisdiction, and – often – translated. Also, where an applicant believes that an intervention order should be granted, but believes that the court may take the view that there should be a guardianship order, best practice is to seek a guardianship order with a motion asking the court nevertheless to grant an intervention order, because of the “one-way” nature of section 58(3). In either of these situations, I personally (while in practice) never had a case where it was not most helpful, verging on essential, to provide the court with a draft of the resulting order(s) sought. One wonders whether there was a reason for not formalising that practice in the new Practice Note.

Adrian D Ward

Cross-border cases involving England & Wales

Editorial note: practitioners who are involved in situations where a Scottish Guardianship Order may be in play in England & Wales are strongly advised to read the Practice and Procedure section of this Report and the discussion thereof of the recent flurry of cases involving such orders.

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 and European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Professor of Practice at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



Victoria Butler-Cole KC: 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 former Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. 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. He trains health, social care and legal professionals through his training company, LPS Law Ltd. 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 practices 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 inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to the Court of Protection Practice (LexisNexis). 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, ICBs 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 2022). 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](#).



Annabel Lee: annabel.lee@39essex.com

Annabel has a well-established practice in the Court of Protection covering all areas of health and welfare, property and affairs and cross-border matters. She is ranked as a leading junior for Court of Protection work in the main legal directories, and was shortlisted for Court of Protection and Community Care Junior of the Year in 2023. She is a contributor to the leading practitioners' text, the Court of Protection Practice (LexisNexis). To view full CV click [here](#).



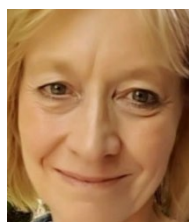
Alex Cisneros: alex.cisneros@39essex.com

Alex regularly appears in health and welfare and property and affairs cases in the Court of Protection. He has appeared in leading cases to do with deputyship and published a textbook about LPAs. His recent doctoral thesis explores the impact of changes to mental capacity law in England and Wales. To view a 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 regularly present at seminars and webinars arranged both by Chambers and by others.

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

Advertising conferences and training events

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

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

Sheraton Doyle
Director of Clerking
sheraton.doyle@39essex.com

Peter Campbell
Director of Clerking
peter.campbell@39essex.com

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

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

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

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